STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15728

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

January 3, 2006

E-Mail

TO: Ray Tylicki

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. Tylicki:

I have received you letter in which you wrote that you are "a student at Clinton Community College who has been the subject of an investigation." You added that "[t]he College has not told [you] who is accusing you or why" or sits on its judicial board.

In this regard, you have not provided sufficient information to permit me to prepare a complete opinion. However, based on the information that you have shared, I offer the following general comments.

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

Because the matter involves a community college, it is likely that the initial ground for denial, §87(2)(a), may be pertinent, for it deals with records that "are specifically exempted from disclosure by state or federal statute." One such statute 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.

If an accusation was made by a person other than a student, a different exception would be relevant. Section 87(2)(b) permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." It has generally been advised that those portions of a complaint or other record which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my opinion, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of a member of the person who made the complaint is often irrelevant to the work of the agency, and in most circumstances, I believe that identifying details may be deleted.

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

RJF:jm

From: Robert Freeman
To: McGinty, Tom
Date: 1/3/2006 5:05:48 PM
Subject: Re: Municipal Bonds

Hi Tom - -

An initial question involves whether a municipality maintains the information of your interest or whether a different entity maintains the records "for" the municipality. FOIL, as you may be aware, pertains to all government agency records, and §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..." If records are kept by or for a municipality, irrespective of their location, I believe that they fall within the coverage of FOIL. When records are kept for an agency pursuant to contract or perhaps by its attorney, a request should be made to the agency's records access officer, who has the duty of coordinating the response to the request.

There is one decision of which I am aware that relates to the records in question. It is an unreported decision, *Westchester-Rockland Newspapers v. Donohue* (Supreme Court, Westchester County, January 1977), in which the court held that records identifying the purchasers of bond anticipation notes, bearer bonds, were accessible. In short, it could not be demonstrated by the municipality that disclosure would result in an unwarranted invasion of personal privacy. If you would like me to fax a copy to you, I would be pleased to obliged.

I hope that this helps, and please give my best to Eden and the rest of the crew, such as it is.

Bob

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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>>> "McGinty, Tom" <Tom.McGinty@newsday.com> 1/3/2006 4:28:46 PM >>>
Bob,

I'm looking into a potential story involving municipal bonds. The other day I talked with a source--an expert in the industry--who suggested that records showing who bought and sold municipal bonds on the secondary market are public records. I would love for that to be true, but I'm not holding my breath. I tried to do a little research on my own, but all I found was one disappointing ruling from the Wisconsin Court of Appeals, which you can find at:

http://wislaw.org/res/capp/z1999/99-1163.htm

As you probably know, the bond issuers themselves don't normally keep records of who owns their bonds once the initial sale to the underwriters is completed. Instead, they assign that duty to another party, often the Depository Trust Company. The plaintiff in the case mentioned above argued that the village he was suing could not evade its responsibilities under the open records law by shifting the creation or custody of a record to a paid contractor. The court disagreed.

I could imagine these records being open to FOIL because the issuing municipality has essentially entered into a contract with whoever owns its bonds. But like I said, I'm not holding my breath. Have you ever run across this issue? I would appreciate any insight you can offer.

Thanks in advance.

Tom

P.S. Last time I talked with you, Eden Laikin had asked me to say hello and I forgot.

Tom McGinty
Staff Writer
Newsday
(631) 843-2998

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15730

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January 4, 2006

Mr. David Loret
04-B-0947
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

Dear Mr. Loret:

I have received your letter in which you requested materials concerning the "310 Genetic Analyzer" from this office.

In this regard, please be advised that the Committee on Open Government is authorized to provide guidance and opinions pertaining to the Freedom of Information Law. The Committee does not have custody or control of records generally, and we do not have any materials pertaining to the subject of your interest.

When seeking records, a request should be made to the "records access officer" at the agency that you believe maintains possession of the records. The records access officer has the duty of coordinating an agency's response to requests. Also, 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. Therefore, in the context of your request, if an agency does not have a record containing a statistic or total of the number of persons about whom information has been collected, it would not be required to prepare a new record containing that information. Further, rather than seeking "information", it is suggested that you request "records", i.e., records indicating the number of persons about information has been collected.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15731

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January 4, 2006

Mr. Richard G. Barger
[redacted]

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

Dear Mr. Barger:

I have received your letters of December 1 and December 23. The first pertained to your request made pursuant to the Freedom of Information Law for various records concerning a particular project in the Village of Wappingers Falls. You received a response indicating that the request needed "specificity", and in your letter to this office, you raised the following question: "Does not the Freedom of Information Law require the Village to provide their folder for review to anyone who applies"? Due to our backlog, I acknowledged the receipt of your letter and indicated that it might take as long as three months to prepare a written advisory opinion, and offered to discuss the matter with you by phone if that would be acceptable to you.

In your second letter, you indicated that you did not seek an advisory opinion, asked why your request was denied and wrote that:

> "I was denied access to Public records and want to know how I can gain access to said records or what State Agency will require the Village to show/provide access to records. WHO IN THE STATE DO I CONTACT TO ASSURE ME MY RIGHTS ARE NOT VIOLATED. FOIL STATES OR MANDATES THAT THESE RECORDS ARE AVAILABLE" (emphasis yours).

In an effort to offer advice, guidance and information, I offer the following comments.

First, I believe that the response by the Village was inconsistent with law. The Freedom of Information Law does not require, as the response to your request suggests, that an applicant must specify the records sought or identify them with particularity. When that statute was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not

meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

I note, too, that the records sought by the applicant in Konigsberg totaled more than 2,300 pages. The Court did not focus on the volume of the material, but rather the ability of the agency to locate the records with reasonable effort. In the context of your request, if, for example, the records sought are kept in a single folder or file or otherwise can be located with reasonable effort, I believe that your request, to that extent, would have reasonably described the records and that the Village was obliged to respond accordingly by granting access as required by law.

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

In my opinion, records submitted to the Village by an applicant must ordinarily be disclosed, for none of the grounds for denial of access would be applicable. However, one of the exceptions might be applicable as a basis for a denial of access to "comments by consultants for Village." That provision typically deals with communications between or among government agency officers or

employees. However, the Court of Appeals, the state's highest court, has determined that it applies to records prepared by and communications with consultants retained by an agency, such as a village. Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty

> Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

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

I note that in a case that reached the Court of Appeals, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

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

In short, that the records 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.

Lastly, when an agency denies access, as suggested at the bottom of the form prepared by the Village, the person denied access has the right to appeal. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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, §89(4)(b) states that the person denied access may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

I note that there is no state agency that is empowered to enforce the Freedom of Information Law or compel an agency to grant or deny access to records. However, this office has the ability to provide advice and opinions pertaining to that statute, and although our opinions are not binding, it is our hope that they are educational and persuasive. In an effort to enhance understanding of and compliance with the Freedom of Information Law, copies of this response will be sent to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Records Access Officer
Hon. William Larkin

STATE OF NEW YORK
DEPARTMENT OF STATE
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January 4, 2006

Mr. Thomas J. Klotzbach
[redacted]

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

Dear Mr. Klotzbach:

I have received your letter concerning access to records by members of boards of education.

You referred to decisions rendered by the Commissioner of Education on the subject, the Commissioner's regulations, and the permissive aspect of the Freedom of Information Law. You also alluded to the ability of a member of a board of education to gain access to "unqualified records" of a school district, and you asked, in essence, what the limit of so-called unqualified records might be.

In this regard, I am unfamiliar with that phrase. However, in an effort to provide general guidance, I offer the following comments.

First, in my view, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a board rule or policy to the contrary, I believe that a member of a public body should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A 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 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 such a case, a member seeking records could presumably be treated in the same manner as the public generally. When that is so, a request by a member of the board could, in my opinion, be considered as a request made under the Freedom of Information Law by a member of the public, and that person could be assessed fees at the same rate as any member of the public.

Further, in conjunction with the authority conferred by §1709 of the Education Law, I believe that a board of education could adopt rules or procedures pertaining to the rights or privileges of its members concerning the disclosure of records, as well as the imposition or perhaps the waiver of fees for copies under prescribed circumstances.

Second, as you suggested, 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 in Capital Newspapers v. Burns [67 NY2d 562 (1986)] held that the agency is not obliged to do so and may choose to disclose, stating that:

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" (id., 567).

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same principle would be applicable under the federal Freedom of Information Act (5 USC §552). While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose.

Based on judicial decisions involving exceptions to rights of access in both the state and federal freedom of information statutes, records would not be "specifically exempted from disclosure by...statute pursuant to §87(2)(a) of the New York Freedom of Information Law or pursuant to its counterpart in the federal Act, the "(b)(3)" exception. Both the New York Court of Appeals and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

Similarly, in construing the "(b)(3)" exception to rights of access in the federal Act, it has been found that:

"Exemption 3 excludes from its coverage only matters that are:

> *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

"5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F. Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

In short, to be "exempted from disclosure by statute", both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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January 4, 2006

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 November 28, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to volunteer fire departments, and specifically, accessibility of records reflecting calls made to and reports generated by volunteer fire departments. Because you do not mention a specific request or fire department, we will respond with general information.

First, if the records are maintained by a volunteer fire department, we believe that the department would be required to comply with the Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

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

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

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

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a

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

Accordingly, it is our opinion that records of a volunteer fire department would be subject to the Freedom of Information Law.

Second, with regard to your question about the accessibility of records pertaining to emergency calls, 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 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 records 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 Vehicles79, NY 2d 106 (1992)].

In our opinion, portions of records identifying those to who 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. Other aspects of the records, however, such as the locations of calls or addresses, in our opinion, 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 know 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.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

FOIL-AO-15734

From: Robert Freeman
To: Teresa Merlucci
Date: 1/5/2006 4:52:43 PM
Subject: Re: Dear Ms. Merlucci:

Dear Ms. Merlucci:

I have received your inquiry concerning rights of access to results of tests involving air quality, soil, mold, etc.

In brief, assuming that the test results consist of statistical or factual information, I believe that they would be public, for none of grounds for denial of access listed in the Freedom of Information Law would be applicable. They would not appear to consist in any of legal advice or reflect expertise uniquely offer by an attorney. If that is so, I do not believe that the attorney-client privilege would be applicable or pertinent. And finally, I know of no provision that would require delaying disclosure of the test results until counsel reviews them. On the contrary, if my understanding the matter is accurate, they would be available as soon as they are produced by or for the school district.

I hope that I have been of assistance.
>>> Teresa Merlucci <tam6281958@optonline.net> 1/5/2006 4:36:25 PM >>>
Dear Mr. Robert Freeman,
Under the FOIL, can the results of air quality testing, mold, soil, etc. performed in a public school district, be requested?
If yes, are there parts which are exempt from public disclosure or protected under attorney-client [school district] privilege ?
Must the district have them reviewed by their counsel or a special counsel prior to the release if a request is made.
Thank you,
Teresa Merlucci

Take care,

Teresa Merlucci

----- Original Message -----
From: Robert Freeman
To: [redacted]
Sent: Tuesday, December 27, 2005 3:27 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
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15235

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

January 5, 2006

E-MAIL

TO: Peter Costa

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. Costa:

We are in receipt of your December 2, 2005 e-mail request for an advisory opinion concerning the Freedom of Information Law, and a request you made to the Town of Eastchester.

Before addressing the accessibility of the particular report requested, we note that the Town's response to your request for records did not include either any basis for denying access to portions of the report, or the method by which you can appeal that denial. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Insofar as the Town is required to inform you of your right to appeal, we point out that 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)].

With regard to the accessibility of the "report the Town commissioned on how to run (any Town Department) more cost effectively", and the Town's offer to make portions of that report available to you, 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. 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. Based on its letter to you, the Town of Eastchester has determined that portions of the report are accessible and has indicated when it would make them available for your inspection.

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 our 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.

We hope this helps to clarify your understanding of the Freedom of Information Law.

CSJ:tt

cc: Linda Doherty

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15236

41 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, 2006

Ms. Alexis Torres
[redacted]

Dear Ms. Torres:

I have received your letter and the materials attached to it. You have sought assistance in obtaining records from the Oneida 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, and courts are not required to designate a records access officer or abide by the procedural requirements imposed by the Freedom of Information Law or the regulations promulgated by the Committee on Open Government.

Relevant to the matter is §166 of the Family Court Act, which 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."

Based on the foregoing, when seeking Family Court records, it is suggested that you refer to §166 of the Family Court Act and specify that your request does not involve "indiscriminate public inspection", but rather a need to obtain documents significant to your life.

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-15737

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

January 5, 2006

Mr. Janusz Muszak
[redacted]

Dear Mr. Muszak:

I have received your letter of December 31, which is purportedly a request made under the Freedom of Information Law. Specifically, as your request, you raised the following question: "What New York State Government entity enforces the New York State Freedom of Information Law?"

In this regard, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it pertains to requests for existing records. That law does not require agency personnel to provide information in response to questions. Similarly, §89(3) provides in part that an agency is not required to prepare a record in response to a request.

Notwithstanding the absence of any obligation to answer your question to comply with the Freedom of Information Law, this is to inform you that there is no agency of government in New York that enforces the Freedom of Information Law. As you may be aware, if a request for records is denied, and the applicant's appeal is also denied, he or she may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Ryan T. McAllister

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15738

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

January 6, 2006

Mr. Robert E. Neratko
[redacted]

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

Dear Mr. Neratko:

As you are aware, I have received your letter concerning your efforts in gaining access to records of the City of Dunkirk. The request involves records pertaining to two named individuals from 1980 to the present.

In response to the initial request, it appears that some of the records were offered to you, but according to the City Attorney, you rejected the offer, and the remaining records were withheld on the basis of an exception in the federal Freedom of Information Act (5 USC §552) concerning unwarranted invasions of personal privacy. The Mayor denied your appeal, citing §96 of the Public Officers Law as the basis for the denial.

Having reviewed their responses and the other correspondence that you forwarded, I offer the following comments.

First, neither of the statutes upon which City officials relied in denying your request would have been applicable or pertinent in determining rights of access. The federal Freedom of Information Act pertains only to records of federal agencies, and §96 of the Public Officers Law is part of the New York Personal Privacy Protection Law, Article 6-A of the Public Officers Law, §§91 to 99, which applies only to state agencies [see §92(1)]. The statute that governs rights of access is the New York Freedom of Information Law.

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Because your request relates to records prepared or events that occurred as long as twenty-five years ago, it likely that records that might once have existed have lawfully been discarded. Once records have been destroyed and there are no records to be disclosed or withheld, the Freedom of Information Law has no application.

Third, an issue of likely significance involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. It has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the recordkeeping systems of the City, to extent that existing records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. If, for example, records are not maintained by name but rather chronologically, and locating those pertaining to particular individuals would involve, in essence, the search for the needle in the haystack, the agency would not be required to engage in that degree of effort, for the request would not reasonably describe the records sought.

Fourth, insofar as records exist and can be located with reasonable effort, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Therefore, the content of records and the effects of their disclosure serve as the primary factors in determining the extent to which the records are accessible to the public.

If, for instance, a person is the subject of an unsubstantiated allegation or complaint, it has been advised that records pertaining to the matter may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see §§87(2)(b) and 89(2)(b). Similarly, if a person is charged with a criminal offense, and the charge is dismissed in his or her favor, the records are sealed pursuant to §160.50 of the Criminal Procedure Law. In those instances, they may be withheld under §87(2)(a) concerning records that "are specifically exempted from disclosure by state or federal statute."

I note that although arrest records are not specifically mentioned in the current Freedom of Information Law, the original version of the Law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. In my opinion, even though reference to those records is not made in the current statute, I believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it was held by the Court of Appeals, several years ago that, unless sealed under §160.50 of the Criminal Procedure Law, records of the arresting agency identifying those arrested must be disclosed [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)]. Therefore, records indicating an admission or finding of guilt are accessible. Similarly, if a person has paid a fine following the issuance of a parking ticket, the ticket identifying the individual would, in my opinion, be accessible. In those situations, disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

Next, it has 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 [see §89(3)]. 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.

Lastly, the reason for which a request is made generally has no bearing or effect on rights of access. When records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the

intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Richard L. Frey
Daniel C. Gard
Chief Ortolano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15239

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

January 6, 2006

Mr. Frank Schwamborn
[redacted]

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

Dear Mr. Schwamborn:

We are in receipt of your request to compel the Nassau County Police Department to release certain records to you.

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.

After reading the materials you submitted, we offer the following general 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.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

From: Robert Freeman
To: Village of Schuylerville
Date: 1/9/2006 9:06:07 AM
Subject: Re: Good Morning from Schuylerville! and HELP, please.

Good morning - -

I hope that you and yours had a wonderful holiday season as well.

With respect to your questions, I believe that your interpretations are correct. In short, first, marking a document "confidential" is irrelevant; the issue involves whether or the extent to which one or more of the exceptions appearing in §87(2) of the Freedom of Information Law may properly be asserted. Similarly, characterizing a document as "official" or "unofficial" would have no bearing on public rights of access. Second, a memo sent by a department head to the Mayor would constitute "intra-agency material" that falls within §87(2)(g). Insofar as material of that nature consists of opinions, advice, recommendations, suggestions and the like, it may be withheld. However, the same provision requires that other portions of intra-agency materials consisting of statistical or factual information, final agency policies or determinations, for example, must be disclosed.

I hope that this helps.

All the best,
Bob Freeman
>>> "Village of Schuylerville" <office@villageofschuylerville.org> 1/9/2006 8:34:35 AM >>>
Hi --
How are things?
Hope you had a nice holiday season and a fun New Year's Eve.
and that you got to spend some time on the Cape.
I have a question - I think I know the answer, but let me ask the expert, just to be safe:
I have a memo from a department head (Code Enforcer) to the Mayor,
and Board of Trustees. It is intended to give them the CEOs opinion on a matter and
is not an official report.
I consider this intra-agency and therefore NOT subject to FOIL.
Am I correct?
Additionally, it is my understanding that marking a document "Confidential",
does not necessarily exclude it from FOIL, unless it falls in categories such
as intra-agency or pending litigation. Am I correct?

Sorry to bother you this early on a Monday morning. Just want to make sure
in case my FOIL is getting rusty due to lack of refresher at Fall Training.
It might be fun to go to Venezuela, but Fall Training is important..... next year, I hope.

Thanks,
Have a great day!
Barbara

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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January 9, 2006

Mr. Mark I. Cushman
[redacted]

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

Dear Mr. Cushman:

I have received your correspondence concerning unanswered requests for records made to the Village of Ilion. The records sought involve W-2 earnings statements pertaining to a particular Village official and records of "payment and/or reimbursement" to the same person relating to "travel, mileage, clothing allowances, etc."

From my perspective, based on the language of the law and its judicial interpretation, it is clear that the substance of the records in question 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 section 87(2)(a) through (i) of the Law.

Although tangential to your inquiry, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed for the following reasons.

One of the grounds for denial, section 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)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

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

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

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. Moreover, in a recent decision, the same conclusion was reached, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992). There may be dozens of W-2 forms from which portions could be deleted, but I believe that employers, i.e., the Village, must also prepare an equivalent record that includes employees' names and gross

wages. It is suggested that you discuss that possibility with an official of the Village, for it would be more efficient and less burdensome to disclose a single listing than dozens of forms.

The same kind of analysis would pertain in consideration of rights of access to expense vouchers and similar materials. In short, records pertaining to billing or payments made to public officers or employees are accessible, except to the extent that disclosure would result in an unwarranted invasion of personal privacy. If, for example, records include social security numbers or home addresses, or personal credit card account numbers, those details could be deleted to protect privacy, while the remainder would be accessible. Portions of those kinds of records indicating reimbursements are clearly relevant to the performance of their official duties and must, therefore, be disclosed.

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

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

STATE OF NEW YORK
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January 9, 2006

Mr. William J. Callahan
Administrative Officer
New York State Police
Building 22
1220 Washington Avenue
Albany, NY 12226-2252

Dear Mr. Callahan:

We are in receipt of your December 7, 2005 determination of an appeal made by Ms. Beth Kissinger. We respectfully disagree with your determination, and offer the following comments.

First, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". In our opinion that provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness, or perhaps a victim. However, when the matter has been adjudicated and records are accessible to the public from a court pursuant to the Uniform Justice Court Act, we believe that the related police report should be accessible. In relevant part, §2019-a provides 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."

Further, the same provision directs that:

> "The record of every criminal action shall state the names of the witnesses sworn and their places of residence, and if in a city, the street and house number."

Because proceedings before a Justice Court are public, and the identity and testimony of every witness before the court is accessible, we are of the opinion that there is no basis on which to categorically refuse to release the entire police report.

Second, where the matter has been adjudicated and the victim of the offense is the requestor of the record, it is our opinion that the risk of invading a witness's privacy is non-existent, except in the circumstance where a witness may not have become known to the court or made public during

the course of a proceeding. In the unlikely event that the police report contains information about a person which was not brought before the court, it may be that the release of such information would constitute an unwarranted invasion of personal privacy, in which case, such information could be redacted from the report.

We hope this helps to clarify your understanding of the Freedom of Information Law and that you will reconsider your response to Ms. Kissinger.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Ms. Beth Kissinger

From: Robert Freeman
To: marcia_barrett@penfield.monroe.edu
Date: 1/10/2006 10:24:42 AM
Subject: Dear Ms. Barrett:

Dear Ms. Barrett:

I have received your inquiry concerning the ability to charge a fee for photocopies.

In response to a request for a report attached to the Board of Education agenda, you indicated that you provided a copy without requiring the person seeking the report to "fill out a FOIL." However, you charged the applicant 25 cents per photocopy. He contended that because the Board received the report, he should not be charged for a copy.

I disagree with his contention. First, the Board members received copies of the report in the performance of their official duties; the resident sought the report as a member of the public. Second, I note that an agency may require that a request for a record be made in writing, but that there is no obligation to do so. Therefore, you had the ability to waive a requirement that the applicant submit a request in writing pursuant to the Freedom of Information Law. And third, when copies are made available to the public because the Freedom of Information Law so requires, the agency, in my view, may charge up to twenty-five cents per photocopy, irrespective of whether the record is made available based on an oral or a written request.

I hope that I have been of assistance.

Robert J. Freeman
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January 10, 2006

Mr. John Salvador, 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. Salvador:

We are in receipt of your December 22, 2005 request for an advisory opinion concerning the Freedom of Information Law and its application to "comparable sheets" in the Town of Queensbury. Specifically, pursuant to resolution by the Town Board, you received the requested sheets, and now question "the form and content of [our] concurrence with [the] Town Counsel", adding that "Any references or opinion of record will also be helpful."

Initially, we note that it is rare to receive a request for an opinion from a person whose request has been fulfilled. More typically, advisory opinions are rendered at the request of persons whose requests have been denied by the municipality. Nevertheless, you have provided an opportunity to elaborate on the permissive nature of the Freedom of Information Law. In that regard, we offer the following comments.

First, the Freedom of Information Law is permissive; the Court of Appeals, the state's highest court, has held that an agency may withhold records in accordance with the grounds for denial, but that it is not required to do so [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. The only instance in which records must be withheld would involve the case in which a statute prohibits disclosure.

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

The "comparable sheets" 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, 180 Misc.2d, 693 NYS2d 870 (New York County, 1999); please note that this case was incorrectly cited in previous correspondence to Mr. Brothers].

In General Motors, the petitioner challenging its assessments, sought "descriptions of the comparables and any sales information including dates and terms of sale" contained in appraisals submitted to the Town by the consultant (id. at 871). The Town refused to disclose such records, taking the position that "the determination of an appraiser to use any particular sale as a comparable represents a professional decision which is part of the expert's deliberative process in formulating his ultimate determination of value" (id. at 871-872). Based on that contention, the court held that the Town "*need not* disclose... that portion of the consultant's appraisal which contains information concerning comparable properties used in determining the fair market value" [id. at 872 (emphasis added)].

While the Town could have chosen to withhold the records at issue, because the Freedom of Information Law is permissive, it apparently exercised its discretionary authority to grant access.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm
cc: Town Board

STATE OF NEW YORK
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January 10, 2006

Ms. Karen King
[redacted]

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

Dear Ms. King:

We are in receipt of your December 19, 2005 request for assistance concerning certain proceedings before the Zoning Board of Appeals and the Building Department of the Town of North Salem. While the Committee on Open Government is not authorized to advise you with regard to the zoning law, we understand that it is the responsibility of the Town to enforce violations thereof.

With respect to your request for a copy of a tape recording from the Town, and the Town's offer to make it available to you for listening, it is our opinion that if the Town does not have the ability to reproduce the tape recording, the Town must make the tape available for listening and copying. In that 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.

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

If the Town has the ability to prepare a duplicate recording, we 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 must be based on the actual cost of reproduction. 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]. 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, it may be that you or someone you know can place a tape recorder next to the Town's recorder, and simply permit that machine to record the sound that emanates from the Town's machine.

Finally, we note that the materials which you submitted included a reference to the Deputy Town Attorney's description of the proceedings before the Zoning Board as follows: "the Zoning Board gave an indication that there would be a denial, the Board did not take a formal vote. Thus, he had the right to withdraw his application. Mr. Reilly claims that it is done 'all the time'." The Town Supervisor further characterized the proceedings, writing "following discussion with the ZBA, Mr. Pawlowski chose to withdraw his application."

Assuming these facts to be accurate, it appears the Zoning Board effectively took action when, in lieu of taking a formal vote, it indicated to the applicant that it would not grant an application. It is our opinion that such action must be memorialized in minutes.

Section 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

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January 11, 2006

Mr. Robert S. Risman, Jr.
[redacted]

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

Dear Mr. Risman:

We are in receipt of your January 2, 2006 request for an advisory opinion concerning requests for records which you have made to the City of New York Department of Small Business Services. Based on my discussion with our Executive Director concerning your conversation with him, it appears that the Department of Small Business Services has granted or will grant access to the extent required by law. However, you have requested written remarks concerning the obligation of the Department to respond in a timely manner.

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

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

We hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Gale L. Rohrs
Andrew Schwartz

STATE OF NEW YORK
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January 12, 2006

Mr. Duane Watson
[redacted]

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

Dear Mr. Watson:

We are in receipt of your December 21, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to requests for records relating to your child and other students, made to the Marcellus School District. Your request, for copies of correspondence between one group of parents and District was denied, despite your joint request with parents of all but one of the students involved. We are in agreement with the District's denial of your request and offer the following comments in that regard.

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.

Relevant is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g). 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 the right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

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

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

Based upon the foregoing, references to students' names, parents' names, or other aspects of records that would make a student's identity easily traceable must in our view be withheld in order to comply with federal law unless, in the context of the facts presented, the parents of all the identifiable students waive confidentiality.

Consequently, insofar as the records you describe are communications between parents and the District that would identify a student other than those of parents who have signed on to your joint request, it is our opinion that the District must withhold the records.

We hope this helps to clarify your understanding of the matter.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15748

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January 17, 2006

Mr. George Hegel
06-A-2409
Gouverneur Correctional Facility
P.O. Box 370
Gouverneur, NY 13642-0370

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

Dear Mr. Hegel:

We are in receipt of your request for an advisory opinion concerning the applicability of the Freedom of Information Law to certain records which you have requested from the facility in which you are incarcerated.

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

It is noted that §87(2)(g) permits an agency provide in pertinent part that:

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

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

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

Concerning "instructions to staff that affect the public" and "final agency policy or determinations", which are generally available, respectively, under subparagraphs (ii) and (iii) of §87(2)(g) of the Freedom of Information Law, there is little decisional law that deals directly with those provisions. In a letter of July 21, 1977 prepared by the sponsor of the revised Freedom of Information Law, however, 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, a denial of access would be appropriate.

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.

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

FOIL-AO-15749

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January 17, 2006

Ms. Bonnie L. Barkley
[redacted]

Dear Ms. Barkley:

We are in receipt of your December 28, 2005 request for records. Please accept our apologies for the delay in responding. We failed to note upon receipt that it was a request for records, not a request for an advisory opinion, and it was processed along with all other requests for opinions, as is our practice, in the order in which they were received.

Please be advised that we were able to identify only one two-page letter from Mr. Miller which is responsive to your request. Although we note that this record was copied to you upon submission, we have enclosed a copy herein.

Also, please be advised that the Committee on Open Government maintains records for finite periods of time, in compliance with records retention schedules promulgated by the State Archives pursuant to §57.05 of the Arts and Cultural Affairs Law. Our general schedule is as follows:

Appeals and related correspondence: 1 year
General correspondence: 2 years
Requests for Advisory Opinions and related correspondence: 3 years.

In addition, we maintain our records in chronological order, not by name or subject matter. Accordingly, because of the volume of records maintained each year, we limited our search of the Advisory Opinions and related correspondence to materials received during the months of November and December, 2003, based on the date of the e-mail and correspondence attached to your request. We also searched through all of the Appeals and related materials.

Were we to search the entirety of our records, it would involve the review of thousands of documents, an effort which is not contemplated by the Freedom of Information Law; however, should you have documents which indicate submissions to us during other months, please advise, and we will conduct the appropriate search. We believe our response is in keeping with the Freedom of Information Law, and in that regard 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 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.

Therefore, to the extent that the records sought can be located with reasonable effort, we 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 we could locate the records you seek with a reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, we would be obliged to do so. In accordance with Konigsberg, however, because we maintain our records in chronological order, and it would take a herculean effort to locate the records you request, and without further information, we are not required to search further. Again, please submit more specific information if you have it, and we will make the appropriate search.

As a postscript, you inquired about how Mr. Miller came into the possession of an e-mail which you sent to this office in November of 2003. Although the Freedom of Information Law does not require the answering of questions, we wish to inform you that we are unable to collectively remember either when or whether we forwarded such e-mail to Mr. Miller, and we have no record documenting such transmission.

As a final note, please be advised 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. From our perspective, the e-mail which you submitted to the Committee on Open Government would be accessible to the public under the Law.

We hope this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 17, 2006

Mr. Ricky Martin
82-A-4576
Woodbourne Correctional Facility
99 Prison Road
Woodbourne, NY 12788

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

Dear Mr. Martin:

We are in receipt of your January 9, 2006 request for assistance in obtaining various court records under the Freedom of Information Law. In response to your indication that you previously wrote to us in June of 2005, we searched our records, and were unable to locate any such request. We offer our apologies for any inconvenience.

In response to your substantive request, 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.

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 these or other statutory provisions.

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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January 19, 2006

Hon. Owen H. Johnson
Member of the Senate
23-24 Argyle Square
Babylon, Long Island, NY 11702

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

Dear Senator Johnson:

I have received your letter and the correspondence addressed to you by Dr. Roger Bleidner, Secretary/Deputy Treasurer of the Islip Fire District. Dr. Bleidner suggested a series of changes in the Freedom of Information Law, and you have asked for my views concerning his suggestions.

Dr. Bleidner referred initially to the fees that may be charged. He correctly indicated that the maximum that may be charged for a photocopy up to nine by fourteen inches is twenty-five cents, and that no fee may be charged for the inspection of records that are accessible in their entirety under the Freedom of Information Law. He recommended that "the hourly wage of the person doing the research and copying be charged."

In this regard, first, I recall that the Office of General Services was contacted soon after the Freedom of Information Law became effective in 1974 to ascertain the actual cost of preparing photocopies based on typical state contracts, and we were informed that the cost then was approximately 6 ½ cents per photocopy. Now, however, the actual cost of a preparing a photocopy is a penny per photocopy or less. It seems that one of the few items that has diminished in cost over the past thirty years involves the preparation of photocopies.

Second, in terms of its philosophy and intent, the Freedom of Information Law is supposed to offer maximum access to government records at a minimal price, in order that the public may use the law in a manner that is meaningful to their lives or work. The Court of Appeals appears to have recognized that to be so in Doolan v. BOCES, in which the Court rejected the notion of furnishing information "on a cost-accounting basis" and held 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" [48 NY2d 341, 347 (1979)]. Stated differently, giving effect to the Freedom of Information Law is not an extra task that government officials are required to carry out; rather, doing so is part of our governmental duty.

Third, reference was made to "the many hours required to research and produce the requested documents." I would conjecture that in most small units of local government, such as fire districts, records are often relatively easy to locate. When that is not so, when records cannot be found with reasonable effort, it has been advised that the request does not "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law.

Based on the language of the law and its judicial construction, a request made for a specific document or documents does not necessarily indicate that a person seeking the record has made a valid request that must be honored by an agency. In considering the requirement that records be "reasonable described", the Court of Appeals has indicated that whether or the extent to which a request meets the standard may be dependent on the nature of an agency's filing, indexing or records retrieval mechanisms [see Konigsburg v. Coughlin, 68 NY2d 245 (1986)]. When an agency has the ability to locate and identify records sought in conjunction with its filing, indexing and retrieval mechanisms, it was found that a request meets the requirement of reasonably describing the records, irrespective of the volume of the request. By stating, however, that an agency is not required to follow "a path not already trodden" (id., 250) in its attempts to locate records, I believe that the Court determined, in essence, that agency officials are not required to search through the haystack for a needle, even if they know or surmise that the needle may be there.

For purposes of further illustration, assuming that the Suffolk County telephone directory is a fire district record and that you request portions of the directory identifying those persons whose last name is "Johnson", 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 Johnsons, the request would be valid. But what if you request those listings in the directory identifying all of those persons whose first name is "John?" 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 John would require an entry by entry search of the entire directory. Despite the specificity of the request and the certainty that the entries sought are included within the record, the request, in my opinion, would not "reasonably describe" the records as required by the Freedom of Information Law.

In short, agency staff are not required to engage in herculean or unreasonable efforts in locating records to accommodate a person seeking records. I note, too, that in a related vein, §89(3) also states in part that an agency is not required to create a record in response to a request. Therefore, the Freedom of Information Law pertains to existing records, and agencies are not required to prepare new records, totals or lists that do not otherwise exist.

Enclosed is an excerpt from the recent report to the Governor and the State Legislature by the Committee on Open Government. In brief, it is the Committee's belief that the use of and disclosures made as a result of the Freedom of Information Law save taxpayers millions of dollars every year. In consideration of those savings and the preceding commentary, I do not believe that there is any justification for raising or altering the fees that currently may be assessed under the Freedom of Information Law.

Dr. Bleidner's second, third and fourth recommendations relate essentially to the same issue. He suggests that an attorney making a request should identify the client and that all requests must indicate the purpose for which the request is made. He also recommended that a request should be accepted only "from a resident residing in the district involved." That suggestion is contrary to judicial decisions and the basic thrust of the law.

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

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

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

In my view, the nature and content of records, as well as the effects of disclosure, are the key factors that must be considered in determining rights of access to records, or conversely, the ability to deny access. Whether I am a resident of a fire district, a reporter for *Newsday*, or a foreign national should have no bearing on rights of access. The contents of minutes of meetings of a board of fire commissioners remain the same, irrespective of the identity or residence of an applicant. Similarly, if a resident or anyone else seeks a public employee's social security number, his or her identity or interest are of no significance; by its nature, the social security number may be withheld because disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Just as significant, often persons or firms own or operate businesses in a municipality but do not reside in the municipality. Clearly they have an interest in the operation of government in the municipality in which their businesses are located, and just as clearly, in my opinion, they must enjoy the same rights of access as any resident. Again, the status, the interest, the residence of a person seeking records should be of no significance. If a record may justifiably be withheld under an exception appearing in §87(2) of the Freedom of Information Law, any member of the public may be denied access. On the other hand, if no exception applies, any member of the public should be able to gain access.

Next, Dr. Bleidner recommended that "requests for documents should be for no more than 2 years", and that his fire district has received a request "for 5-10 years back." In this regard, it is reiterated that an applicant must reasonably describe the records sought, and that, therefore, an agency is not required to engage in unreasonable efforts to locate what may be old records. Perhaps more importantly, most records do not have to be kept as long as Dr. Bleidner has suggested. Under Article 57-A of the Arts and Cultural Affairs Law, the State Archives, under the direction of the Commissioner of Education, develops schedules indicating minimum retention periods for various categories of records. While records of importance may have to be retained for extended periods of time or even permanently, others can be discarded within relatively short periods. For example, this office, based on a retention schedule, has the authority to discard most of its records within three years. Others, such as written advisory opinions and minutes of meetings of the Committee on Open Government, are kept permanently. I would suggest that Fire District staff review its retention schedule or contact the State Archives in order to determine the length of time that records must be retained before they may be discarded.

Additionally, as you are aware, there are numerous instances in which records more than two years old are critical. Records involving land use or zoning more than two years old are often important in the decision making process. Actions taken by government bodies that are memorialized in minutes of meetings are frequently significant, even though the actions might have been taken years ago. Many policies, local enactments and similar records of importance to the public were prepared or adopted more than two years ago. In short, I do not believe that Dr. Bleidner's suggestion has merit.

Lastly, it was suggested that "if a request is denied, then an arbitrator should be assigned, and the courts should not be involved due to legal costs." This issue, how best to resolve disputes arising under a freedom of information law, has been the subject of a great deal of discussion. I point out that the services offered by this office, which are provided without a fee to either government officials or the public, frequently serve to educate and resolve disputes in a manner that negates the necessity to initiate litigation. Since 1995, with a staff never greater than four, this office has responded to approximately 82,000 telephone inquiries, of which nearly 40,000 were made by state and local government officials and 25,000 by members of the public; we have prepared more than 9,000 written advisory legal opinions, many of which are available in full text on our website. The reality, however, is that if a dispute cannot be resolved through education or mediation, the only enforcement mechanism involves the initiation of a judicial proceeding. For reasons discussed in the Committee's annual report, that occurs relatively infrequently.

I note that every state in the United States has enacted a law concerning public access to government records. There is only one state, however, that has created a quasi-judicial review mechanism, Connecticut. Its Freedom of Information Commission has the authority to review denials of access to records and make determinations. Its budget is approximately ten times that of our office in New York, even though its population is one-sixth of New York's. Clearly the cost of implementing an alternative to judicial review would be expensive. Preferable in the Committee's view would be the enactment of provisions designed to encourage compliance with the Freedom of Information Law by deterring unreasonable denials of access. A portion of the Committee's annual report dealing with that issue is included in the attached excerpt.

In sum, while I recognize Dr. Bleidner's concerns, many of them can be effectively addressed by fire districts and other agencies through better understanding and implementation of existing law.

Certainly the Committee on Open Government would welcome your support of the proposed legislation described in its report, and if you or your staff would like to discuss the legislation or any aspect of the matters considered here, it would be my pleasure to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 19, 2006

Mr. Chester Davidson
93-A-5276
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051

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

Dear Mr. Davidson:

We are in receipt of your June 16, 2005 request for "compliance for record of 'Jail Time Certificate' from the Committee on Open Government."

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.

We emphasize 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. While it may be that the correctional facility in which you were incarcerated has records relating to the length of your incarceration, we are not familiar with a document known as a "Jail Time Certificate", and we are not aware of any statutory provision which would require a correctional facility to generate such a document. Again, if no such record exists, the Freedom of Information Law would not require the production of such record. It is suggested that you might request a record indicating dates or the period of your incarceration, rather than a record specifically named as a "jail time certificate."

Based on the materials attached to your request, it appears you have received conflicting advice about where to direct your request for such a record. The Inmate Records Coordinator of the Greene Correctional Facility indicates you should direct your request to the NYC Department of Corrections, and the NYC Department of Corrections indicates you should direct your request to the Greene Correctional Facility. Perhaps forwarding the denial letter from the NYC office to the Greene Correctional Facility would be productive.

In light of your statement in your April 23, 2005 request, which indicates that the Freedom of Information Law mandates a reply within ten business days, 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.

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

FOIL-AO-15753

41 State Street, Albany, New York 12231
(518) 474-2518
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January 19, 2006

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 information presented in your correspondence.

Dear Ms. Seeley:

We are in receipt of your request for further assistance dated December 27, 2005. 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.

Many of the questions which you pose were addressed in our previous correspondence to you which indicated, in brief, the following three items:

> (1) because the Freedom of Information Law does not apply to the courts, we advise that when you make requests for records to the clerk of the court pursuant to Judiciary Law §255 you should cite that provision of law as the basis for the request;
>
> (2) it may be in your best interest to pursue copies directly from your legal counsel, in light of the decision rendered in Moore v. Santucci, 151 AD2d 677 (1989), which holds that if a record was previously made available to you or your attorney, you must demonstrate that neither you nor your attorney possess the record, in order to obtain a second copy; and
>
> (3) insofar as the records you seek may not have been made public through a judicial proceeding, they would be accessible or deniable, in whole or in part, depending on their content. All records of an

> agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in Freedom of Information Law, §87(2)(a) through (I).

In addition to the above items, which were previously explained in more detail, we note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

We hope that this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15754

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

January 19, 2006

Mr. Shawn Boyd
90-A-9357
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

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

Dear Mr. Boyd:

We are in receipt of your May 25, 2005 request for assistance concerning your attempts to recover copies of records from the Queens County District Attorney's Office. 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.

We believe that the District Attorney's Office was thorough in its response to your various requests and required you to submit payment prior to the release of the requested records. We also note your receipt for the money order in the exact amount required. While we are not empowered to compel an agency to comply with a request, as noted above, in an effort to settle the matter, we will send a copy of this letter to the District Attorney's Office. We hope that this will help to resolve the matter to your satisfaction.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Rona I. Kugler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15755

41 State Street, Albany, New York 12231
(518) 474-2518
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January 19, 2006

Mr. Dan Vallely
County of Schenectady
Office of the Public Defender
519 State Street
Schenectady, NY 12305

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

Dear Mr. Vallely:

We are in receipt of your faxed request for an advisory opinion concerning the application of the Freedom of Information Law to requests you have made for legal bulletins from the New York State Police. It is our understanding that your requests for these documents have been unsuccessful. In this regard, we offer the following comments.

Preliminarily we note that the description which you attach to your request states that the legal bulletins "are sent to all police departments in the state, summarizing recent court decisions and legislative enactments." In some instances, it may be unclear whether portions of the document reflect opinion or fact, and, in our general experience with legal bulletins that authorship of the individual summaries might be unknown. It is our opinion that it would be consistent with the thrust of judicial decisions, where it could not be established whether a statement reflected opinion as opposed to fact or policy, that the statement should be disclosed. That reasoning is based not only upon those judicial decisions, but on the fact that an agency bears the burden of proof when a proceeding is brought under Article 78 of the Civil Practice Law and Rules (CPLR) to review an agency's determination to deny access to records [see Freedom of Information Law, §89(4)(b)]. In short, if the author of a document cannot be identified and if ti cannot be established that a statement represents advice or an opinion, rather than a fact or a policy, a court, would, in our view, require disclosure.

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.

One of the grounds for denial of significance under the circumstances is §87(2)(g), for all of the documentation at issue consists of inter-agency material. Due to the structure of that provision, it frequently requires substantial disclosure. Specifically, the cited provision permits an agency to withhold records that:

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

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

Pertinent is a decision rendered by the Court of Appeals in which the Court focused on what constitutes "factual data", stating that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, 463 N.Y.S.2d 122, mod on other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182.

> 417 N.Y.S.2d 142)" [Gould v. New York City Police Department, 89 NY2d 267, 276, 277 (1996)].

From our perspective, the specific language of §87(2)(g), coupled with the direction offered by the Court of Appeals, provides the basis for reviewing and determining the extent to which the records in question might justifiably be withheld. Reference was made earlier to the thrust of the Freedom of Information Law, and the Court in Gould reiterated its stance taken in previous decisions, stating that:

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

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered and held 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.).

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).

It may be that another ground for denial applies, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute."

As you may know, §3101(c) of the CPLR pertains to disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable." The other provision at issue pertains to material prepared for litigation, and §3101(d)(2) states in relevant part that:

> "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

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, however, case law summaries in a "legal bulletin" format are neither prepared for litigation nor shared within the confines of a confidential relationship. Insofar as the records in question have been shared with offices and entities with which the Division's Counsel does not have a privileged attorney-client relationship, no claim of privilege or its equivalent could, in our view, be effectively asserted. Once records in the nature of attorney work product or material prepared for litigation are transmitted to a party which is not the attorney's client, i.e., from the State Police Counsel's Office to offices of district attorneys, 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.

We hope this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

FOIL-AO - 15756

From: Robert Freeman
To: toctownclerk@adelphia.net
Date: 1/23/2006 9:52:22 AM
Subject: Dear Ms. Farr:

Dear Ms. Farr:

As you are aware, I have received your letter.

In your initial inquiry, you asked whether every "request for information made to a local government had to be made through a FOIL request through the Town Clerk's office." In this regard, an agency may require that every request be made in writing, but there is no obligation to do so. The regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force and effect of law, state in relevant part that "An agency may require that a request be made in writing or may make records available upon oral request." Further, the regulations indicate that the records access officer, who most often in towns is the town clerk, has the duty of "coordinating" the agency's response to requests. As part of the process of "coordinating", you, as records access officer, could direct the assessor or other Town officials to respond directly to routine requests, and to accept oral requests. In situations in which rights of access may be unclear, a written request could be required, and other Town officials in receipt of such requests could forward them to you.

Second, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request.

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-15257

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

January 23, 2006

Mark J. Levine, Esq.
Vice President & General Counsel
Roman & Associates
300 Merrick Road, Fourth Floor
Lynbrook, NY 11563

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

Dear Mr. Levine:

I have received your letter and the materials attached to it. You have sought my views concerning the propriety of a denial of access to records by the Nassau County Police Department.

It appears that you represent the insured in a matter in which a deceased person was killed when she was run over by a "hi-lo." Having requested all reports relating to the incident from the Department, you were informed that the incident "was determined to be accidental and non-criminal", and that the file concerning the matter "primarily deals with emergency medical assistance rendered to the decedent." That being so, the Department indicated that the request would be denied, "without a release from the estate", on the ground that disclosure would constitute "an unwarranted invasion of personal privacy", citing §89(2)(b) of the Freedom of Information Law. It was added that the records are also exempted from disclosure by statute, specifically, §2805-c of the Public Health Law and HIPAA.

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.

As suggested in the response to your request, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Insofar as the records include material prepared by a provider of medical services, I believe that they could be characterized as medical records that are exempt from disclosure. While the provision in the Public Health Law referenced in the response to your request appears to reflect a typographical error,

§2803-c(3) concerning rights of patients states in paragraph (f) that "Every patient shall have the right to privacy in treatment and in caring for personal needs, confidentiality in the treatment of personal and medical records, and security in storing personal possessions."

Insofar as the records were not prepared by providers of medical services, but rather, for example, by police personnel, I believe that the Freedom of Information Law would govern, and that the issue would involve the extent to which disclosure would constitute an unwarranted invasion 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 [4 NY3d 477 (2005)]. 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])" (id., 305).

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" (id., 306).

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" (id.).

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. However, to the extent that the records include information that "would ordinarily and reasonably be regarded as intimate, private information", it has been held that disclosure would constitute an unwarranted invasion of personal privacy [see Hanig v. Department of Motor Vehicles, 79 NY2d 106, 112 (1992)].

In sum, without additional information concerning the specific nature and content of the records at issue, I cannot offer unequivocal guidance. Nevertheless, insofar as they consist of medical records falling within the coverage of the Public Health Law, either §§18 or 2803-c, it appears that they would be specifically exempted from disclosure by statute. With respect to other records, I believe that those portions consisting of intimate personal information or which are in the nature of medical records may be withheld under the Freedom of Information Law on the ground that disclosure would result in an unwarranted invasion of personal privacy. Other aspects of the

records, i.e., those that are not medical records or which do not consist of intimate personal information, would appear to be accessible.

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: Robert W. McGuigan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15758

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January 24, 2006

E-Mail

TO: Mr. Bill McCombs

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. McCombs:

I have received your letter in which you wrote that you are seeking "an Employer Separation Agreement" between a town and an employee. You asked whether there are "any obvious circumstances wherein the Town may withhold disclosure of this document."

From my perspective, the thrust of judicial decisions is clear, and such agreements, like other contracts between government agencies and persons or entities, are accessible under the Freedom of Information Law. In this regard, I offer the following comments.

First and significantly, the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the state's highest court, the Court of Appeals, twenty-five years ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have carte blanche to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for in camera inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In another decision, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" [Capital Newspapers v. Burns,67 NY2d 562, 565-566 (1986)].

Second, as the judicial decisions cited above make clear, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While it appears that two of the grounds for denial of access may be pertinent to an analysis of rights of access, neither, in my view, would appear to justify withholding the record at issue.

Assuming that the agreement was reached while the employee was still an employee of the town, I believe that it would constitute "intra-agency" material that falls within §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. Specifically, it authorizes an agency to withhold records that:

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

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

An agreement, by its nature, is final and serves as a final agency determination reflective of the terms and conditions of a relationship between an individual in this instance and the town. That being so, it would be accessible under subparagraph (iii) of §87(2)(g), unless a different exception to rights of access can properly be asserted.

The remaining provisions that are relevant in ascertaining rights of access are §§87(2)(b) and 89(2)(b), which authorize agencies to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

I note that instances have arisen in which agreements or settlements have included provisions requiring confidentiality. Those kinds of agreements have uniformly been struck down and found to be inconsistent with the Freedom of Information Law. In short, it has been held that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

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

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

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

In two decisions rendered by the Appellate Division, the facts appear to have been similar to those that you presented, for they involved persons who left their employment with municipalities in accordance with the terms of agreements with those municipalities. In both instances, it was determined that the agreements were accessible under the Freedom of Information Law. One case involved an agreement concerning a separation from employment that contained a "confidentiality clause" [Village of Brockport v. Calandra 745 NYS2d 662 (2002); affirmed, 305 AD2d 1030 (2003)], and it was determined that the agreement was accessible, and that the confidentiality clause "offends public policy" and "cannot stand" (id., 668). The other dealt with a situation in which a municipality disclosed a settlement agreement with a public employee that included provisions regarding confidentiality and was sued for breach of contract as a result of the disclosure. The municipality contended that disclosure was required by the Freedom of Information Law, and the court agreed, stating that none of the exceptions to rights of access applied [Hansen v. Town of Wallkill, 270 AD2d 390 (2000)].

Based on the direction and weight of the judicial decisions cited and described in the preceding commentary, I believe that the record sought must be disclosed to comply with law.

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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January 24, 2006

Mr. Donnell Jefferson
92-B-2833
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403

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

Dear Mr. Jefferson:

We are in receipt of your June 27, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to three requests for records which you have made to three separate entities.

In this regard, the provisions upon which you relied in seeking records are not all applicable to each of the entities from which you requested records. The federal Freedom of Information Act (5 USCA §552) does not apply to state courts or municipal offices, but to federal agencies only. Similarly, the New York Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Uniform Justice court Act, §2019-a; Judiciary

Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

With respect to your having received no response from the Office of the Albany County District Attorney and/or the Guilderland Police Department, agencies which are subject to the provisions of the Freedom of Information Law, 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.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 27, 2006

Ms. Susan M. Cobaugh
05-G-0129
Bedford Hills Correctional Facility
P.O. Box 1000
Bedford Hills, NY 10507-2499

The staff of the Committee on 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. Cobaugh:

I have received your letter in which you asked whether "there [is] a 'poor person's status'...for F.O.I.L. purposes, if the request is valid."

In this regard, while the federal Freedom of Information Act, which pertains to federal agency records, includes provisions concerning fee waivers, there is no decision of which I am aware rendered under the New York Freedom of Information Law in which a court has held that an indigent person may obtain a fee waiver in conjunction with a request for records under that statute. I note, however, that there is a decision in which the court held to the contrary, that an agency could charge its established fees even though the applicant was an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15761

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January 27, 2006

Mr. Daniel P. Tuohy
05-R-1296
Mohawk Correctional Facility
6100 School Road
P.O. Box 8451
Rome, NY 13442-8451

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

Dear Mr. Tuohy:

I have received your letter in which you referred to three requests for records and asked that "the necessary action be taken."

In this regard, I point out that the Committee on Open Government is authorized to provide advice and opinions; it is not empowered to enforce the law or compel an agency to grant or deny access to records. However, in an effort to provide guidance, I offer the following remarks.

The first involves medical records maintained by St. Francis Hospital in Poughkeepsie. Here I point out that the Freedom of Information Law applies to entities of state and local government in New York. By virtue of its name, I would conjecture that St. Francis is not a governmental entity. If that is so, the Freedom of Information Law would not apply.

I note, however, that a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. It is suggested that you send your request to the 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

The second request, which was made to the Dutchess County Sheriff, involves "log entries" pertaining to you made in "Log Books of Housing Unit 8..." from September 15, 2004 to December 2004. From my perspective, the issue involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the recordkeeping systems of the Sheriff, to the extent that the entries sought can be located with reasonable effort by means of a name, I believe that the request would have met the requirement of reasonably describing the records. In that event, those entries pertaining to you should be disclosed after redaction or deletion of the remaining content. On the other hand, if they are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of entries individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. In that event, I believe that the request could be rejected on that basis.

The third request, which was made to the Town of Poughkeepsie Police Department, involves "investigation reports" prepared by certain officers in relation to your "apprehension/detention."

In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions

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

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

For example, §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.

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

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

> "are compiled for law enforcement purposes and which, if disclosed, would:

I. interfere with law enforcement investigations or judicial proceedings;

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

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

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

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

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

Lastly, you wrote in your request that the "FOIA" permits an agency to waive or reduce fees. The "FOIA" is the federal Freedom of Information Act, which applies only to federal agencies. The New York Freedom of Information Law applies to agencies of state and local government in New York and contains no provision concerning fee waivers.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Lt. Joseph Roberto, FOIL Officer
RAO, Town of Poughkeepsie P.D.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15762

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January 27, 2006

Mr. Marcellus Morris
03-A-1224
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

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

Dear Mr. Morris:

I have received your letter in which you sought assistance concerning your requests to the Nassau County Sheriff's Department for "certified" and "authenticated" copies of certain records, as well as records of "prior bad acts" and grievances pertaining to officers who testified at your trial.

In this regard, first, §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 of the contents of the record. Similarly, there is no requirement in the law that the signature of the person who certifies that a copy of a record is a true copy be notarized.

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

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records,

including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered 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)].

Assuming that the officers in question are police or correction officers, I believe that the records of your interest would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: RAO, Sheriff's Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15763

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January 27, 2006

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 facts presented in your correspondence.

Dear Mr. Vail:

I have received your letter concerning an unanswered request made under the Freedom of Information Law to the Office of the Broome County District Attorney.

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-15764

41 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 27, 2006

Mr. Richard Simone
05-R-2191
Ulster Correctional Facility
P.O. Box 800
Napanoch, NY 12458

Dear Mr. Simone:

I have received your letter in which you asked for a "follow up" concerning a request made under the Freedom of Information Law for a transcript of a judicial proceeding.

In this regard, the matter is beyond the jurisdiction of this office, which is authorized to offer advice concerning the Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

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

I hope that the foregoing serves to clarify your understanding 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-15765

41 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 27, 2006

Mr. Gary Reeb
04-B-2933
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. Reeb:

I have received your letter in which you referred to an entry concerning an arrest in a record maintained by the Department of Correctional Services. As I understand the matter, however, you were not charged or indicted in relation to the arrest. You have sought assistance in removing the entry from a record maintained by the Department.

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

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

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

> "...records constituting disciplinary charges and dispositions, good behavior allowance reports, warrants and cancellations of warrants, legal papers, court orders, transportation orders, records of

> institutional transfers and changes in program assignments, reports of injury to inmates and records relating to inmate property including the personal property lists and postage account card."

The same provision defines "personal history" as follows:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15766

41 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 27, 2006

Mr. Charles Coleman
01-B-2183
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. Coleman:

I have received your letter in which you sought guidance in your efforts in obtaining from a district attorney or a court "a statement dealing with [your] case that was taken by" a particular person "while in Police/Detectives custody."

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.

Second, with respect to records maintained by an agency, such as an office of district attorney, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (iI) of the Law. Without additional information concerning the matter, I cannot offer unequivocal advice. However, several grounds for denial may be pertinent. If, for example, a person who gave a statement offered the statement during a public proceeding, I believe that the statement would be accessible [see Moore v. Santucci, 151 AD2d 677 (1989)]. If that person was a witness and this statement did not become public during a judicial proceeding, it is possible it may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. If this person who gave the statement was an informant who was not identified during a public proceeding or in records accessible to the public, it might be withheld under §87(2)(e)(iii). That provision authorizes an agency to withhold records compiled for law enforcement purposes when disclosure would identify a confidential source. In a similar vein, §87(2)(f) permits an agency to withhold records insofar as disclosure "could endanger the life or safety of any person."

Again, whether any of the exceptions referenced above are relevant to the matter is unknown to me.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15768

41 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 27, 2006

Mr. Vincent Bernardo
98-A-6537
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. Bernardo:

I have received your letter in which you sought guidance concerning your efforts in gaining access to medical records from the Harlem Hospital Clinical Laboratory.

In this regard, I believe that the entity in possession of the records is part of New York City government. If that is so, its records are subject to the Freedom of Information Law. In terms of rights granted by that statute, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, may permit some of those records to 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

FOIL-AO-15769

41 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 27, 2006

Mr. Maurice Walker
99-A-5351
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. Walker:

I have received your correspondence and apologize for the delay in response. You referred to and summarized serval situations involving requests for records and sought guidance in relation to them.

One of the items focuses on records relating to proceedings before a grand jury.

In this regard, Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 grand jury related records is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law, deals with grand jury proceedings and provides in relevant part that:

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

As such, grand jury minutes, records of testimony and other information "attending" to a grand jury would, in my view, ordinarily be exempt from disclosure. Any disclosure of those records would be based on a statute other than the Freedom of Information Law.

A second issue relates to requests for court records. Here I point out that Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

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

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

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Uniform Justice court Act, §2019-a; Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

When a request is made for agency records and the Freedom of Information Law applies, I point out that it has been if a record sought was previously made available to the defendant or his or her attorney, there must be a demonstration that neither possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" [Moore v. Santucci 51 AD2d 677, 678 (1989)].

It is also noted that agencies and courts are generally required to disclose and copy existing records, and that they are not required to create, alter or correct the contents of records on behalf of

an applicant. Similarly, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires the disclosure of information per se; rather, it is a vehicle that pertains to rights of access to existing records. While that statute may require an agency to disclose records, it does not require that an agency provide answers to response to questions.

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-1577O

41 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 27, 2006

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 referred to requests for records that have been ignored.

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

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1577

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

January 27, 2006

Mr. Anthony Peterson
85-A-4338
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. Peterson:

I have received your letter and hope that you will accept my apologies for the delay in response. You described requests made to the New York City Police Department for "records relating to reported rapes...which would not tend to identify the victim(s) of such crimes" covering "the time frame between January 1, 1983 to December 31, 1985" in the area of Central Park in Manhattan.

In consideration of the information presented, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Because the events that are the subject of your request occurred more than twenty years ago, it is likely that many records that once existed have been legally destroyed. In those instances, the Freedom of Information Law is inapplicable.

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

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

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

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

While I am unfamiliar with the record keeping systems of the New York City Police Department, to the extent that the records sought can be located with reasonable effort, I believe that your requests would have met the requirement of reasonably describing the records. On the other hand, if requested records, due to the nature of an agency's filing or record-keeping system, cannot be found with reasonable effort, the applicant in my view would not have reasonably described the records sought. In short, an agency is not required to search for the needle in the haystack, even if it is known that the needle is somewhere within the haystack.

Lastly, reference was made to §50-b of the Civil Rights Law. Subdivision (1) of §50-b states that:

> "The identity of any victim of a sex offense, as defined in article one hundred thirty or §255.25 of the penal law, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."

The initial ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 50-b exempts records identifiable to a victim of a sex offense from disclosure, and consequently, the Freedom of Information Law in my view provides no rights of access to those records.

As you are likely aware, the Freedom of Information Law generally requires agencies to review records to determine which portions, if any, fall within one or more of the grounds for a denial of access appearing in §87(2). Following such review, agencies are required to make appropriate redactions and disclose the remainder of the records. However, the Court of Appeals held more than twenty years ago that:

> "...[t]he statutory authority to delete identifying details as a means to remove records from what would otherwise be an exception to disclosure mandated by the Freedom of Information Law extends only to records whose disclosure without deletion would constitute an unwarranted invasion of personal privacy, and does not extend to

> records excepted in consequence of specific exemption from disclosure by State or Federal statute" [Short v. Board of Managers, 57 NY2d 399, 401 (1982)].

Based on the specific language of §50-b of the Civil Rights Law, in a manner consistent with Short, the Court of Appeals in Fappiano v. New York City Police Department [95 NY2d 738 (2001)] held that any record maintained by a public officer or employee that tends to identify the victim of a sex offense must be withheld in its entirety, except as provided in subdivision (2) of that statute. Similarly, in Karlin v. McMahon, the Court found that "the police are not obligated to provide the records even though redaction might remove all details which 'tend to identify the victim'" [96 NY2d 842 (2001)]. Concurrently, however, the Court in Fappiano indicated that those records which if disclosed would not identify or tend to identify the victim of a sex offense do not fall within §50-b. In those instances, I believe that access to the Department's records would be governed by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jonathan David

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15772

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 27, 2006

Mr. Robert Serrano, Jr.
00-A-4326
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

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

Dear Mr. Serrano:

I have received your letter in which you sought guidance concerning your unsuccessful attempts to obtain "certain records in the possession of private institutions."

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 records, and §86(3) defines the term "agency" to mean:

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

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

Since "private" institutions are not government agencies, they are not required to give effect to the Freedom of Information Law. Further, I know of no provision of law that generally requires that private institutions provide public access to their records.

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15773

41 State Street, Albany, New York 12231
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January 27, 2006

Mr. James Lee
01-B-1967
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

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

Dear Mr. Lee:

I have received your letter in which you asked whether you are entitled to obtain from the Division of Parole "a listing of the recommendation letters and/or cooperation agreement" received by the Division.

In this regard, first, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if no "listing" exists, the Division would not be required to prepare such a record on your behalf.

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

Third, if a list exists, it would be subject to rights 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, the content of such record and the effects of disclosure serve as the key factors in considering the extent to which it must be disclosed. If, for example, it identifies persons other than government officials, those portions might be withheld under §87(2)(b) on the ground that disclosure would constitute an "unwarranted invasion of personal privacy." Also pertinent may be §87(2)(f), which authorizes an agency to withhold records insofar as disclosure "could endanger the life and safety of any person.

In short, without additional knowledge of the facts and circumstances relating to the "listing" in question, if it exists, I cannot offer unequivocal guidance.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15774

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January 30, 2006

E-Mail

TO: Joseph H. LaJoy Sr.

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. LaJoy:

I have received your letter in which you wrote that a zoning enforcement officer received information indicating that you were in violation of a local building code. He added that "as of January 2006", the Freedom of Information Law prohibited him from disclosing of the name of the person who supplied the information. You have asked whether that is accurate.

In this regard, first, as the Freedom of Information Law relates to the issue, it has not changed in many years.

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

Of primary significance in relation to the matter 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 the context of the matter that you described, it has generally been advised that the substance of a complaint or allegation is available, but that those portions of the 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 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.

Lastly, since the zoning enforcement officer expressed the view that the name of your accuser cannot be disclosed, it is noted that the Freedom of Information Law is permissive. While an agency may withhold records in appropriate circumstances, it is not required to do so. As stated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling which the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, while I believe that identifying details pertaining to complainants may ordinarily be withheld, an agency is not prohibited from disclosing the record in question in its entirety.

I hope that I have been of assistance.

RJF:jm

cc: Zoning Enforcement Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15775

41 State Street, Albany, New York 12231
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January 30, 2006

E-Mail

TO: Nathan Eisenberg

FROM: Robert J. Freeman, Executive Director RJF

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

I have received your letter in which you wrote that a police department denied your request for a copy of an accident report relating to an accident involving your wife. The department indicated that "only the driver or registered owner of the vehicle could get the report."

The department's response is inconsistent with law, and in this regard, I offer the following comments.

By way of background, first, the Freedom of Information Law pertains to records of an agency, such as a police department, 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, including photographs taken at the scene, would in my opinion clearly constitute "records" subject to rights conferred by 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.

Second, §66-a of the Public Officers Law has required the disclosure of accident reports, except to the extent that their release would interfere with a criminal investigation, since its enactment in 1941. Subdivision (1) of §66-a states that:

> "Notwithstanding any inconsistent provisions of law, general, special of local or any limitation contained in the provision of any city charter, all reports and records of any accident, kept or maintained by the state police or by the police department or force of any county, city, town, village or other district of the state, *shall be open to the inspection of any person having an interest therein*, or of such person's attorney or agent, even though the state or a municipal corporation or other subdivision thereof may have been involved in the accident; except that the authorities having custody of such reports or records may prescribe reasonable rules and regulations in regard to the time and manner of such inspection, and may withhold from inspection any reports or records the disclosure of which would interfere with the investigation or prosecution by such authorities of a crime involved in or connected with the accident" (emphasis mine).

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."

Third and most importantly, the Court of Appeals, the state's highest court, directly addressed the meaning of the phrase that is italicized and upon which the police department appears to have relied in restricting access. Specifically, the Court found 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.

Lastly, aside from the broad definition of the term "record" appearing in the Freedom of Information Law, I point out that it has been held that records other than an MV-104 prepared during the course of an investigation of an accident are considered 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)].

In sum, based on the direction given by the state's highest court, I believe that your status as a member of the public provides you with rights of access to records under both §66-a of the Public Officers Law and 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

FOIL-AO 15776

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January 30, 2006

Mr. Rayheem Abdur Al Khaliq
04-A-4715
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. Al Khaliq:

We are in receipt of your request for an advisory opinion concerning your requests for confirmation of certain persons' employment with the New York City Police Department and the Inspector General's Office of the New York State Department of Correction. In this regard, we offer the following comments.

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 list of employee names and office addresses 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 list 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. A portion of such list, as maintained by the particular agency, which reflected the office address of the named person, in our opinion, would be required to be released pursuant to the Freedom of Information Law.

With respect to unanswered 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.

We hope this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Records Access Officer, New York City Police Department
Inspector General, New York City Department of Correction

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15777

41 State Street, Albany, New York 12231
(518) 474-2518
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January 30, 2006

Mr. Malachy McGreevy
01-R-1751
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. McGreevy:

I have received your letter concerning an alleged failure by the Commission of Correction to respond to your request for records.

In this regard, this office does not ordinarily intercede on behalf of applicants for records. However, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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: Brian Callahan, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 30, 2006

E-Mail

TO: William C. Brown, Jr.

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. Brown:

I have received your letter in which you allege that the Hoosick Falls Central School District staff has failed to respond to your requests for records in a timely manner. It appears that the records sought are copies of "the visitor sign in sheets for the entire building covering this school year."

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, in my view, the sign in sheets or significant portions of them may be withheld.

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.

Pertinent to the matter is §87(2)(b), which permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective, the names of those who visit a school for reasons other than business purposes may likely be withheld on the basis of the cited provision.

More importantly, if a person signs the sheet and visits the school because he or she is the parent of a student, I do not believe that the District has the authority to disclose his or her identity unless it receives consent to do so. The initial basis for denying access, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute 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, i.e., the name of a parent, must in my view be withheld from the public in order to comply with federal law.

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

RJF:jm

cc: Roger Thompson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 31, 2006

Mr. Bernard J. Dobranski
80-C-0628
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. Dobranski:

We are in receipt of your request for assistance in obtaining copies of records from Chemung County.

Taking each of the issues raised by responses received from the District Attorney's Office and the Department of Law in turn, we 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. Based on the correspondence from the District Attorney, it appears that this was the basis on which you were advised to contact your attorney.

We 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 may not have been 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 our 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 our 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.

Finally, because you have inquired about whether or not you have a legitimate "complaint", please be advised 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. 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.

We hope this helps to clarify your understanding of the Freedom of Information Law, and is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 31, 2006

Mr. Robert D. McLee
04-B-0307
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. McLee:

We are in receipt of your request for an advisory opinion concerning the application of the Freedom of Information Law to certain records which you have requested from the Onondaga County District Attorney's Office.

We note that your request for information relative to plea agreements made between a particular individual, the Department of Probation and the District Attorney's Office, was denied as specifically exempted from disclosure, as a non-final determination, and an attorney work-product which contains confidential and privileged information which, if disclosed, "would constitute an unwarranted invasion of personal privacy." It is our opinion that while records of negotiations between an individual and the District Attorney's Office could be withheld, the final plea agreement, once made a part of the public record, would be required to be disclosed. In this regard, we 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 are pertinent to an analysis of rights of access in this case.

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, we believe that a municipal attorney may engage in a privileged relationship with his or her

client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has 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 our view, there need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

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

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

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that records consist of legal advice or opinion provided by counsel to the client, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld. It would appear that the records in question would consist of advice and expressions of opinion. If that is so, they could be withheld under §87(2)(g).

Because it is our experience that plea agreements are placed on the record in open court, and that a transcript may be generated from such proceeding, we offer the following comments.

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

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

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

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

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

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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January 31, 2006

E-Mail

TO: Andrea Sevio

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

Dear Ms. Sevio:

This is to confirm our recent telephone conversation in which you inquired about the applicability of the Freedom of Information Law to a request for a copy of a recording of a Town Board meeting. Apparently, after the meeting was adjourned, but while the cameras were still recording, the Supervisor and the Town Attorney had a conversation which was recorded. It is likely that the entire recording was aired on cable television twice, including the conversation after the meeting adjourned.

In this regard, we offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

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

Based on the foregoing, when a Town maintains an audiovisual recording of a Town Board meeting, the entire recording 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 or its content.

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 recording of an open meeting is accessible, for any person could have been present, any person could have viewed the meeting on television, and none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is

accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

The fact that the meeting as well as the conversation that followed were recorded and broadcast on local television, in our view, constitutes a waiver of the capacity to withhold what has become part of the public domain.

Further, based upon the statutory language quoted above, the recording need not be in the physical possession of the Town to constitute an agency record; so long as it is produced, kept or filed for an agency, the law specifies and the courts have held that it constitutes an "agency record", even if it is maintained apart from an agency's premises.

In a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University pursuant to a contract were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. 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 NY 2d 410. 417 (1995)].

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

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

In sum, based on the facts as we understand them, the tape constitutes a Town record, and because it has been aired in its entirety, we believe that it is accessible under the Freedom of Information Law.

We hope this helps to clarify your understanding of the Freedom of Information Law and will be of assistance to you.

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 31, 2006

Mr. Desmond Quick
03-B-1945
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. Quick:

This is in response to your two requests for advisory opinions pertaining to records requested from the City of Utica Department of Law and Oneida County Sheriff's Office. 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. Similarly, the Committee does not have custody or control of records.

First, with respect to an index of the 63 crime scene photographs in the possession of the City, there is nothing in the Freedom of Information Law or judicial decision construing that statute that would require that an agency create an index or list describing photographs maintained. An indexing requirement has been imposed only 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.

Second, with respect to your rights of access to the incident report and photographs from the Sheriff's Office, it may be that they were introduced into evidence at your trial. If that is so, of likely relevance is a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, but in which it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

We note that, in the same decision, it was also found that:

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

Third, 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 v. New York City Police Department [89 NY2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, a police department contended that certain reports could be withheld in their entirety on the ground

that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

If the Sheriff's Office maintains the traditional police blotter or equivalent, whether manually or electronically, we believe that such a record would, based on case law, be accessible. In Sheehan v. City of Binghamton [59 AD2d 808 (1977)], it was determined, based on custom and usage, that a police blotter is a log or diary in which events reported by or to a police department are recorded. That kind of record would consist of a summary of events or occurrences, it would not include investigative information, and would be available under the law.

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

In considering the kinds of records at issue, several of the grounds for denial might be pertinent and serve to enable the Sheriff's Office to withhold portions, but not the entire contents of records.

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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

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

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

> Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [id., 276-277 (1996); emphasis added by the Court].

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

Also of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of

identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), 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, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

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

In sum, irrespective of the title or characterization of records, insofar as they exist, they are subject to rights conferred by the Freedom of Information Law, and an agency is obliged to review them for the purpose of determining the extent, if any, to which they may properly be withheld.

We hope this helps to clarify your understanding of the Freedom of Information Law and is of assistance to you. At your request, a copy of this opinion will be forwarded to the City of Utica and the Sheriff's Office.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm
cc: Linda S. Fatata
Charles Brown
Oneida County Sheriff's Office

From: Robert Freeman
To: Bob and Jenny Petrucci
Date: 1/31/2006 2:53:00 PM
Subject: Re: how do we know

There may never be a way of knowing that statistics are accurate. However, if the Casper Group runs golf courses for the County, the records kept for the County, even those in the physical possession of a private entity, are subject to rights conferred by the FOIL. As you may recall, FOIL pertains to all agency records, and §86(4) defines the term "record" to include information extant in any physical form kept by or "for" the agency.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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>>> "Bob and Jenny Petrucci" [redacted]> 1/31/2006 2:43:45 PM >>>
Hi Bob:
Hope all is well.
As you may know, Westchester County has turned over the running of 3 county golf courses to the Casper Group...with no county oversight at any course.
Therefore, when I soon FOIL for rounds and revenue at those courses (Hudson Hills, MapleMoor and Saxon Woods), how does the county , how do we, know that the numbers are accurate?
The biggest joke line going around county courses by county employees is that they've left the fox alone in the henhouse.
Thanks
Bob and Jenny
(914) 632-1765

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-15784

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January 31, 2006

E-Mail

TO: Joe Vescovi

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. Vescovi:

I have received your letter in which you asked whether you may request a copy of minutes of a meeting of your town board "before the next month's board meeting (even though they have not yet been approved). You also asked whether you can be required to seek unapproved minutes under the Freedom of Information Law.

From my perspective, the unapproved minutes should be disclosed, on request, as soon as they exist. In this regard, I offer the following comments.

First, that a document is characterized as a draft or unapproved is not determinative of rights of access, for the Freedom of Information Law is applicable to all agency records. Section 86(4) of that statute defines the term "record" to include:

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

Based on the foregoing, once information exists in some physical form, i.e., a draft, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

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

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

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

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

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

Third, returning to the Freedom of Information Law, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, minutes of open meetings are clearly available; any person could have been present at the meetings to which the minutes relate, and none of the grounds for denial would apply.

Although draft minutes might be characterized as "intra-agency materials" that fall within the scope of §87(2)(g), an analysis of that provision and its judicial interpretation indicates that they must be disclosed. Section 87(2)(g) permits an agency to withhold records that:

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

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

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

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

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

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

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

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

Minutes of a meeting open to the public do not involve "internal government consultations or deliberations"; on the contrary, information contained in those records has effectively been disclosed to the public already.

Lastly, in consideration of the preceding commentary, I do not believe that there would be any valid reason for delaying disclosure of the records in question. In my view, every law must be

implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, although an agency may require that a request be made in writing [see §89(3)], if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

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

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay in disclosure might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for a delay.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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February 3, 2006

Mr. Leonardo Gianella
[redacted]

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

Dear Mr. Gianella:

I have received your letter in which you referred to a request made pursuant to the Freedom of Information Law to the New York City Department of Housing Preservation and Development (HPD). You wrote that although a month had passed since the submission of your request, HPD's records access officer responded with respect to only one of the three categories of the request.

In this regard, in consideration of your remarks, I offer the following comments.

First, it is important to note that the Freedom of Information Law pertains to existing records. Insofar as records sought are not maintained by an agency, the Freedom of Information Law would not be applicable, and the agency would not be required to acquire or create a new record on behalf of an applicant [see §89(3)].

Second, 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.

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: Don Appel

STATE OF NEW YORK
DEPARTMENT OF STATE
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February 6, 2006

Mr. Daniel P. Tuohy
05-R-1296
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. Tuohy:

We are in receipt of your request for an advisory opinion concerning a denial of access to records by the Town of Poughkeepsie Legal Department. In that regard, we offer the following comments.

At the outset we note that you cited the federal Freedom of Information Act, 5 USC §552, in support of your request for records. Please be advised that the federal law applies to federal government agencies, not state and municipal agencies, which are subject to the Freedom of Information Law, as set forth in Article 6 of the New York State Public Officers Law.

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

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

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

Based on the foregoing, it is suggested that you contact your attorney to determine 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.

We 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. If any of the records which you seek were introduced at trial, this decision is of likely relevance. "[O]nce the statements have been used in open court," the court held, "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)]. 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, 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 v. New York City Police Department [89 NY2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case,

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

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

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

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

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

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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

> Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [id., 276-277 (1996); emphasis added by the Court].

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

Also of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of

identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), 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, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

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

In sum, irrespective of the title or characterization of records, insofar as they exist, they are subject to rights conferred by the Freedom of Information Law, and an agency is obliged to review them for the purpose of determining the extent, if any, to which they may properly be withheld.

We hope this helps to clarify your understanding of the Freedom of Information Law and is of assistance to you. At your request, we have enclosed the documents which you forwarded to this office.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 6, 2006

Mr. Willie D. Chandler
94-B-1737
Greenhaven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-0010

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

Dear Mr. Chandler:

We are in receipt of your request for assistance with regard to the denial of your request for records from the Buffalo City Court. Please note that while the Committee on Open Government is authorized to issue advisory opinions concerning the application of the New York State Freedom of Information Law, this office does not maintain records on behalf of other agencies, and we do not have any records of the Buffalo City Court.

In response to the events as you relate them, however, we offer the following comments.

First, since it appears that you seek access to court records, we point out that the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

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

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

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

In view of the foregoing, the courts and court records are not subject to the Freedom of Information Law. This is not intended to suggest that court records cannot be obtained. Although the courts are

not subject to the Freedom of Information Law, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255).

Second, because you were informed that the records you requested have been destroyed, we note that city courts and their employees are subject to §31.1(a) of the Rules of the Chief Judge, which state in relevant part that:

> "The Chief Administrator of the Courts, upon consultation with the Administrative Board of the Courts, shall adopt rules providing for the retention and disposition of the records of the courts of the Unified Court System..." .

Based on §104.3(a) of the Rules of the Chief Administrator,

> "Any court seeking to dispose of court records shall make a written request for such disposal to the Deputy Chief Administrator for Management Support."

Accordingly, in 1997, the Division of Court Operations Office of Records Management published the Records Retention and Disposition Schedule for Criminal Records of the City of New York, City Courts, District Courts and Town and Village Courts, which provides for the systematic destruction of court records after certain periods of time based on the type and content of the record.

We note that generally, pursuant to this schedule, misdemeanor and felony criminal case files, if resolved in favor of the defendant, are retained for six years, grand jury case files are retained for one year, and cases with are disposed are scheduled to be retained for twenty-five years.

We hope this helps to clarify your understanding of the Freedom of Information Law, and that this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 6, 2006

Mr. Jose Ramos
85-A-5899
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. Ramos:

We are in receipt of your request for an advisory opinion concerning the application of the Freedom of Information Law to a request which you have made to the Westchester County District Attorney's Office. In that regard, 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.

With regard to your request for records pertaining to two persons who testified at your criminal trial, it may be that the District Attorney's Office does not maintain records in alphabetical order by witness name. In that regard, since 1978, the Freedom of Information Law has 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 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 District Attorney's Office, 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 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 Attorney's 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, 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, the request would have failed to meet the standard of reasonably describing the records.

We hope this helps to clarify your understanding of the Freedom of Information Law, and that this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 6, 2006

Mr. Jamel Monroe
01-A-4466
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. Monroe:

We are in receipt of your request for assistance in persuading the New York City Police Department to respond to your request for records. 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.

With regard to your request for records from a court, please be advised 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 these provisions, 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 make your request to the clerk of the court, citing Judiciary Law §255 as the basis for your request.

With respect to a lack of response or a delayed response from the New York City Police Department, 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.

We hope this helps to clarify your understanding of the Freedom of Information Law, and that this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Records Access Officer, New York City Police Department
New York City Criminal Court

STATE OF NEW YORK
DEPARTMENT OF STATE
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February 6, 2006

Mr. Randy S. Campney, Sr.
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:

We are in receipt of your request for an advisory opinion concerning the application of the Freedom of Information Law to various requests for records which you have made to the Department of Correctional Services. Although it is not clear whether the Department has responded to your requests and/or to your appeal, 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.

We further note that your requests were directed to individual Inspector Generals at the Department of Correctional Services. It is suggested that a request for records should ordinarily be directed to an agency's "records access officer." The records access officer has the duty of coordinating an agency's response to requests [see 21 NYCRR Part 1401].

We hope this helps to clarify your understanding of the Freedom of Information Law, and that this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Daniel Martuscello, Records Access Officer
Anthony J. Annucci, Counsel

STATE OF NEW YORK
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February 6, 2006

Mr. Robert Bowers
04-B-0616
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. Bowers:

We are in receipt of your request for an advisory opinion concerning the applicability of the Freedom of Information Law to certain records which you are considering requesting from and office of a district attorney. Specifically, you inquire as to the accessibility of responses to discovery demands which may have been forwarded to your attorney, and Daily Activity Reports maintained by the New York State Police. In that regard, we offer the following comments.

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

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

Based on the foregoing, it is suggested that you contact your attorney to determine the extent to which he continues to possess the records of your interest. If the attorney no longer maintains the records, he should prepare an affidavit so stating that can be submitted to the agency that maintains the records sought, and you should prepare a similar affidavit.

We 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. If any of the records which you seek were introduced at trial, this decision is of likely relevance. "[O]nce the statements have been used in open court," the court held, "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)]. 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, 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 v. New York City Police Department [89 NY2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, a police department contended that certain reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data,

the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

If the State Police maintain a traditional police blotter or equivalent, whether manually or electronically, we believe that such a record would, based on case law, be accessible. In Sheehan v. City of Binghamton [59 AD2d 808 (1977)], it was determined, based on custom and usage, that a police blotter is a log or diary in which events reported by or to a police department are recorded. That kind of record would consist of a summary of events or occurrences, it would not include investigative information, and would be available under the law.

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

In considering the kinds of records at issue, several of the grounds for denial might be pertinent and serve to enable the Sheriff's Office to withhold portions, but not the entire contents of records.

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

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

"...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, supra, 276-277 (1996); emphasis added by the Court].

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

Also of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of

identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), 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, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

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

In sum, irrespective of the title or characterization of records, insofar as they exist, they are subject to rights conferred by the Freedom of Information Law, and an agency is obliged to review them for the purpose of determining the extent, if any, to which they may properly be withheld.

We hope this helps to clarify your understanding of the Freedom of Information Law, and that this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

STATE OF NEW YORK
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February 6, 2006

Ms. Bonnie L. MacPherson
[redacted]

The staff of the Committee on 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. MacPherson:

I have received your letter of January 5, as well as the materials attached to it. You have sought my views concerning requests made under the Freedom of Information Law to the Village of Afton.

Having reviewed your requests, in every instance you sought information by asking questions, i.e., "What benefits were offered to clerk?"; "How many times has Attorney attended meeting from Jan 2005 - Dec 2005."

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, Village 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

RJF:jm

Enc.

cc: Records Access Officer

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February 6, 2006

E-Mail

TO: Ray Tylicki

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. Tylicki:

I have received your letter of January 6. You asked whether it "would be possible to request the outcomes of other student disciplinary hearings in the SUNY system with the names blacked out." You indicated that the search would involve seeking precedent "in other disciplinary cases."

As stated in my letter to you of January 3, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Section 87(2)(g) authorizes an agency, such as an entity within the SUNY system, to withhold records that:

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

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

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

In my view, the "outcomes" of disciplinary proceedings are final agency determinations that must be disclosed, except to the extent that a different exception to rights of access may be asserted.

That different or other exception is the provision cited in my earlier response. Section 87(2)(a) deals with records that "are specifically exempted from disclosure by state or federal statute." To reiterate, one such statute is the Family Education Rights and Privacy Act (20 U.S.C. §1232g, "FERPA"). In general, FERPA states 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. Therefore, the determinations of your interest are, in my view, accessible, but only after the deletion of any information that would make a student's identity easily traceable.

I hope that I have been of assistance.

RJF:jm

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February 6, 2006

Mr. Perry P. Ross
[redacted]

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

Dear Mr. Ross:

I have received your letter of January 3 concerning a request made under the Freedom of Information Law to the Village of Hamburg in June.

Although you were given the opportunity to inspect certain records soon thereafter, you indicated that you were not granted access to the "specific" record of your interest, a "site plan - 378 Sunset Drive - 'Sunset Court Apartments' circa 1974." You appealed what you considered to have been a denial of your request on December 7. However, in a response by the Village Attorney on December 9, he indicated that you were advised months earlier "that the Village of Hamburg did not possess the site plans that met your request."

In this regard, I point out that the Freedom of Information Law pertains to existing records. Since the record at issue involve events occurring more than thirty years ago, it is likely that a record that once existed may have been legally destroyed. If that is so, the Freedom of Information Law would not apply, and there would have been no denial of access.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward J. Murphy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 6, 2006

Ms. Teresa Merlucci
[redacted]

The staff of the Committee on 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. Merlucci:

I have received your letter and the materials relating to it. You have sought an advisory opinion concerning requests made pursuant to the Freedom of Information Law to the Lindenhurst Public Schools.

In one of the requests, you sought:

> "All environmental, moisture, mold, soil, air quality testing requested, results, reports done in any and all Lindenhurst Public Schools from 1990 till [sic] present."

The Schools' records access officer acknowledged the receipt of the request, explaining that the records sought are voluminous and must be reviewed to determine the extent to which they must be disclosed. She indicated that records required to be disclosed would be made available "on or about February 6, 2006."

In this regard, as you may be aware, based on recent amendments to§89(3) of the Freedom of Information Law, when it is known that granting a request in whole or in part will involve more than twenty business days from the acknowledgment of the receipt of a request, an agency is required to explain the reason for the delay and provide a "date certain" within which it will grant the request in whole or in part. In my view, the records access officer's response is reflective of substantial compliance with that aspect of the Freedom of Information Law.

I point out that several other issues may be pertinent in relation to that request.

First, the Freedom of Information Law pertains to existing records [see §89(3)]. Because the request relates to records that may involve activities that occurred as long as sixteen years ago,

many records that once were maintained by or for the Schools may have been legally destroyed. Insofar as records no longer exist, the Freedom of Information Law would not apply.

Second, also relevant may be the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

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

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

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Some of the records may be exempt from disclosure

based on the assertion of the attorney-client privilege, which is codified in §4503 of the Civil Practice Law and Rules (CPLR). Additionally, §3101(c) and (d) of the CPLR authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation. Those kinds of records remain confidential in my opinion only so long as they are not disclosed to an adversary or a filed with a court, for example. I do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

Section 3101 pertains disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable." The other provision at issue pertains to material prepared for litigation, and §3101(d)(2) states in relevant part that:

> "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit

> showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

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

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

In my view, insofar as the records in question have been communicated between the Schools and an adversary have been filed with a court, or have been disclosed to a third party, 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 believe that the capacity to claim exemptions from disclosure under §3101(c) or (d) of the CPLR or, therefore, §87(2)(a) of the Freedom of Information Law, ends. Conversely, however, if the records have not been disclosed to a person other than a client or clients, it appears that the assertion of the privilege would be proper.

It is also noted that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

Also relevant is §87(2)(g) of the Freedom of Information Law, which pertains to communications between or among government agency officers or employees. 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][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)..." [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.

The other request involves minutes of meetings of the Board of Education from October 6, 2005 to December 15, 2005. The records access officer indicated that the minutes would be made available "when completed."

In my opinion, that response is inconsistent with the requirements of the Open Meetings Law. Section 106 of that statute 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."

Based on the foregoing, it is clear that minutes must be prepared and made available within two weeks of the meetings to which they relate.

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. 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Mary Lou Gates

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15796

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February 6, 2006

E-Mail

TO: Donald G. Symer

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. Symer:

I have received your letter of January 11 in which you raised several questions. In this regard, your questions concerning "rezoning property" are unrelated to the duties of this office and fall beyond our jurisdiction or expertise.

Your first question relates to a response to a request for audiotapes of town board meetings in which the deputy town clerk indicated that the tapes were required to be kept for four months. You asked whether that is accurate.

In this regard, although the Freedom of Information Law does not address the issue, it has arisen on many occasions, and I have obtained and can share the following.

Pertinent are provisions dealing with the retention and disposal of records. Specifically, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of

> enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

As such, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached.

I have been informed by staff at the State Archives that, based on the applicable retention schedule, the response by the deputy town clerk is accurate. Following the expiration of the four month retention period, tape recordings of meetings may be erased or discarded. I note that minutes of meetings must be kept permanently.

Your remaining question referenced my response relating to a list of all employees of an agency, and you asked whether a request "for accrued compensatory time for all Town employees [should] be structured to follow [the same] basic guidelines."

A request for a list of all employees relates to a record required to be maintained by an agency. Specifically, §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." There is no requirement, however, that an agency must maintain a single record or list that includes reference to all employees' accrued compensatory time. Therefore, rather than seeking a single record or list, it is suggested that a request be made for records or portions of records that indicate town employees' accrued compensatory time.

It is possible that records that include reference to employees' compensatory time might contain items that may properly be withheld, i.e., social security numbers. When records are accessible in their entirety, an applicant may inspect them at no charge. However, when they include items that may properly be withheld, it has been held that there is no right to inspect the records (see VanNess v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999). In that event, an agency could prepare a photocopy from which the appropriate deletions would be made and charge up to twenty-five cents per photocopy in accordance with §87(1)(b)(iii) 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

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February 6, 2006

Hon. Alice Wangelin
Town Clerk
Town of Colden
S-8812 State Road
Colden, NY 14033

The staff of the Committee on 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. Wangelin:

I have received your correspondence, which includes a memorandum addressed to you one day prior to the expiration of her term by the former Town Supervisor. The former Supervisor wrote as follows:

> "...please either send or will come and pickup the Town Board minutes, the monthly Supervisors Report, the year end Comptrollers Report, copies of the Monthly Abstract and Warrant."

It is your view, since she is no longer a public officer, that the former Supervisor may be asked to request records in writing and that she can be charged twenty-five cents per photocopy.

I agree with your opinion. From my perspective, when a person is no longer a public officer, he or she has the same rights as any member of the public and may be treated in the same manner as members of the public.

It is noted, too, that the Freedom of Information Law pertains to existing records [see §89(3)]. Because that is so, in a technical sense, you can neither grant or deny access to records that do not yet exist. For that reason, it has consistently been advised that an agency is not required to honor a request that is prospective or for records that have not yet been prepared.

Lastly, as you are aware, the Freedom of Information Law authorizes an agency to require that requests for records be made in writing and to charge up to twenty-five cents per photocopy. In opinion, if it is the practice of the Town to require the public to submit written requests and to

charge twenty-five cents per photocopy, you may do so with respect to former public officers. In short, because she is no longer a public officer, again, I believe that the former Supervisor may be treated in the same manner as the general 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 OML-AO-4130
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February 6, 2006

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 of January 4 in which you sought an advisory opinion by raising the following questions:

> "• Are SUNY College foundations subject to the provisions of both FOIL and OML?
>
> • If the foundations are subject to OML, are they also required to post their meeting schedules and provide them to the media?
>
> • If the foundations are subject to FOIL, where should FOIL applications be directed? Is it the responsibility of the campus records access officer to arrange for records or does the responsibility rest with the related foundation.
>
> • Relative to the foundation compliance with FOIL and OML, in an Article 78 Proceeding, who are the named respondents? Would it by SUNY Farmingdale alone or would both entities be named in the action?"

In this regard, first, I believe that the records of SUNY college foundations fall within the requirements of the Freedom of Information Law, irrespective of whether a foundation has an independent responsibility to comply with that statute.

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

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

While the status of a SUNY college foundation has not been the subject of any judicial decision, it is clear that the State University is an "agency" required to comply with the Freedom of Information Law. As indicated later in this response, it has been determined that a foundation associated with CUNY is subject to the Freedom of Information Law.

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

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

Based on the foregoing, the Court of Appeals, the state's highest court, found that documents maintained by a not-for-profit corporation providing services for a branch of the State University were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxillary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)]. Therefore, if a document is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency. In the context of the question that you raised, irrespective of whether the SUNY college foundation is an "agency", its records appear to be maintained for SUNY. If that is so, its records would, based on Encore, constitute agency records subject to the Freedom of Information Law.

Second, while profit or not-for-profit corporations would not in most instances be subject to the Freedom of Information Law because they are not governmental entities, there are several judicial determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are "agencies" that fall within the scope of the Freedom of Information Law.

In the first decision in which it was held that a not-for-profit corporation may be an "agency" required to comply with the Freedom of Information Law, [Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their

status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the State's highest court stated that:

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

In the same decision, the Court noted that:

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

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

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American

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

As inferred earlier, perhaps most analogous to the issue described is a decision in which it was held that a community college foundation associated with a CUNY institution was subject to the Freedom of Information Law, despite its status as a not-for-profit corporation. In so holding, it was stated that:

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> "The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Verified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:
>
> > '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.
>
> "Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation

> would not exist but for its relationship with the College" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

As in the case of the foundation in Eisenberg, that entity, and, in this instance, a SUNY college foundation, would not exist but for its relationships with SUNY. Due to the similarity between the issue you have raised and that presented in Eisenberg, as well as the functions of the foundations and their relationship to the University, I believe that they are subject to the Freedom of Information Law.

I believe that the direction provided by a SUNY "policy item" entitled "Campus-related Foundation Guidelines" can be cited to reach the same conclusion. In its summary of the functions of campus-related foundations, the policy states that:

> "As part of a coordinated fundraising effort led by the campus president, each campus-related foundation (foundation) supports the fundraising efforts of the campus. The foundation and the State University of New York provide the campus with mechanisms to receive and manage gifts and make these resources available to the campus to support approved campus programs and activities. The foundation is also the primary entity that manages real property and other assets not managed by the campus. Foundations play an important role with activities and functions no specifically vested with the campus or other entities on campus."

The policy states that "The charter or certificate of incorporation of the foundation should relate to the University campus it will benefit in terms of purposes, objectives and programs."

As in the Eisenberg decision, based on SUNY policy, it is clear that a SUNY foundation exists and maintains its records solely for the SUNY campus to which it relates.

In sum, to reiterate, I believe records of a SUNY college foundation fall within the coverage of the Freedom of Information Law either because they are maintained for SUNY, or because those foundations are "agencies" that have an independent obligation to give effect to that statute.

If it is contended that a SUNY college foundation's records are kept for SUNY, but that a foundation is not an "agency", it is recommended that a request for records of a given foundation be made to the records access officer at the SUNY college with which the foundation is associated. The records access officer has the duty of coordinating an agency's response to requests for records (see 21 NYCRR §1401.2), and I believe that a records access officer has been designated at each SUNY college.

Next with respect to the application of the Open Meetings Law, that statute is applicable to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

> "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By breaking the definition into components, I believe that each condition necessary to a finding that the board of a SUNY college foundation is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. In view of the degree of governmental control exercised by and its nexus with the State University, I believe that it conducts public business and performs a governmental function for a governmental entity.

In Smith v. City University of New York [92 NY2d 707 (1999)], the Court of Appeals held that a student government association carried out various governmental functions on behalf of CUNY and, therefore, that its governing body is subject to the Open Meetings Law. In its consideration of the matter, the Court found that:

> "in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" (id., 713).

In consideration of those criteria and applying them to the matter at hand, a SUNY college foundation would not exist but for its relationship with the University; it carries out a variety of functions that the University would otherwise perform; the University has substantial control over a foundation board in the terms of membership, for the description of the composition of such a board indicates that a majority of its members are officials of or chosen by SUNY

.

Based on the foregoing, I believe that the governing bodies of SUNY college foundations are "public bodies" required to comply with the Open Meetings Law.

If that is so, those entities are required to provide notice of their meetings in accordance with §104 of the Open Meetings Law. That provision states that:

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

conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Lastly, you asked "who...the named respondents" would be in an Article 78 proceeding initiated to compel compliance with the Freedom of Information Law or the Open Meetings Law. In this regard, the advisory jurisdiction of the Committee on Open Government is limited, and this office does not have the authority to advise with respect to Article 78.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stacey Hengsterman
Wendy Kowalczyk

From: Robert Freeman
To: [redacted]
Date: 2/7/2006 4:28:37 PM
Subject: Dear Mr. Roberson:

Dear Mr. Roberson:

As indicated in a telephone message, I have received your request for records indicating violations by alcoholic beverage licensees during a certain period.

In this regard, this office, 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.

To seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that maintains the records. The records access officer has the duty of coordinating an agency's response to requests. The agency that would maintain the records of your interest is the State Liquor Authority, 84 Holland Avenue, Albany, NY 12208, and its records access officer is J. Mark Anderson.

It is suggested that you phone Mr. Anderson to ascertain how the Authority maintains its records. If, for example, records of violations are maintained chronologically, it would likely be easy to locate the records of your interest. On the other hand, if they are maintained by means of the names of licensees, your request might not "reasonably describe" the records as required by §89(3) of the Freedom of Information Law, for the records sought might not be retrievable in that circumstance except by searching through thousands of records individually.

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-15800

From: Robert Freeman
To: tsheraw@nysutmail.org
Date: 2/7/2006 12:46:13 PM
Subject: Hi Tom - -

Hi Tom - -

I must admit that I do not recall that the question you have raised has arisen previously. From my perspective, there is but one exception to rights of access that would be pertinent in considering rights of access to fact finding briefs. As you are likely aware, §87(2)(c) authorizes an agency to withhold records insofar as disclosure "would impair present or imminent contract awards or collective bargaining negotiations." Assuming that a fact finding brief has been served on the opposing party, I cannot envision how disclosure at that juncture could "impair" the collective bargaining process. Both parties would possess the record, and consequently, disclosure to the public would neither provide an advantage nor create a disadvantage to either.

I hope that I have been of assistance and that all is well with you and yours.
Bob

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4131
FOIL-AO-15801

41 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, 2006

E-MAIL

TO: Hon. Debra Denz

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. Denz:

I have received your letter in which, in your capacity as Town Clerk of the Town of Victor, you asked the following question:

> "When public, developers, etc. give me feedback/comments/opinions verbally on the telephone, in person, in a meeting, what is my responsibility to track and disclose to the public and/or have available if a foil request is received"?

In this regard, the Freedom of Information Law pertains to records, and §89(3) states in part that agency, such as a town, is not required to create a record to comply with that statute. I know of no provision of law that requires you or the Town to prepare records or notations concerning every element of feedback, comment or opinion that is expressed verbally. If there is no record, the Freedom of Information Law does not apply.

On the other hand, if a notation or similar material is prepared, it constitutes a "record" that falls within the coverage of the Freedom of Information Law, 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."

Notes, telephone logs and other documentary materials constitute records, and their content is the key factor in determining the extent to which they must be disclosed.

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. There may be privacy considerations relative those identified in notes or similar materials. Further, they would consist of intra-agency materials falling within the scope of §87(2)(g). Under that provision, those portions of the materials consisting of town officials' expressions of opinions, for example, may be withheld. Other portions, such as those consisting of factual information, must be disclosed.

Lastly, since you referred to meetings, I point out that the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. Section 106(1) pertains to minutes of open meetings and states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary or all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Based on the foregoing, it is clear that minutes need consist of a verbatim account of what is expressed at a meeting, and there is no obligation to include reference to comments made during a meeting. So long as they consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members, I believe that the obligations imposed by the Open Meetings Law would be met.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15802

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

February 8, 2006

Mr. Ronald Diggs
04-R-3906
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

Dear Mr. Diggs:

I have received your letter in which you requested a variety of material concerning to the use of the Freedom of Information Law.

There is no complete "breakdown" or list of agencies subject to the Freedom of Information Law, because the law includes state agencies, counties, cities, towns, villages, school districts, fire districts, public authorities and other governmental entities. In short, thousands of agencies fall within the coverage of that law, and there is no list identifying all of them. If you are interested in obtaining a directory of state agencies, a copy of the directory is available for $5.00 payable by check or money order by writing to: NYS Office for Technology, Division of Telecommunications, Directory Sales, 27th Floor, Corning II Tower Building, ESP, Albany, NY 12242. Enclosed is the portion of the directory pertaining to the Department of Correctional Services.

Similarly, there is no list of records that are available under the Freedom of Information Law. Due to the structure and language of the law, no such list can be prepared. In short, there are instances in which records might properly be withheld now due to harmful effects of disclosure, but which may become available in the future due to the passage of time or the elimination of the likelihood of harm. However, each agency must maintain a subject matter list indicating the categories of records that it maintains, irrespective of whether the records are available. The subject matter list maintained by the Department of Correctional Services is known as its "master index", which can be obtained at your facility.

Lastly, enclosed are copies of the Freedom of Information Law and "Your Right to Know", which serves as a guide to that law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15803

41 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, 2006

Mr. Omar Miller
[redacted]

Dear Mr. Miller:

I have received your letter and offer the following.

First, this office, the Committee on Open Government, is authorized by law to provide advice and opinions pertaining to the New York Freedom of Information Law. The Committee performs advisory functions; it is not empowered to render binding decisions or enforce the law. Also, there are no regional offices of the Committee; this is its only office.

Second, there are no particular forms that must be used to request records. In brief, any written request that reasonably describes the records sought should be sufficient. Our basic guide to the Freedom of Information Law, "Your Right to Know", a copy of which is enclosed, includes a sample letter of request. When seeking records, a request should be made to the "records access officer" at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating the agency's response to requests.

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

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

Based on the foregoing, the Freedom of Information Law pertains to entities of state and local government; it does not apply to private entities.

I do not have an address for the hospital to which you referred, and to the best of my knowledge, it is private. If that is so, it would not be required to give effect to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15804
PPPL-AO-324

41 State Street, Albany, New York 12231
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February 8, 2006

Mr. Timothy Chittenden
Rye Police Association
P.O. Box 246
Rye, NY 10580

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

Dear Mr. Chittenden:

We are in receipt of your January 7, 2006 request for an advisory opinion concerning the application of the Freedom of Information Law and regulations of the City of Rye to a request for records which you made to the City of Rye, including subsequent disclosure and payment issues. Addressing each of your seven questions in turn, we offer the following comments.

First, with regard to the release of social security numbers, it has been established through judicial interpretation that an entity of local government is not prohibited from disclosing social security numbers, even when the subjects of the records objected to disclosure. In Seelig v. Sielaff [200 AD2d 298 (1994)], 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. 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, which applies only to state agencies or, therefore, 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).

We note that the same provision specifically excludes the judiciary from the coverage of the Personal Privacy Protection Law.

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.

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)].

Second, with regard to your questions about the inspection of records which require redaction, we point out that 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. In a situation 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), it has been held that an applicant would not have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record [see VanNess v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999].

When accessible and deniable information must, of necessity, appear on the same page, the practice of preparing a redacted copy and charging the established fee, in our opinion, is fully justifiable. If some pages of the requested records contain information which may be withheld, and others do not, and inspection of all the records is denied on the grounds that some of the records require redaction, we believe that such a practice would be inconsistent with law.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, you have included a copy of the City's regulations for our reference. Ordinarily, regulations are not sent to the Committee for review. As we understand the law, agencies do not seek permission to promulgate regulations; rather they have the obligation to do so to implement the Freedom of Information Law. Section 89(1)(b)(iii) of the Freedom of Information Law requires that the Committee on Open Government promulgate general rules and regulations concerning the procedural aspects of that statute, as well as fees. In turn, §87(1) requires agencies to promulgate rules and regulations "pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article..." As such, agencies must adopt regulations consistent with the Freedom of Information Law and the regulations promulgated by the Committee. Insofar as regulations are inconsistent with the Freedom of Information Law or the regulations promulgated by the Committee, we believe that they are invalid.

For your information, we have enclosed a copy of model regulations drafted by the Committee on Open Government for consideration by municipalities and other agencies.

We hope this helps clarify your understanding and this is of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: City of Rye

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15805

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

February 8, 2006

Mr. William R. Werner
[redacted]

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

Dear Mr. Werner:

We are in receipt of your December 30, 2005 request for guidance and input concerning the applicability of the Freedom of Information Law to various requests made to the Orange County Sheriff's Office. In that regard, we offer the following comments.

First, with respect to any documents which you believe have been omitted, either inadvertently or otherwise, 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 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. While we are not recommending that you resort to judicial action on these matters, the law provides for such relief at this juncture.

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. To the extent that the authority of our office may bring more attention to these matters, we will forward a copy of this opinion to the Orange County Sheriff's Office.

We hope that this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Orange County Sheriff's Office

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15806

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

February 8, 2006

E-MAIL

TO: Hon. Molly Miller

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. Miller:

I have received your correspondence in which you indicated that a request was made for a map with the names of the former and present owners removed and marked "confidential." You added that you have a copy with the names included and asked whether you may disclose the map with the names.

In this regard, first, 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. I do not believe that any statute in this instance would require or permit the Town to honor a request for confidentiality.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In consideration of your description of the record in question, it does not appear that any of the grounds for denial of access would apply.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-4133
FOIL-AO-15807

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

February 13, 2006

E-MAIL

TO: Charles Knapp

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. Knapp:

I have received your letter, and in your capacity as Supervisor of the Town of Conquest, you asked whether the meetings of a volunteer fire company should be held open to the public.

In this regard, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of the Law defines "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By reviewing the components in the definition of "public body", I believe that each is present with respect to the board of a volunteer fire company. The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law.

I point out that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was questionable whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions if the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland, I believe that the board of a volunteer fire company falls within the definition of "public body" and would be required to comply with the Open Meetings Law.

With respect to the scope of the Freedom of Information Law, as indicated above, that statute applies to agency records, and §86(3) defines the term "agency" to mean:

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

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

In Westchester-Rockland, the case involved access to records relating to a lottery conducted by a volunteer fire company, and it was determined that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to

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

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

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'

> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15808

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

February 13, 2006

E-MAIL

TO: Thane Joyal

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. Joyal:

I have received your letter in which you asked whether it is "appropriate for the Town of Lysander to have required [you] to show a drivers license and state the purpose of [your] request for documents on a sworn and notarized form..."

In short, in my opinion, the requirements to which you referred are inappropriate and would be found by a court to be inconsistent with law.

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

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

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

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

In sum, insofar as the Town maintains records in which you are interested, I believe that they are subject to rights of access, irrespective of your intended use of the records, your identity or your address. That being so, I do not believe that the Town may condition disclosure of its records upon your showing proof of identity, your address or an indication of the purpose of your request.

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Hon. Gale J. Grice, Town Clerk

From: Robert Freeman
To: [redacted]
Date: 2/14/2006 8:46:18 AM
Subject: Dear Ms. Keelan:

Dear Ms. Keelan:

In an effort to respond to your inquiry, I conducted research regarding the Mid-Hudson Library System ("the System") and spoke with one of its executives. In short, I do not believe that the System is a governmental entity or, therefore, that it constitutes an "agency" that falls within the coverage of the Freedom of Information Law.

I note that many libraries that are not governmental in nature (but which may receive government funding) that are characterized as "public" libraries (i.e., association or free association libraries, as well as many library systems) fall beyond the coverage of the Freedom of Information Law but are, nonetheless, required to comply with the Open Meetings Law. The reason for the distinction in the coverage of those laws is §260-a of the Education Law, which requires boards of trustees of numerous libraries to give effect to the Open Meetings Law, even though the libraries they serve may not be governmental entities.

Although the System may not be required to comply with the Freedom of Information Law, I was told that most of the records of your interest are accessible on the System's website and that any others that exist would be made available to you on request. It was emphasized that decisions were reached primarily through discussion and that there are relatively few records in existence that reflect the decision making process relative to the subject of your interest.

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-15810

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February 14, 2006

Mr. Michael Graham
03-R-0367
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. Graham:

I have received your letter in which you sought assistance in obtaining various court records under the Freedom of Information Law. You indicated that you were told by the Criminal Court in New York City to contact the New York State Supreme Court Criminal Branch Law Library in an effort to obtain the records of your interest. As of the date of your letter to this office, you had not 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 New York State Supreme Court Criminal Branch Law Library, 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

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February 14, 2006

Mr. L. R. Huffman
99-B-0020
Box 1187
Alden, NY 14004

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

Dear Mr. Huffman:

I have received your letter in which you indicated that you have requested various records from the Erie County Holding Center and, as of the date of your letter, you had not 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, 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.

As requested, I am returning the materials that you forwarded to this office.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15812

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February 14, 2006

E-MAIL

TO: Shawn Harmon

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. Harmon:

We are in receipt of your January 6, 2006 request for an advisory opinion concerning the application of the Freedom of Information Law to a statewide voter registration list, which is required to be maintained by the State Board of Elections pursuant to recent amendments to the Election Law, effective January 1, 2006.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Nevertheless, §89(6) of the Freedom of Information Law states that:

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

As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access [see e.g., Kwitny v. McGuire, 53 NY2d 968 (1981); Szikszay v. Buelow, 436 NYS 2d 558, 583 (1981)].

Relevant in this instance is §5-602 of the Election Law, entitled "Lists of registered voters; publication of", which states that voter registration lists are public. Specifically, subdivision (1) of that statute provides in part that a "board of elections shall cause to be published a complete list of names and residence addresses of the registered voters for each election district over which the board has jurisdiction"; subdivision (2) states that "The board of elections shall cause a list to be published for each election district over which it has jurisdiction"; subdivision (3) requires that at least fifty copies of such lists shall be prepared, that at least five copies be kept "for public inspection at each

main office or branch of the board", and that "other copies shall be sold at a charge not exceeding the cost of publication."

Since §5-602 of the Election Law confers unrestricted public rights of access to voter registration lists generated for each election district, in our opinion, nothing in the Freedom of Information Law could be cited to restrict those rights. Further, as a general matter, we believe that a statute pertaining to a specific subject prevails over a statute pertaining to a general subject. A statute in the Election Law that pertains to particular records would in our view supersede a statute pertaining to records generally, such as the Freedom of Information Law.

As you note, the Election Law was recently amended (L. 2005, Ch. 179). In concert with the Help America Vote Act of 2002 (42 USC 15301; "HAVA"), the amendments establish an individual districts statewide voter registration list for voter identification verification purposes. In an attempt to clarify the impact of the amendments, we contacted the Board of Elections and learned that counties will continue to maintain separate lists, and that the state will create and maintain a registration list separate from those individual lists, using information gathered from counties, the Social Security Administration, and various state agencies.

In relevant part, HAVA provides for access to the statewide voter registration list as follows:

> "Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list." [§303(a)(1)(A)(v).]

And in general, HAVA restricts unauthorized access as follows:

> "The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section." [§303(a)(3)]

As part of the recent amendments to the state law, §3-103 of the Election Law states in part that:

> "The information contained in the statewide voter registration list shall not be used for non-election purposes."

This appears to be in keeping with and stemming from the above-cited provisions of HAVA. Because of the specificity of the language, which refers to the statewide list and not the election district lists referenced to earlier in §5-602 of the Election Law, it also appears that this restriction would apply only to the statewide list currently under construction.

Your inquiry goes to the heart of the question and the amendments, and that is whether the public will continue to have access to the individual district or county lists for any purpose. It is our opinion that access to the individual lists should not change, based upon both the legislative purpose

and the specificity of the amendment to the Election Law. Access to the statewide list, however, would not be permitted for non-election purposes.

We hope this clarifies your understanding, and that we have been of assistance.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15813

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February 14, 2006

E-Mail

TO: Jeff Hartnett

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. Hartnett:

I have received your inquiry concerning a situation in which a former superintendent of a school district has been accused of "misusing public funds", and his employment contract has been "taken by the District Attorney's office, who is now investigating this individual." Consequently, the District has denied your client's request for the contract. You have asked whether the District is required "to get a copy from the DA's office back" or whether there may be some other remedy.

In this regard, first, it is possible if not likely that the District maintains a copy of the contract. If that is so, the copy must, in my opinion, be made available, for none of the grounds for denying access would be applicable. There is nothing in the Freedom of Information Law that would require the District to obtain a record that it does not possess. I note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Second, the office of a district attorney is clearly an "agency" required to comply with the Freedom of Information Law [see definition of "agency", §86(3)], and a request for the contract could be made to the Office of the Albany County District Attorney. As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The fact that a contract has been sent to the District Attorney does not alter the nature or character of the contract, and I believe that the District Attorney would be obliged to disclose the contract on request. One of the exceptions to rights of access, §87(2)(e), states that an agency may withhold records that:

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

To characterize the contract between the District and its former superintendent as having been compiled for law enforcement purposes, even though it may be used in or pertinent to an investigation, would be inconsistent with both the language and the judicial interpretation of the Freedom of Information Law. The Court of Appeals has held on several occasions that the exceptions to rights of access appearing in §87(2) "are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption be articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, M. Farbman & Sons v. New York City Health and Hospitals Corp., 62 NY 2d 75, 80 (1984); Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]. Based upon the thrust of those decisions, §87(2)(e) should be construed narrowly in order to foster access. Further, there is case law that illustrates why §87(2)(e) should be construed narrowly, and why a broad construction of that provision would give rise to an anomalous result. Specifically, in King v. Dillon (Supreme Court, Nassau County, December 19, 1984), the District Attorney was engaged in an investigation of the petitioner, who had served as a village clerk. In conjunction with the investigation, the District Attorney obtained minutes of meetings of the village board of trustees. Those minutes, which were prepared by the petitioner, were requested from the District Attorney. In granting access to the minutes, the decision indicated that "the party resisting disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he:

> "must note in the first instance that the records sought were not compiled for law enforcement purposes (P.O.L. 87[2]e). Minutes of Village Board meetings serve a different function...These were public records, ostensibly prepared by the petitioner, so there can be little question of the disclosure of confidential material."

Often records prepared in the ordinary course of business, which might already have been disclosed under the Freedom of Information Law, become relevant to or used in a law enforcement investigation or perhaps in litigation. In my view, when that occurs, the records would not be transformed into records compiled for law enforcement purposes. If they would have been available prior to their use in a law enforcement context, I believe that they would remain available, notwithstanding their use in that context for a purpose inconsistent with the reason for which they were prepared.

From my perspective, the record that your client requested, by its nature, indicates that the exception concerning records "compiled for law enforcement purposes" is inapplicable. To contend that records which were generated for purposes wholly unrelated to any law enforcement investigation may now be withheld due to their use in an investigation would, in my opinion, be unreasonable and tend to subvert the purposes of the Freedom of Information Law. In support of this view, I again point to the decision rendered by the Court of Appeals in Capital Newspapers, supra. In its discussion of the intent of the Freedom of Information Law, the court found that the statute:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of the state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence or abuse on the part of government officers" (id. at 566).

In short, whether the contract is maintained by the District or the Office of the District Attorney, I believe that it must be disclosed.

I hope that I have been of assistance.

RJF:jm

cc: Records Access Officer, Voorheesville Central School District
Records Access Officer, Office of the Albany County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15814

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February 14, 2006

Mr. Rashad Scott
99-A-1636
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. Scott:

I have received your letter in which you requested an advisory opinion concerning your ability to obtain "minutes via transcript or audio-tape from [your] Tier III hearing."

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

Second, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in a response to a request. It is also important to note, however, that §86(4) of the Law defines the term "record" to include:

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

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law.

If minutes prepared "via transcript or audio-tape" of your Tier III hearing exist, in my view, they would be available to you for none of the grounds for denying the record would appear to 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-15815

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February 15, 2006

Mr. Donahue Miller
03-A-6829
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. Miller:

I have received your letter in which you indicated that you were denied access to letters that were sent to the Parole Board concerning your release.

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, consideration should be given, in my view, to the privacy of others. If the letters were sent to the Parole Board by friends, relatives, neighbors, etc. who expressed their opinions concerning your release, I believe that personally identifying details pertaining to members of the public who transmitted communications may be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

When Board members transmit opinions or recommendations among one another, or when other government officers or employees offer opinions concerning an inmate's release, I believe that those opinions may be withheld. For instance, in a case in which a district attorney sent a recommendation to the Parole Board regarding the release of a certain inmate, it was determined that the record could be withheld [Ramalho v. Bruno, 273 AD2d 521 (2000)]. However, statistical or factual information contained within those kinds of communications must generally be disclosed pursuant to §87(2)(g)(i), and in addition, §87(2)(g)(iii) requires that "final agency...determinations" be made available. From my perspective, any determination by the Board to grant or deny an inmate's release would constitute a final agency determination that must be disclosed. Moreover, assuming that a determination of that nature does not include intimate, personal information, I believe that it would be available in its entirety. If it does contain intimate, personal information, I believe that that portion may be redacted.

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 15, 2006

Mr. Patrick Graham
83-A-5739
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. Graham:

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. You indicated that you have reviewed an August 24, 2005 advisory opinion prepared by this office and asked if that opinion is applicable to the situation that you described.

Having reviewed that opinion, it appears that it is applicable in the situation to which you referred.

To reiterate the content of that opinion, 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. Further, 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, 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-15817

41 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, 2006

Mr. Emile Moreau
04-A-1588
Five Points Correctional Facility
P.O. Box 119
Romulus, NY 14541

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

Dear Mr. Moreau:

I have received your letter and apologize for the delay in response. You indicated that you have submitted requests since the end of 2004 to the New York City Fire Department and the New York City Police Department and, 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

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-15818

41 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, 2006

Mr. Hasheen Thompson
04-B-1016
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. Thompson:

I have received your letter in which you asked that this office reverse a decision made by Anthony J. Annucci, Counsel to the New York State Department of Correctional Services, relating to your right to inspect records that are not maintained at your facility. You indicated that you are unable to pay for copies of the records since you are indigent and believe that it is your right to be able to inspect the records.

In this regard, the Committee on Open Government is authorized to provide advice concerning access to government information, primarily under the state's Freedom of Information Law. The Committee is not empowered to compel an agency to grant or deny access to records, nor does it have the authority to "reverse a decision" made by an agency. However, 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, §87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying, and the regulations promulgated by the Committee on Open Government state in part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3). In my view, neither the Law nor the regulations require that records be transferred from their usual locations to accommodate an applicant at a site convenient to the applicant. In short, while inmates may be indigent or unable to travel, I do not believe that an agency is required to make records available at other than its designated or customary locations.

I hope that I have been of 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 - 15819

41 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, 2006

Mr. Kevin Millett
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. Roddy:

I have received your letter in which you sought assistance in obtaining various 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 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-15820

41 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, 2006

Mr. John Vera Moreno
98-A-0175
Greenhaven 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. Moreno:

I have received your letter in which you indicated that you have sent requests to the New York City Office of the Mayor for records concerning the Assigned Counsel Program and a particular attorney. As of the date of your letter to this office, you had not received a 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, 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.

With respect to the portion of your request concerning "an index listing" of all records possessed regarding this particular request, it is noted that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. If no index of records exists, the Office of the Mayor would not be obliged to prepare such a document 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
cc: Isabel Alicea
George Golfinopoulos

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15821

41 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, 2006

Mr. Donahue Miller
03-A-6829
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. Miller:

I have received your letter in which indicated that you requested a copy of an audio tape of your parole hearing and were denied a copy.

Having reviewed the correspondence attached to your letter, it appears that every parole hearing is videotaped, but that no audiotape is created. Here I note that the Freedom of Information Law pertains to existing records and §89(3) of that statute states that an agency is not required to create a record in response to a request. If no audiotape exists, the Freedom of Information Law would not apply.

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

I hope that 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

FOIL-AO-15822

From: Robert Freeman
To: [redacted]
Date: 2/17/2006 8:58:12 AM
Subject: I have received your inquiry concerning access to "salaries of public officials" and whether salarie

I have received your inquiry concerning access to "salaries of public officials" and whether salaries with names are available.

In this regard, §87(3)(b) of the Freedom of Information Law specifies that each government agency "shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency." Based on that provision and judicial decisions, it is clear that the public has a right to gain access to records indicating the salaries of all public employees and officials by name.

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-15823

From: Robert Freeman
To: [redacted]
Date: 2/17/2006 9:10:52 AM
Subject: Dear Mr. Husek:

Dear Mr. Husek:

I must admit that I don't understand your question. However, I point out that the town clerk is the legal custodian of all town records, irrespective of where they are kept (see Town Law, §30). While a highway superintendent may have physical custody of certain records, I believe that they are in the legal custody of the clerk. If you request records in possession of the highway superintendent and access is denied, you have right to appeal the denial to the town board or a person designated by the town board to determine appeals.

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: 2/17/2006 9:23:14 AM
Subject: Dear Mr. Branches:

Dear Mr. Branches:

I have received your letter in which you asked whether requests may be made to the New York City Police Department pursuant to the Freedom of Information Law.

In this regard, that statute is applicable to all state and local government agencies, and the New York City Police Department clearly constitutes an "agency" that falls within the coverage of the Freedom of Information Law.

I note that the regulations promulgated by the Committee on Open Government 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 (see 21 NYCRR §1401.2). It is also important to point out that a request must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records of your interest.

To seek records from the Department, it is suggested that any request be directed to: Records Access Officer, New York City Police Department, FOIL Unit, Room 110C, New York, NY 10038.

I hope that I have been of assistance.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4139
FOIL-AO-15825

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

February 22, 2006

E-Mail

TO: Hon. Jim Zecca, Council Member, City of Utica

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. Zecca:

As you are aware, I have received your letter in which you questioned the propriety of an executive session held by the Utica City Council "to discuss who would be president pro tempore." You added that the action taken to do so occurred "behind closed doors with a secret ballot."

In this regard, I offer the following comments.

A public body, such as a city council, cannot enter into an executive session without accomplishing the procedure described in §105(1) of the Open Meetings Law. That provision states in relevant part that:

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

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

The only provision that appears to be relevant, §105(1)(f), permits 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 Council considered the criteria inherent in the position of president pro tempore or the attributes or qualifications of any person who might serve in that position, I do not believe that §105(1)(f) could be asserted. That kind of discussion would not focus on any "particular person" but rather on the functions associated with the position and characteristics that any person who fulfills that role should or perhaps should not possess. However, if and when the discussion does pertain to a particular person, the language of §105(1)(f) may become applicable.

The first clause authorizes an executive session to consider the "medical, financial, credit or employment history of a particular person." There may be instances in which one or more of those subjects may be discussed regarding a candidate. The physical ability of an individual to hold the position could be an issue, particularly if that person has a history of health problems. In view of the time consuming nature of the position, it is possible that a discussion might involve an individual's financial history, i.e., consideration of whether that person can afford to spend the time needed to carry out the duties of chancellor. One's employment history might also be considered in an effort to determine whether a candidate's work or professional experience renders that person suitable for the position. In short, to the extent that the Council discussed the medical, financial or employment history of a particular person, I believe that the initial clause of §105(1)(f) may clearly have been invoked as a basis for conducting an executive session.

The second clause pertains to "matters leading to the appointment, employment, promotion" etc. "of a particular person". Discussion of the issue might pertain to the "appointment...of a particular person". If that is so, to that extent, an executive session could properly have been held. On the other hand, the Council's action involved an *election*, rather than an appointment, I do not believe that §105(1)(h) would have applied. Often that issue should be considered in relation to an entity's charter or rules, and it is suggested that any such provision be reviewed.

Lastly, I point out that §87(3)(a) of the Freedom of Information Law requires an agency, including a city council, to maintain a record indicating the manner in which the members of the City Council voted (see Perez v. City University of New York, 2005 Slip Opinion 06765, November 17, 2005, __ NY3d __). That being so, the Freedom of Information Law prohibits secret ballot voting by members of public bodies. It is also noted that it has been held that secret ballot voting is not permitted regarding the election of officers (Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000).

I hope that I have been of assistance.

RJF:jm

cc: Charles Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15826

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

February 22, 2006

Mr. John F. Fitzgerald
[redacted]

Dear Mr. Fitzgerald:

I have received your letter of February 15, which was characterized as an appeal of a denial of access by the Valhalla Union Free School District.

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

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

I will treat your letter as a request for an advisory opinion. In consideration of our backlog, I expect to be able to prepare an opinion within approximately a month.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15827

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

February 23, 2006

Mr. George Rand
[redacted]

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

Dear Mr. Rand:

I have received your letter in which you referred to a request made to a school district for a copy of the agreement between the board of education and the teachers union. You wrote that the agreement "is a printed and bound document", but you were informed that you would be required to pay a fee of twenty-five cents per page to obtain a copy of the agreement.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law requires that an agency, such as a school district, adopt rules and regulations concerning:

> "...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."

Based on the foregoing, the Freedom of Information Law provides two standards for assessing fees for copies, the first of which pertains to the reproduction of records by means of photocopying, and the second to the reproduction of records by other means. In those latter situations, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, provide in relevant part that fees assessed by an agency "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)(2)].

In the context of your inquiry, if the District had printed copies of the agreement produced, and if the copy made available to you was not the result of photocopying, but rather accomplished by making available a printed copy, I do not believe that the District could validly have charged twenty-five cents per page. Its fee in my view would be restricted to the "average unit cost" of printing the agreement. If, for instance, a commercial printer was paid a hundred dollars to print a hundred copies, the fee, based on the actual cost of reproduction, would be one dollar per copy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Robert Freeman
To: [redacted]
Date: 2/23/2006 11:10:05 AM
Subject: Dear Mr. Ford:

Dear Mr. Ford:

I have received your letter in which you indicated that you are attempting to "access [our] database which contain individual records such as court decisions, mortgages, support payments, etc."

It is unclear whether you are seeking the records from this office or advice concerning access to those records. In that regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the New York Freedom of Information Law (FOIL). This office does not maintain custody or control of records generally. However, as a means of offering guidance, I offer the following comments.

First, many of the records of your interest are maintained by the courts, and the courts are not subject to the FOIL. This is not intended to suggest that court records are private, for they are often accessible pursuant to other statutes (see e.g., Judiciary Law, §255).

Second, I do not believe that there is any central statewide database that stores the records to which you referred. There are numerous courts, each of which maintains records independently. Similarly, records involving real property, such as deeds and the like, are maintained independently by countly clerks. In those instances, requests would be made to the individual court clerks or county clerks as appropriate.

Lastly, I am unaware of the extent to which court or county databases exist or the manner in which records may be accessed. Again, contact would likely needed to be made with offices of court or county clerks to obtain specific guidance relative to your request.

I hope that I have been of assistance.

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

FOIL-AO-15829

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February 23, 2006

Cheryl L. Kates, 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. Kates:

We are in receipt of your January 6, 2006 request for an advisory opinion. Please accept our apologies for the delay in responding.

You have made requests for records to the Ontario County Sheriff's Office, the New York State Police, the Ontario County District Attorney and the Ontario County Archives in relation to a murder investigation which occurred in 1977. Access to crime scene photographs was denied on the ground that release would constitute an unwarranted invasion of personal privacy, and the District Attorney has indicated that records would only be available upon receipt of payment of $400. In this regard, we 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) 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, none of which appear to apply to crime scene photographs 29 years old.

It has been held that the provisions pertaining to the protection of privacy are intended to deal with intimate or personal information about natural persons [see e.g., Hanig v. State Department of Motor Vehicles, 79 NY2d 106 (1992)]. While we are unfamiliar with the contents of the photographs to which you have been denied access, it is difficult to envision any contents relating to a crime scene, for which there was a trial approximately 29 years ago, the release of which would now result in an unwarranted invasion of personal privacy.

As set forth by the court in Pennington v. Clark [16 A.D.3d 1049, 791 N.Y.S.2d 774, 777 (4th Dept 2005)],

> "'What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities.... This determination requires balancing the competing interests of public access and individual privacy' (Matter of Dobranski v. Houper, 154 A.D.2d [16 A.D.3d 1052] 736, 737, 546 N.Y.S.2d 180;...)"

From our perspective, as the nature and amount of information disclosed to the public relating to a criminal investigation or proceeding increases, the extent to which the exception concerning privacy decreases.

Perhaps most importantly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, records introduced into evidence or disclosed during a public judicial proceeding must be disclosed. We would conjecture that many of the records of your interest became public via judicial proceedings. To that extent, an agency would have no basis for denying access. Moreover, if, for instance, certain crime scene photos have been disclosed, as evidence or otherwise, it is unlikely that others involving the same locations or persons would reveal more, in terms of an invasion of personal privacy, than those previously disclosed; the magnitude of any additional invasion of privacy would not likely be significant in view of the disclosures already made, and particularly those made so long ago.

Because the investigation resulted in a murder trial, we can presume that the events surrounding the case generated public interest. Disclosures about the defendant, the victim, their families and the community were likely made and disseminated over a lengthy period of time. If that is so, we believe that it would be difficult to justify a denial of access to significant portions of the records sought based on a claim that disclosure would result in an unwarranted invasion of privacy.

With regard to the inspection of records which may require redaction, we point out that 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. In a situation 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), it has been held that an applicant would not have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record [see VanNess v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999].

When accessible and deniable information appear on the same page, the practice of preparing a redacted copy and charging the established fee, in our opinion, is fully justifiable. If some pages of the requested records contain information which may be withheld, and others do not, and

inspection of all the records is denied on the grounds that some of the records require redaction, we believe that such a practice is inconsistent with law.

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

Lastly, we note that it has been held that physical evidence, such as firearms or shell casings do not constitute "records" and, therefore, are not subject to the Freedom of Information Law [see Allen v. Strojnowski, 129 AD2d 700, motion for leave to appeal denied, 70 NY2d 871 (1989)].

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Captain Laurie Wagner
William J. Callahan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 24, 2006

Mr. Felipe Montejo
Todtman, Nachamie, Spizz & Johns, P.C.
425 Park 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 information presented in your correspondence.

Dear Mr. Montejo:

We are in receipt of your request for an advisory opinion dated January 13, 2006, concerning application of the Freedom of Information Law to requests for records made to the Hudson River Park Trust (the Trust). We apologize for the delay in our response.

Specifically, you have been effectively denied access to the following:

> "copies of all surveys, reports, and/or studies relating to the understructures and overstructures of the Chelsea Piers in Manhattan."

Additionally, you have been informed in response to a request for discovery in litigation that since the World Trade Center attacks of September 11, 2001, such documents are privileged and not subject to disclosure. You indicate that the Trust will be filing a motion for a protective order in response to a court order to produce the records and that the records of your interest have not been disclosed. 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.

As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making

the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules (CPLR). Specifically, it was found that:

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

Based upon the foregoing, the pendency of litigation would not, in our opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

Second, in our view, the informality of the Trust's communications with you and its failure to respond to your most recent inquiries has resulted in a constructive denial of your request. In that regard, we note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Third, while the Trust indicated to you which reports were available, it appears the Trust failed to describe those records it would not make available to you, namely those prepared since 2000. If the information you provided is accurate, the Trust failed to refer to your right to appeal the denial. In addition to the statutory provisions referenced above, regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.

> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

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

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In sum, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

Next, although not an issue explicitly raised by the Trust, pertinent with respect to 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 a house in a suburban development, for example, which is not unique, we 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, the records may be withheld, in our opinion, to that extent.

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 confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency

> to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). 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 Trust 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 their entirety. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In addition, it is likely that records which were previously available to the public in earlier reports continue to be available, and that a blanket denial of access to such records is inconsistent with the law.

Finally, with respect to documents which you have requested from the Department of Transportation, 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.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Laurie Silberfeld
Aysha Cox

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 24, 2006

Ms. Carol Lucas
[redacted]

The staff of the Committee on 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. Lucas:

We are in receipt of your January 9, 2006 request for an advisory opinion concerning the application of the Freedom of Information and Open Meetings Laws to requests made to the Town of Mamakating. In response to your many questions, we offer the following comments.

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

One of your requests pertains to correspondence between Town officials that was denied on the ground that the materials involve "personnel matters." Here we point out that there is no exception for "personnel matters" in the Freedom of Information Law, and the term "personnel" appears nowhere in that statute. The nature and content of so-called personnel records may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

In analyzing the issue with respect to the Zoning Board of Appeals correspondence to which you seek access, the exception of greatest significance may be §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers

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].

Another provision of significance may 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 our view be withheld.

To the extent that the correspondence indicates final agency policy, a determination of the ZBA and/or instructions to the staff ZBA attorney which affects the public, we believe that it would be required to be made available pursuant to the Freedom of Information Law.

With regard to your question about educational seminars on open government issues, there is no requirement that elected officials attend any such seminars. It may be that the seminar to which

the Supervisor referred is one of the many conducted by our Executive Director. Should you require further related information, most of our materials are available online at our website noted above.

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.

Turning to your questions pertaining to public participation at meetings of the Town Board, we note that while individuals may have the right to express themselves and to speak, we do not believe that they necessarily have the right to do so at meetings of public bodies. It is noted that there is no constitutional right to attend meetings of public bodies. Those rights are conferred by statute, i.e., by legislative action, in laws enacted in each of the fifty states. In the absence of a statutory grant of authority to attend such meetings, we do not believe that the public would have the right to attend.

There is nothing in the Open Meetings Law that pertains to the right of those in attendance to speak or otherwise participate at meetings. Certainly a member of the public may attend meetings and may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which we are aware provides the public with the right to speak *during* meetings, we do not believe that a public body is required to permit the public to do so. Clearly a public body may in our view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally. From our perspective, a rule authorizing any person in attendance to speak for a maximum prescribed time on agenda items, and those items only, would be reasonable and valid, so long as it is carried out reasonably and consistently.

Next, as you may be aware, §30 of the Town Law provides in part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting." As such, a town clerk has the statutory duty to prepare minutes of meetings of a town board.

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.

If a clerk does not prepare minutes in accordance within two weeks as required by law, he or she would have failed to carry out his or her statutory duties. A legal remedy addressing any such failure would involve the initiation by any person of a proceeding under Article 78 of the Civil Practice Law and Rules to compel the clerk to carry out his or her duties in a manner consistent with law.

Turning now to what appears to be the Town's constructive denial of your requests for records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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. Although we are not advising you to institute an Article 78 proceeding against the Town, that would be one of the options available to you should an appeal go unanswered.

Additionally, insofar as the Town Clerk specifically denied access to certain records, she did not refer to your right to appeal the denial. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

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

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

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

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In sum, a Town's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal, as well as the name and address of the person or body to whom an appeal may be directed.

On behalf of the Committee on Open Government, we hope this is helpful to you. 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 Town officials.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15832

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

February 24, 2006

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:

We are in receipt of your January 15, 2006 request for an advisory opinion concerning the application of the Freedom of Information Law to requests made to the New York City Department of Education.

First, with regard to request (a), based on your account, the Department, by letter dated December 1, offered to make the record available to your for viewing at their office ("Please call Arlene Longoria of my staff at 212/374-5027 to arrange a mutual date and time.") Because you requested to inspect the record and chose which pages you require for printing, it is our understanding that the Department has now complied with your request.

Second, with regard to request (b), based on your account, the Department, by letter dated July 21, you were informed that "You will be provided with that general list as soon as it is completed."

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. As you know, 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.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Susan Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15833

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February 28, 2006

Mr. Richard O. Mistretta
[redacted]

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

Dear Mr. Mistretta:

I have received your letter in which you described a series of difficulties and delays in your attempt to gain access to minutes of meetings of the Town Board of the Town of Burlington in a timely manner.

In consideration of the facts as you described them, I offer the following comments.

First, based on §89(3) of the Freedom of Information Law, an agency may require that a request be made in writing. While a municipal official may waive that requirement, there is no obligation to do so.

Second, the same provision states in part that an applicant must "reasonably describe" the records sought. An applicant is not required to specify or identify each and every record in which he or she is interested to meet that standard. On the contrary, if a request includes sufficient detail to enable agency staff to locate records with reasonable effort, the request would meet the legal requirements. In the context of the situation that you described, a request for minutes covering a period of a year would, in my view, clearly reasonably describe the records sought.

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

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

> approximate date, 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: Hon. Deb Wengert, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15834

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

February 28, 2006

Ms. Grace Searby
[redacted]

The staff of the Committee on 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. Searby:

We are in receipt of your January 16, 2006 request for an advisory opinion concerning application of the Freedom of Information Law to certain responses received from the Oyster Bay East Norwich School District. Specifically, you inquire about the appropriateness of the District permitting review of minutes of District meetings only during limited times. Please accept our apologies for the delay in our response. Out of fairness, we issue advisory opinions in response to written requests in the order in which they are received.

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

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

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

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

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

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

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

Based on the foregoing, the District, in our view, cannot limit your ability to inspect records to a period less than its regular business hours.

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

On behalf of the Committee on Open Government, we hope this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Sydney Freifelder

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15835

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

February 28, 2006

Mr. Mark I. Cushman
[redacted]

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

Dear Mr. Cushman:

We are in receipt of your January 13, 2006 request for an advisory opinion, in follow up to our January 9, 2006 opinion letter to you. As you relate, in response to your request for copies of the village clerk-treasurer's "W-2 earnings statements", apparently you received a list of weekly payments made to the clerk in 1990. You now question whether by providing a list rather than copies of the forms, the Village has fulfilled the terms of your request. We have also received correspondence from the village clerk-treasurer dated January 11, 2006, to which she attached copies of your request and her responses, and in which she indicated that you have never been denied access to records.

In addition to the observations and advice offered in our January 9, 2006 correspondence to you, we note that a very similar issue to yours was determined in a recent case, Boni v. Mills, Supreme Court, Ulster County, February 27, 2003. Citing the school district's memorandum, the Court dismissed the case based on a finding that petitioner "failed to allege any FOIL violation which occurred when the District decided to provide her with copies of the District Treasurer's monthly reports in lieu of the considerably more voluminous monthly bank statements which she had sought". Referencing the district's memorandum, the court indicated that there was no significant difference between the 295 monthly reports of the Treasurer, and the 2,880 pages of bank statements, that those two kinds of documents "included virtually the equivalent information", and that the Treasurer's reports were readily available in a file drawer, but that the 72 months of bank statements would involve the assignment of an employee to make redactions.

In your case, based on your description of the information you received, and based on the correspondence from the clerk-treasurer, it appears that the information provided by the Village of Ilion is essentially the same as that which is available from the requested W-2 forms, and that in providing the information in report form, similar to the school district's allocation of resources in

Boni, the village has conveyed the requested information to you in a manner which is efficient and economical.

On behalf of the Committee on Open Government, we hope this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Hon. Gale M. Hatch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15836

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February 28, 2006

TO: Betty Barry

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. Barry:

As you are aware, I have received your inquiry. You asked whether "the hand-written notes taken by the supervisor and/or board members during a meeting [are] foilable."

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

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

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).

Perhaps most pertinent is a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he prepared the notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

In sum, I believe that the notes in question are "records" that fall within the coverage of the Freedom of Information Law.

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.

Notes prepared by government agency officers or employees fall within one of the exceptions, §87(2)(g). However, due to the structure of that provision, 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.

As indicated in Warder, insofar as notes consist of a factual rendition of events occurring or comments made during an open meeting, they would be accessible pursuant to §87(2)(g)(i).

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15837

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February 28, 2006

E-Mail

TO: Debra Cohen

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. Cohen:

I have received your letter in which you sought an advisory opinion concerning a denial of your request for a certain record by the City of Yonkers.

According to your letter, early in February, the Mayor:

> "...held a press conference and announced an agreement with three developers for a $3 billion development project for downtown Yonkers. During the press conference the Mayor and the developers 'signed' a Master Development Agreement with great fanfare."

Having requested the agreement signed by the Mayor and the developers, you were denied access and informed that the agreement was "ceremonially" signed and "was non-binding as the agreement requires approval by several agencies." You were informed that the agreement would be available after it is approved by the City Council.

Based on your description of the facts, the agreement, in my view, should have been 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.

From my perspective, only one of the exceptions to rights of access is pertinent in consideration of the matter. Specifically, §87(2)(c) permits an agency to deny access to records to

the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in that provision in my opinion is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That an agreement has not received final approval, in my opinion, 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.

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.

Conversely, however, 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)].

It appears that the situation that you described is analogous in terms of principle to that found in Community Board 7. Based on the language of §87(2)(c), it is clear in my opinion that the absence of "final" approvals by other agencies is not determinative of an agency's ability to deny access to records relating to the contracting process. Further, in a case involving a contract that was awarded by a state agency and requested prior to final approvals by the Attorney General and the State Comptroller, it was held by the Appellate Division that the records sought "could no longer be competitively sensitive", that §87(2)(c) could not validly be asserted and that, therefore, they were accessible to the public [Cross-Sound Ferry v. Department of Transportation, 219 AD2d 346, 634 NYS2d 575, 577 (1995)].

Lastly, it is emphasized that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals more than decade ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was found that:

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

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Mayor Amicone.

I hope that I have been of assistance.

RJF:jm

cc: Hon. Philip A. Amicone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 28, 2006

Mr. Thoms B. Caulfield
[redacted]

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

Dear Mr. Caulfield:

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

You referred to actions of Suffolk County that adversely affect your business and sought advice "on how to respond to their efforts to put [you] out of business." You also asked that I "have them comply with the two FOI requests."

In this regard, in the context of the matters that you described, the authority of the Committee on Open Government is limited to providing advice pertaining to the Freedom of Information Law. I cannot offer advice relative to your business, and neither the Committee nor its staff is empowered to compel an agency to comply with law. Nevertheless, in an effort to assist you, I offer the following comments.

First, you referred to failure to respond to a request and appeals. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Although the County disclosed certain information to you, other aspects of your request were denied on the basis of §§3101(c) and 4503 of the Civil Practice Law and Rules (CPLR), as well as §87(2)(g) of the Freedom of Information Law.

Section 3101(c) pertains to the work product of an attorney, and §4503 is codification of the attorney-client privilege. When those provisions apply, they fall within §87(2)(a) of the Freedom of Information Law concerning records that "are specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS

243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101©) of the Civil Practice Law and Rules. In 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 ©) 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 a legal opinion provided by counsel to the client, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

The other ground for denial cited by the County, §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).

Lastly, with respect to your ability to use a personal photocopier, from my perspective, as a general matter, a municipality has the ability to adopt rules to implement and govern the manner in which it carries out its duties. So long as those rules are reasonable and not inconsistent with law, I believe that they would be valid. As you may be aware, in a decision concerning a situation in which a village adopted rules prohibiting requesters from using their own photocopiers, it was held that the rules "constitute a valid and rational exercise of the Village's authority under Public Officers Law §87(1)(b)" [Murtha v. Leonard, 620 NYS 2d 101,102; 210 AD2d 411 (1994)]. In my opinion, the decision was based upon the reasonableness of the rules in view of attendant facts and circumstances. In situations in which an agency does not have sufficient resources or cannot carry out its duties effectively due to the use or presence of a personal copier without disruption, it might be found, as indicated in Murtha that a prohibition against the use of personal photocopiers would be valid.

In the context of the situation that you described, I cannot offer an unequivocal response. There may be circumstances in which, due to the nature of the records sought, their volume, their location, the workload of the County of staff and similar factors, the use of one's own photocopier may be disruptive. In that instance, it is likely in my view that the County, could validly prohibit an individual from using his or her own photocopier. There may be other instances, however, in which the attendant facts suggest that the use of a personal photocopier might not be disruptive. In those cases, it may be unreasonable to prohibit the use of a personal photocopier.

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: Mary Jane Walker
Laura Conway
FOIL Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 28, 2006

E-Mail

TO: Robin Nold

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. Nold:

I have received your letter in which you indicated that you are the mother of a homicide victim, and that the Troy Police Department has denied your request for a copy of the autopsy report pertaining to your daughter.

In this regard, as a general matter, the Freedom of Information Law deals with rights of access to government records. However, in this instance, a different statute is applicable, and in my opinion, as the mother of the deceased, it is clear that you have rights of access to the autopsy report concerning your daughter.

Section 677 of the County Law refers to autopsy reports and related records, and 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, 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.

Again, as the next of kin, I believe that you clearly have rights of access to the records at issue.

I hope that I have been of assistance.

RJF:jm

cc: Chief, City of Troy Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 28, 2006

E-MAIL

TO: Diane Cawley

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. Cawley:

I have received your letter concerning your ability to obtain certain information from the Town of Millerton.

You wrote that you requested "the names of members and minutes from a housing committee that was set up to review housing situation in Millerton." You were told that no minutes were taken, and in response to your request for a list of the members, you were told: 'I'm too old - I can't remember.'" In short, you wrote that you are "asking questions and...not getting answers."

In this regard, first, I point out that the Freedom of Information Law does not require that agency officials answer questions or create new records in response to requests for information [see §89(3)]. That statute pertains to existing records, and it is suggested that your requests should involve existing records.

I point out that the regulations promulgated by the Committee on Open Government require that each agency, such as a town, must designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests (see 21 NYCRR §1401.2). In most towns, the records access officer is the town clerk, and requests for records should generally be made to the Town Clerk.

In the context of the situation that you described, it is suggested that you seek a record or records identifying those who serve on the committee. Similarly, while there may be no records characterized as "minutes", there may be others of interest. That being so, it is suggested that you might request "records" prepared or received by the housing committee.

Lastly, I note that all such materials fall within the coverage of the Freedom of Information Law, 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."

Even if records are maintained for the Town at the private home or office of a member of the committee, it is clear in my view that they fall within the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 28, 2006

E-MAIL

TO: Philip Church

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. Church:

I have received your letter in which you raised the following questions:

> "Are the computer files, Internet cache, e-mail messages, and time sheets of employees and supervisors of a SUNY college subject to FOIL? If so, are they still subject to FOIL if those employees and supervisors are named in a discrimination and harassment complaint?"

In this regard, that there may be a complaint, an internal investigation or administrative proceeding or even litigation may have no impact on public rights of access conferred by the Freedom of Information Law. If records were prepared solely for litigation, for example, they would be exempt from disclosure pursuant to §3101(d) of the Civil Practice Law and Rules (CPLR) and, therefore, §87(2)(a) of the Freedom of Information Law concerning records that are "specifically exempted from disclosure by state or federal statute." However, if, as in the case of time sheets, for example, records are prepared in the ordinary course of business, the pendency of a complaint, a charge or litigation would not, in my opinion, affect public rights of access conferred by the Freedom of Information Law [see e.g., M. Farbman & Sons v. New York City Health and Hops. Corp., 62 NY2d 75 (1984)].

Second, 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, I believe that e-mail communications involving SUNY employees constitute "records" that fall within the coverage of 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. The content of e-mail, like any other record is the key factor in ascertaining rights of access. In my view, e-mail is merely a means of communicating records, and e-mail should be treated in the same manner as paper records in determining rights of access.

Lastly, with specific respect to the time sheets, pertinent is §87(2)(b) of the Freedom of Information Law, which 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 time sheets must be disclosed under the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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February 28, 2006

E-Mail

TO: Katherine Stewart

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. Stewart:

As you are aware, I have received your letter concerning a request for the Town of Red Hook's budget "in digital format." You wrote that:

> "The request was denied due to a copyright on the program they used which apparently needs the program itself to read the output.
>
> "That was their reason. This is puzzling since they told me that they could print me a paper copy of the program, and it would appear that if the output could be printed it could be made into a pdf document. I was also told by the same employee that town hall had no pdf capability. They do have pdf documents on their website."

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

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

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

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disc.

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, I believe that that an agency must do so.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

In another decision which cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

It is my understanding that data maintained electronically may be convicted to PDF easily and at no cost. The software is available online from Adobe and may be downloaded for free. If that can be accomplished in this instance, I believe that the Town would be required to do so to comply with the Freedom of Information Law. I note that in its statement of intent, §84, the Freedom of Information Law provides that agencies are required to make records available "wherever and whenever feasible."

Attached is material regarding the availability of PDF. That will be sent with a copy of this response to Town officials.

I hope that I have been of assistance.

RJF:jm

cc: Hon. Margaret Doty, Town Clerk
Bookkeeper

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-4148
FOIL-AO-15843

41 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 28, 2006

E-Mail

TO: Ronald Knott

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. Knott:

I have received your letter in which you indicated that a "group of concerned citizens" in the Town of Stuyvesant videotapes Town Board meetings. You wrote that a resident recently "has been making copies of the tape and selling them" and asked whether that practice is "legal."

In this regard, first, it has been held that those who attend open meetings of public bodies, such as town boards, may audio record or video record those meetings, so long as the use of the recording devices is neither disruptive nor obtrusive [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Csorny v. Shoreham-Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003)].

When a member of the public records a meeting, the tape is his or her property. What the person does with the tape is beyond the control of the government. In Mitchell, the Appellate Division found that the ability to record an open meeting cannot be restricted, even though a tape recording may be altered, edited, or replayed in a manner that is out of context.

Lastly, I point out that it was held years ago that an agency's tape recording of an open meeting is accessible under the Freedom of Information Law (see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978). When records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

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

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

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15841

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

February 28, 2006

E-Mail

TO: Rick Lockwood

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. Lockwood:

I have received your letter in which you wrote that an agency denied an initial request and on appeal using "the catch-all excuse of 'records not readily available'." You asked whether there is "any further affordable recourse."

Although the response offered by the agency is unclear, I offer the following comments.

First, it is possible that the response is intended to mean that the records of your interest cannot be located with reasonable effort. Section 89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. It has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

> (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

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

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

If the ability to locate the records is the issue, it is suggested that you contact the agency's records access officer to ascertain how the records are kept in order that you may make a request that reasonably describes the records. The records access officer, according to the regulations promulgated by the Committee on Open Government, has the duty of coordinating an agency's response to requests (21 NYCRR , §1401.2).

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, assuming that the records of your interest 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.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-15845

From: Robert Freeman
To: [redacted]
Date: 2/28/2006 1:14:22 PM
Subject: Good afternoon - -

Good afternoon - -

It was a pleasure to meet you last week, and I appreciate that you related my best wishes to your wife and Gail.

If I understand your question and recall our conversation accurately, it involves the nature of responses that must be given by an agency in receipt of a request for records sought under the Freedom of Information Law (FOIL), which may also be referenced as Article 6 of the Public Officers Law.

In short, when an agency receives such a request, it has three potential responses: (1) we have the record and it is being made available to you; (2) we have the record, but we are denying access to it in accordance with one or more of the exceptions to rights of access appearing in the FOIL; or (3) we do not maintain or possess the record of your interest.

With respect to your question, §240.65 of the Penal Law states that:
"A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record." Stated differently, if a request is made for a record, and the agency person responds by indicating that no such record exists, even though that person knows that the record does indeed exist, I believe that §240.65 would apply. I note, too, that by denying the existence of a record, a person would essentially preclude a person seeking the record from appealing a denial of access or eventually seeking judicial review of a denial, which might involve a closed door or *in camera* inspection by a judge.

While I am not an expert regarding the Penal Law, §195.00(2) might be pertinent. That provision states that "A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit....He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office."

I hope that I have been of assistance. If I have misinterpreted the nature of the issue, please feel free to contact me.

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

PPDL-AO-326
FOIL-AO-15846

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February 28, 2006

Mr. Hugh Skerker
[redacted]

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

Dear Mr. Skerker:

I have received your letter concerning records maintained by the State Department of Health pertaining to you.

You referred to a request relating to complaints and an investigation that followed pertaining to you and another individual "regarding sending anonymous e-mails to the Town of Colonie" that led to your suspension as a paramedic and the other individual's termination. You wrote that the "'investigation' appears to exonerate" you, and that you have been seeking "any and all documents pertaining to this investigation." You added that the "privilege" asserted by the Department "shouldn't" exist "because a number of the documents claiming to be inter or intra-agency were obviously completed by Mr. Politis on a Personal E-mail account and not a Town of Colonie Business account in an official capacity.

You have sought my "personal intervention" in an effort to persuade the Department to disclose the records.

In this regard, it is noted at the outset that neither the Committee on Open Government nor its staff is authorized to "intervene" as that term is used in a legal sense. We are authorized to prepare advisory opinions, and this response, a copy of which will be forwarded to the Department, should be considered advisory.

First, it appears that two statutes, the Freedom of Information Law and the Personal Privacy Protection Law, are relevent in analyzing rights of access. The latter, which applies only to state agencies, pertains to records relating to a "data subject", a phrase defined in §92(1) of that statute to mean "any natural person about whom personal information has been collected by an agency." The term "record" for purposes of the Personal Privacy Protection Law is defined in §92(9) 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.

In general, §95(1) of the Personal Privacy Protection Law grants rights of access to a data subject to records pertaining to that person, unless an exception to rights of access applies. While I am unfamiliar with the contents of the records sought or the powers of the Department of Health relative to the matter, several of the exceptions might be applicable; the extent to which they would apply is unknown to me.

One exception, §95(5)(a), states that records "compiled for law enforcement purposes may be withheld insofar as disclosure would:

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

Even if the records were "compiled for law enforcement purposes", based on the information that you provided, it would appear that the only potential exception would involve subparagraph (iii) concerning the identification of a confidential source. In my view, if, for example, the record at issue identifies Town officers or employees who communicated with the Department in their capacities as Town officials, §95(a)(iii) would not apply. In these instances, they would have communicated in a professional, not a personal capacity.

Similarly, although you could not invade your own privacy, insofar as records pertaining to you identify others, it is possible that identifying details pertaining to those persons may be withheld under §96(1) of the Personal Privacy Protection Law and §89(2)(a) of the Freedom of Information Law on the ground that disclosure would constitute and unwarranted invasion of personal privacy relative to those persons. However, when a public officer or employee is acting in the performance of his or her governmental duties, there would be nothing "personal" about his or her activities, and I do not believe that the provisions concerning the protection of personal privacy may be asserted in those circumstances.

Also relevant may be §95(6)(d), which states that rights conferred by the Personal Privacy Protection Law do not apply to:

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

The provision quoted above might be pertinent if the records sought were prepared for use in a quasi-judicial or administrative proceeding.

The remaining exception of possible significance, §95(7) exempts "public safety agency records" from rights of access conferred upon data subjects by the Personal Privacy Protection Law. According to §92(8), a "public safety agency record" means a record "of any agency or component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation [or] law enforcement." Whether any of the records at issue constitute "public safety agency record" is unknown to me.

In sum, insofar as the exceptions to §95 cited above apply, you would not enjoy rights of access under the Personal Privacy Protection Law. To the extent that the exceptions are inapplicable, however, I believe that the Department would be required to disclose records pertaining to you pursuant to a request made under the Personal Privacy Protection Law.

Even when the exceptions to rights of access in the Personal Privacy Protection Law apply, the Freedom of Information Law would nonetheless apply. That statute pertains to all agency records. For purposes of that law, §86(4) defines the term "record" to include:

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

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

The Freedom of Information Law contains exceptions somewhat analogous to those in the Personal Privacy Protection Law. Sections 87(2)(e) pertains to records compiled for law enforcement purposes, which may be withheld on the same basis as §95(5)(a) of the Personal Privacy Protection Law. Sections 87(2)(b) and 89(2)(b) pertain to unwarranted invasions of privacy relative to persons other than yourself. Section 87(2)(a) deals with records that "are specifically exempted from disclosure by state or federal statute, such as §3101(c) of the Civil Practice Law and Rules concerning the work product of an attorney.

When the Personal Privacy Protection Law applies, it contains no exception to rights of access comparable or analogous to §87(2)(g) of the Freedom of Information Law. That provision authorizes an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

If, for example, an employee of the Town transmitted a record pertaining to you reflective of his or her opinion, the opinion may be withheld, but only if the Freedom of Information Law governs rights of access to the record. If the Personal Privacy Protection Law applies (because none of the exceptions appearing in §95 of that law would apply), that same record would be available to you.

Lastly, that an e-mail may have been transmitted from a person's home computer to a state agency would not necessarily indicate that the communication is not "inter-agency material." Again, the Freedom of Information Law defines the term "record" to include information in any physical form kept, held, filed, produced or reproduced by or *for* an agency. If a Town official acting in his capacity as a Town official transmitted a record to an agency or received a record from an agency, I believe that such records would constitute "inter-agency materials." It is reiterated, however, that if such records pertain to you, and if none of the exceptions appearing in §95 of the Personal Privacy Protection Law may be asserted, in my opinion, they must be made available to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Valerie A. Weaver

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15847

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

March 6, 2006

E-MAIL

TO: Brian Kidwell

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. Kidwell:

I have received your letter concerning a denial by the City Manager of the City of Ogdensburg for a copy of "a financial proposal from a local business threatened with loss of city services (sewer, water) if bills are not paid....because the city plans to sue the business for assets if it closes and the letter is part of the litigation background." You have sought an opinion concerning the propriety of the denial of access.

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

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

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

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public under the Freedom of Information Law. In short, if the record would be accessible if litigation was not a possibility, it would be just as accessible even though litigation may be or has been commenced.

In an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be forwarded to the City Manager.

I hope that I have been of assistance.

RJF:tt

cc: City Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1584

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March 6, 2006

Ms. Sarah Nicholas
[redacted]

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

Dear Ms. Nicholas:

We are in receipt of your January 6, 2006 request for an advisory opinion concerning application of the Freedom of Information Law in relation to responses received from the City of Long Beach providing as follows:

> "Please be advised that your request has been forwarded to the appropriate departments and I expect responses in the next three weeks. Kindly contact this office at that time to ascertain the status of your request."

In this regard, we offer the following comments.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation (i.e., a county, city, town, village, school district, etc.) 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, and when requests are accepted via email, an email address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized

> to make records or information available to the public from continuing to do so."

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

> "The records access officer is responsible for assuring that agency personnel...
>
> (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 must "coordinate" an agency's response to requests. Frequently the records access officer is an agency officer or employee who has familiarity with an agency's records. For example, the town clerk is designated as records access officer in the great majority of towns, for he or she, by law, is also the records management officer and the custodian of town records.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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 sum, unless there is a reasonable basis for delaying access on a regular basis, the policy that you described would, in our opinion, be inconsistent with the language of the Freedom of Information Law and its judicial interpretation.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Noreen O. Costello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15849

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 6, 2006

E-MAIL

TO: Richard Lockwood

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. Lockwood:

Thank you for sending a copy of your request made under the Freedom of Information Law. Having reviewed the request, I believe that I can ascertain the difficulty.

In short, the Freedom of Information Law pertains to existing records, and §89(3) states in relevant part that an agency is not required to create a record in response to a request. Similarly, while an agency may choose to supply information in response to questions, it is not required to do so.

You requested "Number of Orders of Protection granted in Cattaraugus County since 11/03" and "Number of times an officer was dispatched to seize weapons from the subject of an Order of Protection since 11/03". I would conjecture that the County maintains no record indicating the "number" of orders of protection granted or the "number" times an officer was dispatched to seize weapons for a particular purpose during a specific time period. If that is so, the County would not be required to review its records to create or tabulate a "number" in response to your request. As suggested previously, an agency would not be required to engage in an effort of that nature, for the request would not involve existing records, nor would it likely "reasonably describe" the records that would have to be located in order to tabulate a number.

I note that the regulations promulgated by the Committee on Open Government require that each agency designate one or more persons as "records access officer" (21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records and assuring that agency personnel:

> "Assist persons seeking records to identify the records sought, if necessary, and appropriate, indicate the manner in which the

records are filed, retrieved or generated to assist persons in reasonably describing records" [§1401.2(b)(2)].

I hope that I have been of assistance.

RJF:jm

cc: John Searles

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15850

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

March 6, 2006

Mr. Rodney Freeman
05-R-1346
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 facts presented in your correspondence.

Dear Mr. Freeman:

We are in receipt of your request for "an investigation" in regard to what your perceive to be a failure to comply with the Freedom of Information Law, the Freedom of Information Act, and the Privacy Act, by two attorneys who were assigned to represent you in a criminal matter. Please be advised that it is our opinion that neither the two attorneys nor their law firm would be subject to the above mentioned laws.

First, the New York State Freedom of Information Law is applicable only 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."

It is clear that a law firm is not an "agency" required to comply with the Freedom of Information Law.

Second, the federal Freedom of Information Act applies only to the records of federal agencies, and third, the Privacy Act, insofar as it pertains to the release of social security numbers, does not apply to records maintained by private law firms. Because these laws do not pertain to records maintained by private law firms. You must use other methods to obtain the desired records.

On behalf of the Committee on Open Government, we hope this is helpful to your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

FOIL-AO-15851

From: Robert Freeman
To: Richard J. Brickwedde
Date: 3/9/2006 3:49:39 PM
Subject: Re: DOL UIAB

I would conjecture that the agency is charging based on the State Administrative Procedure Act (SAPA). Subdivision (2) of §302 states in relevant part that: "Except when any statute provides otherwise, the agency is authorized to charge not more than its cost for the preparation and furnishing of such record or transcript or any part thereof, or the rate specified in the contract between the agency and a contractor if prepared by a private contractor."

I hope that this will be of assistance to you.

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

>>> "Richard J. Brickwedde" [redacted]> 3/9/2006 3:41:18 PM >>>
Dear Bob - I ordered a transcript of a DOL Unemployment Appeals Board Hearing. They charge $1.75 per page, but probably had to transcribe the hearing record. Does that take them out of the $.50 per page limit.

Best

Dick Brickwedde

Brickwedde Law Firm

One Park Place, Suite 400

300 S. State Street

Syracuse, NY 13202-2060

315-423-3302

rbrickwedde@brickwedde.com

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15852

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

March 10, 2006

Mr. Bashir Hameed
82-A-6313
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. Hameed:

We are in receipt of your request for an advisory opinion concerning the application of the Freedom of Information Law to a request made to the New York State Department of Correctional Services for a copy of a tape recording of a disciplinary proceeding, and records indicating names of guards present at certain points during your incarceration. In this regard, we offer the following comments.

First, a tape recording of the disciplinary hearing of which you were the subject, and during which you were present, in our view clearly falls within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

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

Based on the foregoing, when a correctional facility maintains a tape recording of a disciplinary hearing, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law, irrespective of the reason for which the recording was prepared.

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

our view, a tape recording of a hearing at which you were present, if it exists, is accessible to you as the subject of the hearing, for none of the grounds for denial would apply.

With respect to destruction of the recordings, we note that 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."

Second, and with regard to records which indicate the names of guards present at certain times during your incarceration and hospitalization, please note that the Freedom of Information Law applies to records, not information.

To the extent that there are records which indicate the information you seek, we note that the only exception that could potentially be cited with respect to information sought would be §87(2)(f). The cited provision states that an agency may withhold records or portions thereof when disclosure could "endanger the life or safety of any person." In our view, disclosure of the identities and assignments of correction officers would not in most cases endanger their lives or safety, particularly when they are requested following the completion of the employees' assignments.

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

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

On behalf of the Committee on Open Government, 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-15853

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

March 13, 2006

Mr. Bruce C. Flynn
[redacted]

Dear Mr. Flynn:

I have received your letter dated February 22, which reached this office on March 6 and is characterized as an appeal.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information law. The Committee is not empowered to determine appeals. The provision concerning the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

For your information, the person designated by the Division of State Police to determine appeals is William J. Callahan, Administrative Director.

Having reviewed your appeal, I note that you requested lists in several instances. Here I point out that the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a new record in response to a request.

You also requested a waiver or reduction of fees. Although the federal Freedom of Information Act includes fee waiver provisions, there are no such provisions in the New York Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Janet Mercer
To: planningsec@townofdover.us
Date: 3/15/2006 10:47:12 AM
Subject: Fees

As per your request - please note that while we do not have a written opinion addressing your particular question at this time, it is our opinion that because sending a record electronically does not involve a storage medium, no fee can be charged. E-mailing a copy of the meeting minutes, which are already maintained in .pdf format, involves the transmittal of a record, not the reproduction thereof.

We hope this is of assistance to you.

Camille S. Jobin-Davis
Assistant Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4157
FOIL-AO-1585S

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March 15, 2006

E-MAIL

TO: Shmuel Gerber

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. Gerber:

We are in receipt of your request for an advisory opinion concerning "secret balloting" and quorum requirements, specifically the following two questions: (1) whether the decision in Perez v. City University of New York [5 NY3d 522, 806 NYS2d 460 (2005)] is "a departure" from Smithson v. Ilion Housing Authority, [130 AD2d 965, 516 NYS2d 564 (4th Dept, 1987) *aff'd*, 72 NY2d 1034, 534 NYS2d 930 (1988)] with respect to secret balloting, and (2) whether bylaws, which could define a "quorum" of a public body at the City University of New York as a majority of the entire membership, are in keeping with the Open Meetings Law.

With regard to your question about the recent decision by the Court of Appeals in Perez, *supra*, by way of background, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although the Freedom of Information Law generally pertains to existing records and ordinarily does not require that a record be created or prepared [see §89(3)], an exception to that rule involves voting by agency members. Specifically, §87(3) of the Freedom of Information Law has long required that:

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

Stated differently, when a final vote is taken by members of an agency, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have

voted individually concerning particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, we 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."

In Perez, the primary issue was whether the Hostos Community College Senate and its Executive Committee were subject to the Open Meetings Law. Further, the Court considered whether secret ballots by the Collage Senate were prohibited by either the Open Meetings Law or the Freedom of Information Law. Based on the Court's finding that the College Senate is subject to both laws, the Court held that although there was no requirement pursuant to the Open Meetings Law to record an accounting of each participant's ballot, it would be impossible for the College Senate to maintain the requisite record of votes pursuant to the Freedom of Information Law, were the final vote of each member anonymous or secret. "Consequently," the Court ruled, "voting by the College Senate and the Executive Committee may not be conducted by secret ballot." Perez, 5 NY3d at 530, 806 NYS2d at 464.

In 1988 the Court affirmed an Appellate Division decision in which it was found that "[t]he use of a secret ballot for voting purposes was improper", and that the Freedom of Information Law requires "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967, 516 NYS 2d 564, 566 (4th Dept 1987), aff'd 72 NY 2d 1034, 534 NYS 2d 930 (1988)].

Based on Smithson and now Perez, it is clear that in order for an agency to comply with the Freedom of Information Law, a record must be prepared and maintained indicating how each member cast his or her vote. Disclosure of the record of votes represents the only means by which the public could know how its representatives asserted their authority. Ordinarily, a record of votes of the members will appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law, and in our opinion, so long as minutes indicate how each member cast his or her vote, the requirements of the Freedom of Information Law would be satisfied.

In addition to the above-stated declaration set forth in §100 of the Open Meetings Law, §106 specifically requires the following:

> 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.

Accordingly, while there is no provision in the Open Meetings Law which requires the keeping of a record of the vote by member, it is our opinion that the purpose and intent of the law are clear, and to the extent that a summary of a vote taken could include a record of each member's vote, we recommend that it should. The requirement, however, that a record be prepared indicating the manner in which the members voted is imposed by the Freedom of Information Law.

Lastly, as a general matter, we do not believe that the Open Meetings Law applies unless a quorum is present. Even when a meeting is scheduled and reasonable notice is given to all the members in a manner consistent with the requirements of §41 of the General Construction Law, but less than a majority attends, the gathering would not constitute a "meeting" and the public would have no right to attend. Section 41 of the General Construction Law, entitled "Quorum and majority", states in relevant part that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

The question which you pose is whether public bodies at the university "will be subject to a quorum (and voting) requirement of a majority of the entire membership, regardless of particular provisions set out in the various bylaws", and further, whether a college council or faculty senate with 200 members and/or a small student senate with 20 members would be public bodies.

In response, please note that it is not the size of the public body which dictates whether it would be subject to those laws. In this regard, as you may be aware, 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."

From our perspective, the university bylaws imposing a quorum requirement on meetings of public bodies which by their nature are subject to the Open Meetings Law, would have no impact on the application of the Open Meetings Law. Again, based on the statutory definition of "public body", such entities are subject to quorum requirements.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15856

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

March 15, 2006

E-MAIL

TO: Mike McAndrew

FROM: Camille S. 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. McAndrew:

We are in receipt of your January 30, 2006 request for an advisory opinion concerning the application of the Freedom of Information Law to a request made to the Department of Economic Development to inspect Part D of Empire Zone Business Annual Reports, which indicate dollar amounts of certain tax credits claimed or estimated to be claimed by a particular commercial entity.

The reports are completed by business entities that have applied for or have been certified for participation in the "Empire Zones" program, and you enclosed a copy of the form of a report. Our executive director has spoken with the Department's records access officer and Counsel. Based on his conversations with them, the terms of the Freedom of Information Law, and the judicial interpretation of that statute, 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.

It is emphasized that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals, the state's highest court, nearly thirty years ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any

> information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was found that:

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

Second, the key exception in the context of your inquiry is §87(2)(d), which permits an agency to withhold records or portions thereof that:

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

Therefore, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity.

From our perspective, in some circumstances, that exception might be properly asserted with respect to Part D, depending on the attendant facts.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

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

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

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

In our view, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would

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

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

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

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise...
>
> ...[A]s explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not

contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

Based on our discussions of Part D with representatives of the Department, it is unclear how the release of its content could be damaging to the firms. We note that the Court in Encore observed that the reasoning underlying 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).

It is our understanding that Part D may include information pertaining to real property. If a purchase is "projected", if it is part of the business plan or strategy of a firm, those portions of the form containing information regarding investments in real property might properly be withheld under §87(2)(d). On the other hand, if real property has been purchased, if such a transaction has been consummated, we believe that entries regarding investments in real property and real property tax credits would be accessible. In short, the purchase or sale of real property is not secret; records pertaining a transaction of that nature are accessible to any person at an office of a county clerk or a municipal assessor.

Lastly, it is our understanding that some of the information contained in Part D is included in an annual report prepared by the Department of Taxation and Finance, and that such report is specifically exempted from disclosure pursuant to a statute in the Tax Law. Nevertheless, the tax secrecy provisions apply to records maintained by the Department of Taxation and Finance, but not to other agencies.

It has been contended that other records reported to the IRS and the State Department of Taxation and Finance 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 our opinion, those statutes would not be applicable in this instance. In an effort to obtain expert advice on the matter, we contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue. We were 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, employer, or in this instance, the Department of Economic Development [see e.g., Stokwitz v. Naval Investigation Service, 831 F.2d 893 (1987)]. 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.

On behalf of the Committee on Open Government, we hope this is of assistance to you.

cc: William Osta
Lisa Bonacci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15857

41 State Street, Albany, New York 12231
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March 17, 2006

Hon. Catherine Gill
Town Clerk
Town of Milan
20 Wilcox Circle
Milan, NY 12571

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

Dear Ms. Gill:

I have received your letter in which you sought my opinion concerning a proposed resolution to be considered by the Milan Town Board concerning the "Application of FOIL to Town Board Members." From my perspective, the resolution is unnecessary, for it limits the exercise of common sense and discretion. Further, there are elements of the resolution that may be contrary to law. In this regard, I offer the following comments.

First, in my view, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. It has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of the Board or other official should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

As you are aware, there are numerous instances in which records are clearly public and readily accessible. In those instances, municipalities often disclose those records routinely and do not require that requests be made in writing. That kind of response is in my opinion fully consistent with statement of legislative intent that appears in §84 of the Freedom of Information Law, directing that state and local government agencies make records available "wherever and whenever feasible." The proposal would remove the flexibility and the ability to exercise judgment, particularly when dealing with records that are, by law, clearly available to the public.

One of the requirements in the proposed local law involves a provision stating that "individual Town Board members shall release no town record to any member of the general public, whether for review or copy, without obtaining a FOIL request, in whatever form, signed by the individual to whom records are released." I believe that there are several problems that relate to that requirement.

If a Board member has obtained records from the Town that are accessible under the Freedom of Information Law, that person, like any other member of the public, may do with the records as he or she sees fit. If that person wants to reproduce and distribute records available under the Freedom of Information Law, I believe that he or she may do so without any restriction or limitation, and in that circumstance, I do not believe that the Board member who obtained the records could be required to have others seek copies in writing.

In a related vein, in brief, when a Board member obtains records, unless the records are prohibited from being disclosed by a statute (an act of Congress or the State Legislature), I know of no provision that would preclude that person from redisclosing the records to a third party.

Lastly, as indicated earlier, it has been held that when records are accessible under the Freedom of Information Law, they are equally available to any person; the identity of a person seeking records is irrelevant when an agency determines rights of access. That being so, the only instance in my opinion in which a person may be required to identify him/herself when requesting records would involve the situation in which a person seeks records pertaining to him/herself that would be available only to that person. In that kind of situation, disclosure to the public at large would constitute "an unwarranted invasion of personal privacy" [see §§87(2)(b) and 89(2)(b)]. Stated differently, reasonable proof of one's identity may be sought when a person seeks records pertaining to him/herself, and when the records could be withheld from others on the ground that disclosure would result in an unwarranted invasion of that person's privacy [see §89(2)(c)].

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-15858

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March 17, 2006

Mr. Robert Temple
[redacted]

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

Dear Mr. Temple:

We are in receipt of your January 21, 2006 request for an advisory opinion concerning the application of the Freedom of Information Law to requests made to the New York City Police Department and the New York City Housing Authority Police Department.

You wrote that you have had difficulty obtaining records pertaining to your former employment with these agencies, in one case there was a delayed response and in the other a disregard of records which you are certain exist. In particular, you are concerned with records pertaining to an investigation conducted by Internal Affairs, although your request was broader, including all records pertaining to your employment. You request our advice "on the next course of action to force FOIL compliance on the NYPD and NYHPD."

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 grant or deny access to records. Nevertheless, in an effort to offer guidance, 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. 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.

To the extent that the Police Department has taken an inordinate amount of time to respond to what appears to be a relatively straightforward request, and then failed to abide by its self-imposed deadline, we are of the opinion that its actions are inconsistent with the Freedom of Information Law, and that the constructive denial of your request can be appealed. By not providing any grounds on which it relies for additional time to respond to you request, it is our opinion that the Department has constructively denied your request.

To the extent that the Housing Authority has failed to grant or deny access to records which you believe exist, we note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the

Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification. In the alternative, if the records exist and the Authority has failed to address them in its response to you, it is our opinion that it has constructively denied your request, and that you have the ability to appeal such denial.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Sgt. James Russo
Geneve Davis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4160
FOIL-AO-15859

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March 17, 2006

Mr. Ron Antini
Chairman
Concerned Taxpayers Assn. Of Granville
324 Dekalb Road
Granville, NY 12832

Ms. Florence Riegert
Co-Chairman
Concerned Taxpayers Assn. Of Granville
324 Dekalb Road
Granville, NY 12832

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

Dear Mr. Antini and Ms. Riegert:

We are in receipt of your request for an advisory opinion concerning availability of minutes, and the application of the Open Meetings Law to the preparation of minutes of a meeting of the Town of Granville Board of Assessment Review. Three months after the meeting, the Town Clerk indicated that the minutes include "the opening of the meeting and the closing," and that "a copy of the minutes, as yet has not been filed with the Town Clerk." To date, you are still awaiting production of such minutes. In this regard, we offer the following comments.

Section 106 of the Open Meetings Law provides direction concerning the contents of minutes and the time within which they must be prepared and disclosed. Specifically, that provision states that:

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

> which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, minutes must be prepared and made available within two weeks of meetings, and, at a minimum, subdivision (1) directs that minutes consist of a record or summary of motions, proposals, resolutions, action taken and the votes of the members. While it is unclear from the Clerk's description whether the minutes consist only of the opening and closing of the meeting, in our opinion, if that is an accurate statement, such an account would not be consistent with the provisions of the Open Meetings Law.

It is emphasized that the law requires that minutes be prepared and made available within two weeks, and 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.

Although you did not mention a tape recording of the meeting, we note that if the May 24, 2005 meeting was tape recorded, in our view, if it still exists, 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].

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt
cc: Hon. Jenny Martelle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1586

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March 17, 2006

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:

We are in receipt of your request for an advisory opinion concerning the application of the Freedom of Information Law to a request made to the City of Watervliet, after having received no written response to your requests for information. In this regard, we offer the following comments.

First, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information *per se*; rather it is a statute that may require agencies to disclose existing records. Similarly, §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request.

Second, whether records are accessible or not, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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, although these points are not dispositive as to when the City must respond to your request, we note that you may have more success with a particular request if you direct it to the Records Access Officer of the City, the individual required by law to be designated by the City as the coordinator of responses to all requests. We also note that the Federal Freedom of Information Act, which you cite as the basis for your request, only pertains to federal government entities, not municipalities. The law which would govern, were you to appeal the constructive denial of your request, is the Freedom of Information Law, as set forth in Article 6 of the New York Public Officers Law.

On behalf of the Committee on Open Government, we hope this is helpful to you.

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-15861

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 17, 2006

Mr. John Salvador, 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. Salvador:

In response to yours of January 23, 2006, please be advised that without further information, we can only conjecture as to the "form and content" of the basis on which the Town Attorney relied for his statement regarding an "unambiguous concurrence of Mr. Robert Freeman." It is likely that the attorney established a position through a telephone conversation with our office, or through research via our website, which contains relevant and consistent written advisory opinions. In any event, our opinion remains the same and is in keeping with the attorney's representation, that comparable sheets are not required to be made available to the public pursuant to the Freedom of Information Law.

The basis for our opinion is, as you note, the case of General Motors Corporation v. Town of Massena, 180 Misc.2d, 693 NYS2d 870 (New York County, 1999), 262 AD2d 1074 (1999), and we refer you to the enclosed previous advisory opinions, specifically AO-FOIL-15519 and AO-FOIL-13981, in addition to the advisory opinion which was prepared in response to your correspondence in January of this year. To the extent that you disagree with the Town's denial of access to such records on appeal, or the Town's inconsistency in this regard, the legal mechanism available to you is an Article 78 proceeding in Supreme Court.

We note your frustration with the Town's failure to disclose comparable sheets based on the Town Board's earlier resolution to make available certain comparable sheets and the doctrine of *stare decisis*. It is our understanding that the doctrine of *stare decisis* would apply only to rules or principles set forth in previous judicial decisions. Further, it is our opinion that a single resolution addressing the availability of certain comparable sheets would not constitute a judicial determination on the matter or dictate Town policy on the availability of comparable reports in general.

To the extent that you wish to be advised of "the procedure available for a citizen-taxpayer" to request an advisory opinion from this office, please note that we do not require that requests be made on a particular form; rather but issue opinions are prepared in response to written requests, such as those we have received from you, as time permits in the order in which they are received.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Town Board

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15862

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March 20, 2006

E-MAIL

TO: Jack Lotsof

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. Lotsof:

I have received your letter concerning a request for records made to the New York State Department of Health in January for which you "have not yet received any substantive reply."

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:tt

cc: Jake LoCicero

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15863

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

March 20, 2006

E-MAIL

TO: Robert W. Kuiken

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Kuiken:

I have received your letter in which you asked whether Village of Speculator officials "violate[d] election law as well as the Sunshine law."

In this regard, the advisory jurisdiction of the Committee on Open Government is limited to matters involving public access to government information, primarily in relation to the Freedom of Information and Open Meetings Laws. That being so, I cannot address an issue involving compliance with the Election Law.

With respect to the apparent failure to respond to a request made on February 28, although that issue was addressed in previous correspondence, it is reiterated 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).

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

cc: Village Board

There is
not a
FOIA-AO-15804

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4163
FOIL-AO-15865

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

March 21, 2006

E-MAIL

TO: Peter Golden

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. Golden:

We are in receipt of your request for an advisory opinion concerning whether members of a public body may discuss the performance of a contractor in a public meeting, or whether such discussion would be required to be conducted during an executive session. In this regard, because the Open Meetings Law is permissive, it does not require that discussions are conducted during executive session, but rather permits public bodies, under appropriate circumstances, to enter into executive session for specific purposes.

It is clear that a public body such as a Board of Education might justifiably consider the performance of a contractor in executive session under §105(1)(f) of the Open Meetings Law. That provision permits a public body to enter into executive session to discuss:

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

In short, even though the contract is public, a discussion of the employment history of a particular person or corporation, for example, could clearly be conducted during an executive session.

Again, however, even though a matter may be discussed in executive session, there is no requirement that it must be discussed in executive session. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, indicates that a public body "may" conduct an executive session only after having completed that procedure.

If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals, the state's highest court, that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15866

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

March 21, 2006 .

Ms. Pauline Ann Ausfeld
[redacted]

Dear Ms. Ausfeld:

I have received your letter in which you requested any information that this office maintains concerning you.

In this regard, the Committee on Open Government is authorized to provide advice concerning access to government information, primarily under the state's Freedom of Information Law. This office does not possess records generally and, as such, has no records concerning you.

If you believe that an entity of state or local government maintains the records of your interest, it is suggested that you direct a request to the "records access officer" at that agency. The records access officer has the duty of coordinating an agency's response to requests. You should provide sufficient detail in an effort to enable staff to locate the records of your interest.

I hope that I have been of assistance.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15867

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

March 21, 2006

E-MAIL

TO: Joseph Scarpena

FROM: Camille S. Jobin, 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. Scarpena:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request made to your former employer, a city police department. You indicate that one of the items you requested existed at the time you filed your request, but it is now missing. With respect to the obligation of police departments to maintain records for specific periods of time, we offer the following comments.

By way of background, Article 57-A of the Arts and Cultural Affairs Law, the "Local Government Records Law", deals with records management, and §57.17(1) defines "local government" to include:

> "...any county, city, town, village, school district, board of cooperative educational services, district corporation, public benefit corporation, public corporation, or other government created under state law that is not a state department, division, board, bureau, commission or other agency, heretofore or hereafter established by law."

For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include

> library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..." (emphasis added).

In view of the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. The provisions relating to the retention and disposal of records are carried out by the State Archives, which is a unit of the State Education Department. That being so, we believe that it is the duty of the police department to ensure that the records sought be maintained in a manner that gives effect to the requirements of the Local Government Records Law. Stated differently, because, due to their significance, the law requires that records must be kept, preserved and protected for a minimum number of years, the police department should, in our view, have the capacity to locate and retrieve the records of your interest and disclose them in accordance with the Freedom of Information Law.

Next, when an agency indicates that it cannot locate or does not maintain a record requested under the Freedom of Information Law, §89(3) enables the applicant for the record to seek a certification in which it is asserted by the agency "that it does not have possession of such record or that such record cannot be found after diligent search." In addition, while we are not suggesting that they apply, §89(8) of the Freedom of Information Law, which is Article Six of the Public Officers

Law, and §240.65 of the Penal Law deal with "unlawful prevention of public access to records." The latter states that:

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

From our 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. We 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.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15868

41 State Street, Albany, New York 12231
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March 21, 2006

Ms. Heidi Podnorszki
Adjuster
Independent Insurance Adjusters
P.O. Box 231
Amsterdam, NY 12010-0231

The staff of the Committee on 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. Podnorszki:

We are in receipt of your request for an advisory opinion concerning the $20.00 fee charged by the Saratoga Springs Fire Department for a copy of a one page fire incident report. It is our opinion that this fee is inconsistent with the provisions of the Freedom of Information Law, and in that regard, we offer the following comments.

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

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. Under the amendment, however, only an act of the State

Legislature, a statute, would in our view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, 226 AD 2d 339 (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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

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

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

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

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

In 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 Office of the Chief of the Saratoga Springs Fire Department and the City's records access officer. We hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Office of the Chief, Saratoga Springs Fire Department
Sheila Brooks, Assistant City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15869

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

March 24, 2006

Mr. Joe Diaz
[redacted]

The staff of the Committee 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. Diaz:

I have received your letter and the materials relating to it. As I understand the situation, in response to a request made to the Department of Correctional Services, you were granted access to certain records, but the Department denied access to a "directive."

In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In consideration of your request, several of the grounds for denial may be pertinent to an analysis of rights of access.

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

There is no question but that a directive constitutes intra-agency material that falls within the scope of §87(2)(g). However, due to its structure, that provision frequently requires substantial disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the record sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that it would be available, unless a different basis for denial 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 record in question includes descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the techniques or procedures contained in the record could be characterized as "non-routine", or that disclosure of each aspect of the record would result in the harmful effects of disclosure described above.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15870

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

March 24, 2006

Mr. Joseph D'Imperio
[redacted]

Dear Mr. Imperio:

I have received correspondence concerning a request made under the Freedom of Information Law to the Town of Patterson. In response, you were informed that "[D]ue to the large amount of research involved", the Town "will be able to provide the information requested some time in May."

In this regard, I offer the following comments.

First, since the response referred to "research", one of the issues may involve whether or the extent to which your request "reasonably described" the records sought as required by §89(3) of the Freedom of Information Law. It has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

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

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

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15871

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March 24, 2006

E-Mail

TO: Ms. Angela Magill

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. Magill:

I have received your letter concerning your ability to gain access to foster care records from Erie County.

In this regard, rights of access to the records in question are not governed by the Freedom of Information Law, but rather by a different statute. With regard to records maintained by a children's or youth facility, whether public or private, I believe that the applicable statute is §372 of the Social Services Law, which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4) of §372 states in relevant part that such records:

> "shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination or by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court or by a justice of the supreme court, or by a judge of the family court when such records are required for the trial of a proceeding in such court, after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information thus obtained without authorization so to do by the department, or by such judge or justice."

Based on the foregoing, I do not believe that records maintained by entities having duties relating to 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, by the County, Department of Social Services or, where appropriate, by successor of the Division for Youth, the NYS Office of Children and Family Services.

Under the circumstances, it is suggested that you contact the County Department of Social Services, explain your situation, and seek authorization to disclose as described in §372 of the Social Services Law.

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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March 24, 2006

Mr. Todd Elzey
[redacted]

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

Dear Mr. Elzey:

I have received your letter in which you sought guidance concerning the obligation of the Ontario County Area Transit System (CATS) to comply with the Freedom of Information Law.

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."

According to the Ontario County website, CATS is part of County government. That being so, I believe that its records 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
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March 24, 2006

E-Mail

TO: Ms. Sue 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 information presented in your correspondence.

Dear Ms. Fuller:

I have received your correspondence in which you asked whether "a homeowner need[s] to fill out a FOIL to view information on their own property, such as building plans."

In this regard, while agency officials may choose to accept and respond to verbal or informal requests, they may nonetheless require that requests for records be made in writing.

By way of background, the Freedom of Information Law is applicable to all government agency records, for §86(4) defines the term "record" expansively to mean:

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

Therefore, all agency records, even those that are clearly accessible to the public, fall within the scope of the Freedom of Information Law.

Section 89(3) of the Freedom of Information Law states, in brief, that an agency may require that a request for a record be made in writing. That is so, again, even when it is clear that records are accessible to the public. Notwithstanding the foregoing, however, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) specify that an agency may accept oral requests for records.

In sum, an agency may require that a request for any record must be made in writing, even though it may opt to accept and respond to oral requests.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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March 27, 2006

Mr. Anthony T. Martin
05-B-2777
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403-3600

Dear Mr. Martin:

I have received your letter in which you sought assistance in "pursuing a civil claim" concerning alleged failures to comply with the Freedom of Information Law.

In this regard, first, this office does not become involved in litigation and we cannot provide direct assistance.

Second, I point out that the Freedom of Information Law is applicable to agencies and that §86(3) defines the term "agency" to mean:

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

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 or to the federal agencies to which you referred in your letter.

When the Freedom of Information Law is applicable, requests should be made to an agency's "records access officer." The records access officer, according to the regulations promulgated by the Committee on Open Government (21 NYCRR §1401.2), has the duty of coordinating an agency's response to requests.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

From: Robert Freeman
To: Jill Warner
Date: 3/27/2006 1:32:28 PM
Subject: Re: Ques.

Hi - -

The provision, §1401.9 of the Committee's regulations, has stated since 1978 that "Each agency shall publicize by posting in a conspicuous location and/or by publication in a local newspaper of general circulation"....the "name, title, business address and business telephone numbers of the designated records access officers", as well as the right to appeal and the locations where records are available for inspection and copying.

Therefore, if notice to that effect has been published in a newspaper, there would be no obligation to post the information described above.. However, if that was not done, posting would be required.

Our regulations are available online, and you might want to review §1401.9.

I hope that this serves to clarify your understanding.
>>> "Jill Warner" <jill_warner@thruway.state.ny.us> 3/27/2006 12:50:18 PM >>>
Are we required under the amended FOI Law to post my name and Michael's name in the HQ lobby as well as the Division Lobbies?

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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March 27, 2006

E-MAIL

TO: Kathryn Burke

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, unless otherwise indicated.

Dear Ms. Burke:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to the proceedings of the SUNY Farmingdale Student Senate. Specifically, you inquire about your right to speak at a meeting of a public body, and whether elected members of the public body have the ability to ban a member of the public from attending future meetings. Prior to receiving your request, I spoke with the President of the Student Senate, who indicated her desire to conduct certain votes by secret ballot in the event she was not able to prevent the public from observing a particular vote. In this regard, we offer the following comments.

First, the Open Meetings Law is intended to open the deliberative process to the public and provide the right to know how public bodies reach their decisions. As stated in §100 of the Law, its Legislative Declaration:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

According to a decision by the Court of Appeals, New York State's highest court, an entity equivalent to the SUNY Farmingdale Student Senate, an association at a CUNY community college, was authorized to review budgets and allocate student activity fees and disbursements. Due to its ability to exercise authority of this nature, the court determined that the student government body constitutes a "public body" required to comply with the Open Meetings Law [Smith v. CUNY, 92 NY2d 707 (1999)]. It is our understanding that the Student Senate at SUNY Farmingdale performs similar functions.

Pursuant to §103 of the Open Meetings Law, meetings of public bodies must be held open to the general public. Accordingly, we believe that the SUNY Farmingdale Student Senate is clearly a public body subject to the Open Meetings Law.

Second, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body, such as the Student Senate, does not want to answer questions or permit the public to speak or otherwise participate at its meetings, we do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, we believe that it should do so based upon reasonable rules that treat members of the public equally.

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Education Law, §1709), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain students 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.

We note that there are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited. It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)].

In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

> "In a traditional public forum, like a street or park, the government may enforce a content-based exclusion only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n., 460 U.S. at 45. A designated or 'limited' public forum is public property 'that the state has opened for use by the public as a place for expressive activity.' Id. So long as the government retains the facility open for speech, it is bound by the same standards that apply to a traditional public forum. Thus, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 46."

In our view, a court would determine that a public body may limit the amount of time allotted to person who wishes to speak at a meeting, so long as the limitation is reasonable. Similarly, it is our view that the Student Senate may by policy or rule limit comments to matters involving Senate business or the operation of the Student Senate. In short, when a public body does permit the public to speak, we believe that it should do so based upon reasonable rules that treat members of the public equally.

From our perspective, any such rules could serve as a basis for preventing verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language or signs; similarly, we believe that the Student Senate could regulate movement on the part of those carrying signs or posters so as not to interfere with meetings or prevent those in attendance from observing or hearing the deliberative process.

A public body's rules pertaining to public participation typically indicate when, during a meeting (i.e., at the beginning or end of a meeting, for a limited period of time before or after an agenda item or other matter is discussed by a public body, etc.) those in attendance may speak. Most rules also limit the amount of time during which a member of the body may speak (i.e., no more than three minutes).

In sum, based on the foregoing, we believe that the Student Senate may establish rules concerning the conduct of those who attend its meetings, including the privilege of those in attendance to speak or participate to certain times, topics and duration.

With regard to the President's attempt to enter into a "voting session", asking all non-voting members to leave the room, we note that there is no provision in law for entering into a "voting session", and we do not believe the Senate has any authority to exclude the public from attendance at any such session.

Only under limited circumstances may a public body remove itself from an open meeting, and enter into an "executive session." By of background, the Open Meetings Law requires that a

procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

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

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

And, it has been held judicially that :

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807)"

In sum, it is reiterated that a public body may validly conduct an executive session only to discuss one or more of the subjects listed in §105(1) and that a motion to conduct an executive session must be sufficiently detailed to enable the public to know that there is a proper basis for entry into the closed session.

With regard to the issue of conducting votes in public, it has been found that the governing body of an entity similar to the Student Senate, a CUNY student government association, could not elect its officers by secret ballot vote (Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000).

In this regard, we direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

"Each agency shall maintain:

(a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually concerning particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, we believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration set forth above. 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)]. Most recently, the Court of Appeals confirmed that members of public bodies cannot vote by secret ballot [Perez v. City University of New York, 2005 Slip Opinion 08765, Nov. 17, 2005 ___NY3d ___].

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

cc: Taneeka Johnson

STATE OF NEW YORK
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March 28, 2006

Ms. Patty Villanova
[redacted]

Dear Ms. Villanova:

I have received your note indicating that the City of Peekskill failed to respond to your requests for records.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Joseph A. Stargiotti
Marcus Serrano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 28, 2006

Mr. Edward Schunk
[redacted]

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

Dear Mr. Schunk:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request made to the Town of Amherst for various documents. Specifically, you seek a copy of the Custom Lighting Services Street Light Business Plan prepared pursuant to contract between the Town of Amherst and Custom Lighting Services, and any and all analyses and/or estimates of cost to bring street lights up to legal standards by Custom Lighting Services, that are not included in the Plan.

Based on documentation which you submitted, the Town commissioned Custom Lighting Services "to assist the Town of Amherst in purchasing the streetlights present[ly] owned by Niagara Mohawk a/k/a National Grid" but indicated that "an agreement with Niagara Mohawk concerning the purchase of streetlights has not been finalized." Your request was denied based on §§87(2)(c) and (d) of the Freedom of Information Law. 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.

The Court of Appeals expressed and confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from that cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

The first provision upon which the Board relied to deny access, §87(2)(c), permits an agency to deny access to records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in that provision in our opinion is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers.

As 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 of those bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor a bid in a manner that provides him with an unfair advantage in the

bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied.

In a decision rendered more than twenty-five years ago, however, it was held that after the deadline for submission of bids or proposals has been reached and a contract has been awarded, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Conversely, the Court of Appeals sustained the assertion of §87(2)(c) in Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], in which the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

Based on our conversation, although the document which you seek is the product of the contract which was awarded by the Town to Custom Lighting Services, the purpose for which the contents of the Plan and any further costs analyses were developed was to assist the Town in negotiating a contract with Niagara Mohawk. Until the contract with Niagara Mohawk is finalized, those portions of the Plan which would in any way "impair" the ability of the Board to reach a fair and optimal agreement on behalf of the public would not be required to be made available. Upon finalization of the contract with Niagara Mohawk, of course, any impairment would essentially disappear. As indicated in Contracting Plumbers, supra, and confirmed in a case involving a request for a copy of a successful proposal following an award: "Once the contract was awarded...the terms of [the] RFP response could no longer be competitively sensitive" [Cross-Sound Ferry v. Department of Transportation, 219 AD2d 346, 634 NYS2d 575, 577 (1995)].

The second provision upon which the Board relied to deny access to the records, §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 our 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).

The ability to justify a denial of access subsequent to resolution of the contract with Niagara Mohawk would, in our opinion, be dependent on the degree of detail contained within the records, their specificity, the extent to which there is real competition, and the ability to demonstrate that disclosure would indeed cause substantial injury to Custom Lighting Service's competitive position. While it is possible that *some* aspects of those records might have been properly withheld, it is unlikely in our opinion that they may be justifiably withheld *in toto*.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Alan P. McCracken

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 29, 2006

Mr. Jack Boden
[redacted]

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

Dear Mr. Boden:

I have received your letters concerning your efforts in obtaining breakdowns of the Town of Marbletown budget. You requested records from the Supervisor and wrote that "he and he alone had all of the budget information on his computer and that his computer was not compatible with any others in the Town Hall." Further, although you requested a printout of the data, the Supervisor asked that you make an appointment to meet with him, for he indicated that "budget calculations are primarily a verbal collaborative process between the Supervisor, Accountant and Town Board..."

Based on the materials that you forwarded, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency, such as a town, is not required to create a record in response to a request. Therefore, if, for example, no breakdowns exist, the Town would not be required to prepare new records containing the information sought.

Second and most importantly in the context of the situation that you described, the Freedom of Information Law pertains to all agency records and §86(4) defines the term "record" expansively to mean:

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

Based upon the language quoted above, documentary materials need not be maintained on paper or in the physical possession of an agency to constitute agency records; so long as they are produced,

kept or filed for an agency, the law specifies and the courts have held that they constitute "agency records", even if they are maintained apart from an agency's premises.

In a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University pursuant to a contract were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. 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 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 sum, insofar as the Supervisor or any other Town official stores information relating to the performance of their duties electronically or on the paper, those materials would consist of "records" that fall within the coverage of the Freedom of Information Law.

Third, there is no reference in the Freedom of Information Law to materials characterized as draft, preliminary, as working papers or works in progress. Those items clearly constitute "records", and their content is the primary factor in determining the extent to which they must be disclosed.

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

The relevant provision in this instance is §87(2)(g). While that exception represents one of the grounds for denial of access, 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 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 of your interest, to the extent that they consist of numbers, "statistical or factual tabulations or data", must be made available.

Lastly, while the Supervisor may have physical custody of the records in question, I believe that they are in the legal custody of the Town Clerk. Section 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 the Clerk's legal custody. Additionally, consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

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...

(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..."

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. As part of that coordination, I believe that other Town officials and employees are required to cooperate with the records access officer in an effort to enable him or her to carry out his or her official duties.

It is my understanding that the Town Clerk is the records access officer for Marbletown. From my perspective, a failure to share the records with or to inform the Clerk of their existence may effectively preclude her from carrying out her duties as records management officer, as well as her responsibilities as records access officer for purposes of responding to requests under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Vincent C. Martello
Hon. Katherine A. Cairo Davis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 29, 2006

E-MAIL

TO: Tom Kackmeister

FROM: Camille S. 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. Kackmeister:

We are in receipt of your request for an advisory opinion concerning the application of the Freedom of Information Law to requests made to the Greece Central School District. You initially requested that the records be made available to you on a piecemeal basis, and the District initially estimated that it would respond in February of 2003. In this regard, we offer the following comments.

First, since your request was initiated in 2003, it is possible that the District considers the request to have been satisfied or that the request might have been misfiled. To the extent that the District has not yet responded, it is suggested that you submit a new request.

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

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

Third, it is likely that many of the records which you have requested should be made available to the public in their entirety. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 clearly must be disclosed under the Freedom of Information Law.

In analyzing the issue, the provision of greatest significance in our 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, we believe that a contract between a school district and an individual, like a collective bargaining agreement between a public employer and a public employee union, must be disclosed, for it is clearly relevant to the duties, terms and conditions reflective of the responsibilities of the parties.

With regard to your request that records be made available on a piecemeal basis, we point out that an agency, pursuant to §89(3) of the Freedom of Information Law, may require that a request be made in writing, even when records are clearly accessible to the public. This is not to suggest that an agency must require an applicant to seek records in writing; on the contrary, the regulations promulgated by the Committee on Open Government state that an agency "may make records available upon oral request" [21 NYCRR §1401.5(a)].

Most important in our view, every law, including the Freedom of Information Law, should be implemented in a manner that gives reasonable effect to its intent. To give reasonable effect to the intent of the Freedom of Information Law, we believe that an agency must grant access to records "wherever and whenever feasible." The phrase quoted in the preceding sentence appears in §84, the legislative declaration, which states in part that:

> "The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.
>
> "As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extent public accountability *wherever and whenever feasible*" (emphasis added).

From our perspective, if records are clearly available to the public under the Freedom of Information Law and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. Taking the time to appoint a new FOIL appeals officer, in our opinion, would not serve as reasonable basis for delaying a substantive response to your request.

In sum, insofar as the request involves records that are clearly public and readily retrievable, we believe that a delay in disclosure of as much as thirty days would be inconsistent with the intent of the law and its judicial construction.

We point out, too, that a school district's proposed budget, also known as its "estimated expenditures", must include details regarding the compensation paid to a superintendent and certain administrators. Subdivision (5) of §1716 of the Education Law states in relevant part that:

> "The board of education shall append to the statement of estimated expenditures a detailed statement of the total compensation to be paid to the superintendent of schools, and any assistant or associate superintendents of schools in the ensuing school year, including a delineation of the salary, annualized cost of benefits and any in-kind or other form of remuneration. The board shall also append a list of all other school administrators and supervisors, if any, whose annual salary will be eighty-five thousand dollars or more in the ensuing school year, with the title of their positions and annual salary identified..."

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 District.

CSJ:tt

cc: Records Access Officer, Greece Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15881

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March 29, 2006

Mr. Peter DeFelice
[redacted]

Dear Mr. DeFelice:

We are in receipt of your February 1, 2006 request for an advisory opinion concerning application of the Freedom of Information Law to a request made to the Town of Eastchester for financial records of Carf Caterers, Inc., a licensee with an exclusive contract to provide food and beverages for sale and consumption at a Town facility. Having reviewed the license agreement, it appears that rent is calculated by adding a base annual fee to a percentage of the caterer's gross receipts above a certain amount.

The Town has denied access to "the audit of gross receipts" pertaining to the caterer, citing §87(2)(d) of the Freedom of Information Law. From our perspective, it is likely that such a "blanket denial" is inconsistent with the language of the Freedom of Information Law and its judicial interpretation. While we are not able to answer your questions about the content of the records, we offer the following comments concerning the propriety of the Town's denial of access.

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 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, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency

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

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

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

The Town has relied on the exception set forth in §87(2)(d) to deny access. In our opinion, the extent to which it would serve as a valid basis for denial is questionable. 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..."

In our view, 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 our perspective, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" [(Encore College Bookstores, Inc. v.

Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

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

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise...
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing

confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421).

In our opinion, if certain assumptions are accurate, it may be difficult to justify a denial of the kind of information in which you are interested. It is assumed that prices for food and beverages are public, for any person could contact the caterer and inquire as to rates. If release of the audit would enable a recipient to know the total receipts or income of the caterer insofar as they contract with the Town, perhaps it could be contended that the income of the caterer could become known by competitors and that disclosure of those figures might be used by competitors in a manner that could cause competitive injury to the entity that is the subject of the figures. However, if it can be assumed that gross receipts for the Town's purposes represent only a portion of the caterer's business, those figures would not disclose the caterer's gross receipts or income. Other aspects of the caterer's business might involve revenue generated by services and goods provided in other venues. If income is generated by those other kinds of activities, gross receipts earned via operation of the Town facilities could not be used to ascertain the entire gross receipts of the caterer.

On the other hand, if the caterer has no income outside receipts generated at a Town facility, it may be that a denial of access is justified.

In short, while we are unaware of the degree of detail contained in the audit, if the assumptions described above are valid, the extent, if any, to which disclosure of the records in question would "cause substantial injury to the competitive position" of the caterer is questionable.

On behalf of the Committee on Open Government, we hope this is helpful to you. At your request, a copy of this opinion will be forwarded to Ms. Doherty and Mr. Berg.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Hon. Linda Doherty
Comptroller Berg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-15882

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March 29, 2006

Ms. Marna Lawrence
[redacted]

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

Dear Ms. Lawrence:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information and the Personal Privacy Protection Laws to a request made to the State University of New York. Based on the materials you have provided, SUNY has denied access to a summary of a meeting regarding renewal of your employment with SUNY as a visiting professor. It is our opinion that SUNY's responses to your requests are inconsistent with the Freedom of Information or the Personal Privacy Protection Laws. That being so, 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. 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.

The records which you have submitted indicate that the timeliness of SUNY's responses are not in keeping with the law. By refusing to interpret your January 31, 2006 letter in which you state "I am appealing Mr. Luntta's determination" as an appeal of the denial of your request, we believe that SUNY failed to respond to your appeal. Regardless of whether you mentioned the Personal Privacy Protection Law in your initial request, upon receipt of written requests, SUNY is bound by statutory provisions contained within both the Freedom of Information and Personal Privacy Protection Laws. While we do not recommend that you take legal action, it is our opinion that you have a right to do so.

Further, it is our opinion that SUNY should make the summary available to you in its entirety, based on the following analysis:

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

In consideration of the nature of the records sought, the provision of primary significance under that statute is §87(2)(g), which enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

The response by the Department's records access officer indicates that the records at issue were withheld in their entirety pursuant to §87(2)(g). In this regard, we point out that one of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

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

In short, that intra-agency material does not reflect a final agency policy or determination would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

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

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

In our view, insofar as the records at issue consist of recommendations, advice, opinions or constructive material, for example, they could be withheld under Freedom of Information Law; insofar as they consist of statistical or factual information, we believe that they must be disclosed, unless a separate exception is applicable.

Most importantly, since you requested records pertaining to yourself, however, the Personal Privacy Protection Law (Public Officers Law, Article 6-A) applies and the result would be different. The Freedom of Information Law deals with rights of access conferred upon the public generally; the Personal Privacy Protection Law deals with rights of access conferred upon an individual, a "data subject", to records pertaining to him or her. A "data subject" is "any natural person about whom personal information has been collected by an agency" [§92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

Rights conferred upon individuals by the Personal Privacy Protection Law are separate from those granted under the Freedom of Information Law. Under §95 of the Personal Privacy Protection Law, a data subject has the right to obtain from a state agency records pertaining to herself, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of that section or §96, which would deal with the privacy of others. It is our opinion that because none of the exceptions would apply, the summary should have been made available to you.

Finally, it appears SUNY's refusal to grant access to the summary is inconsistent with bylaws adopted by the Department of Theatre, College of Arts and Sciences, on May 6, 2004, which indicate that the Department will "follow procedures established by University regulations." Relevant Policies and Guidelines set forth in Administrative Procedures for the Preparation of Recommendations for Promotions and Continuing Appointment, indicate

> "The summary of the departmental/school meeting must be prepared by a member of the teaching faculty or professional staff other than the department chair or dean and approved by the department/school as a whole. The summary should indicate the date on which the minute was approved. The summary must be a separate document in the file (i.e., reports of department/school personnel committees or recommendations from a department chair or dean are not satisfactory substitutes).
>
> "The summary of discussion and the departmental/school vote must be given to the candidate before the case is forwarded to the next level of review."

As adopted by SUNY and the Department, these regulations appear to require SUNY to promulgate a summary of the discussion, separate from a record of the vote, and provide a copy to the professor who is the subject of review.

In our opinion, regardless of when the summary has been approved, it should be made available upon request to the subject of the review. In an effort to enhance understanding of and compliance with the law, a copy of this advisory opinion will be forwarded to Ms. Hengsterman and Mr. Luntta.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Stacey Hengsterman
Karl Luntta

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15883

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

March 30, 2006

E-Mail

TO: Fabien Royer

FROM: Camille S. Jobin-Davis, Assistant Director CJD

Dear Mr. Royer:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests for records pertaining to your son's mother. You have sought guidance concerning your ability to gain access to police reports and records pertaining to her from a county office of child protective services.

As we understand the matter, the New York Freedom of Information Law would not serve as a basis for obtaining the records of your interest from child protective services. However, we 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, we 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.

With regard to your request for access to arrest records pertaining to your son's mother, from our perspective, unless the records were sealed pursuant to law, the lack of responses by the police departments were inconsistent with law. In this regard, we offer the following comments.

First and most importantly, while the Freedom of Information Law is based upon a presumption of access, we 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 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.

Second, in our view, unless the arrest or booking records have been sealed pursuant to §§160.50 of 160.55 of the Criminal Procedure Law, they must be disclosed. Under §160.50, when criminal charges have been dismissed in favor of an accused, the records relating to the arrest ordinarily are sealed. Under §160.55, if a charge of a felony or misdemeanor is reduced to a violation, although the records relating to the event in possession of agencies, such as a police department or office of a district attorney, are sealed, they remain available from the court in which the matter was determined. We note, however, that the sealing requirement does not apply in the case of a charge of driving while impaired, and that a record of such an arrest is not sealed unless the charge is fully dismissed.

While arrest records are not specifically mentioned in the current Freedom of Information Law, the original Law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. In 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 Court of Appeals, the highest court in New York State, several years ago that, unless sealed under §160.50 of the Criminal Procedure Law, records of the arresting agency identifying those arrested, i.e., booking records, must

be disclosed [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)]. We point out that the decision rendered by the Court of Appeals dealt specifically with arrests for speeding.

Lastly, unless sealed, the records you seek would in our opinion be available in great measure, if not in their entirety. The only portions of such records that might be withheld, depending on the facts and circumstances, would involve the identities of witnesses, for example. If the identities of witnesses have not yet been disclosed or are not part of a public court record, those portions of the records might be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy pertaining to those persons.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:jm

STATE OF NEW YORK
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March 31, 2006

E-Mail

TO: Thomas S. Barger, Jr.

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. Barger:

I have received your letter in which you wrote that Westchester County "charges an annual access fee for online viewing of Public Land Records of $1089.00." You asked whether doing so is "allowable under FOIL."

In this regard, §87(1)(b)(iii) of the Freedom of Information Law deals with the fees that agencies may charge for reproducing records, and it contains two components. One deals with photocopies of records up to nine by fourteen inches, in which case, as you are aware, an agency may charge a maximum of twenty-five cents per photocopy. The other involves any other records, i.e., those larger than nine by fourteen inches or those that cannot be reproduced by means of photocopying, such as tape recordings or computer tapes or disks, in which case the fee is based on the "actual cost" of reproduction.

As I understand the situation, the fee does not involve the reproduction of records, but rather a service provided by the County in which the public is offered online access to records. From my perspective, there is nothing in the Freedom of Information Law that requires agencies to make records available online via the internet. When they choose to do so, they would be acting above and beyond the responsibilities imposed upon them by law, and in those cases, the provisions in the Freedom of Information Law pertaining to fees, in my view, do not apply.

Until the law is changed, I believe that the County's charge is permissible.

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

RJF:jm

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March 31, 2006

Mr. Bruce Greif
[redacted]

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

Dear Mr. Greif:

I have received your letter in which you asked how a village records access officer is selected and where a subject matter list is supposed to be maintained.

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 governing body of a public corporation, such as a village board of trustees, to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

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

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

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) upon locating the records, take one of the following actions:

(i) make records promptly available for inspection; or
(ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
(4) Upon request for copies of records:
(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the requester to copy those records..."

In short, the records access officer must "coordinate" an agency's response to requests.

With respect to the subject matter list, §87(3)(c) of the Freedom of Information Law merely requires that such a record be "maintained" by an agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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March 31, 2006

Mr. Peter DeFelice
[redacted]

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

Dear Mr. DeFelice:

I have received your letter concerning rights of access to "the time cards and payroll records" pertaining to firefighters in the Town of Eastchester.

It is noted at the outset that you referred to "rulings" rendered by this office. Please note that neither the Committee on Open Government nor its staff can render binding determinations or rulings. Rather, this office is authorized to provide advice and opinions relating to public access to government information, and the following comments should be considered advisory in nature.

With respect to your question, from my perspective, records reflective of payments to public employees, including those concerning payments for overtime, 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.

Although the Freedom of Information Law generally does not require that agencies maintain or prepare records [see §89(3)], an exception involves payroll information. Specifically, §87(3) of the Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

While §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Based upon the foregoing, it is clear in my view that records reflective of salaries of public employees must be prepared and made available. Similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records in my view would be relevant to the performance of one's official duties.

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

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

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-

> day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Linda Doherty

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 31, 2006

E-MAIL

TO: Mona Goodman

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. Goodman:

I have received your letter and the materials relating to it. You have requested an advisory opinion concerning the propriety of certain actions involving the Long Beach City Council.

You wrote that:

> "The new administration hired a new City Manager on 1/3/06. He is a retiree of the New York City Police Dept. and receives a pension. Then, on 1/22, the new administration placed a classified ad in the New York Times for a City Manager, seemingly as a procedural step in helping the retiree get a waiver from the State Civil Service Commission, so that he may collect his pension and his City Manager salary of $137,000."

You also transmitted a transcript of a City Council meeting involving an exchange between the City Council President, Mr. Remo, and Councilman Hennessey in which the latter sought answers to questions relating to the ad. The Council President indicated that the issues involved a "personnel matter" that should be discussed in executive session. Councilman Hennessey persisted and raised a series of questions as follows:

> "I'd like to know if Mr. Remo had any input into the placement of the ad, I'd like to know if any other members of the council had any input into the placement of the advertisement. I'd like to know where the purchasing agent gets the legal authority to take the lead on placing such an ad. I want to know how we paid for the ad, I want to know who authorized the payment of the ad. I would like to know whose

> idea it was in the first place to place the ad. I would like to know why Mr. Sofield and myself were excluded from the placement of the ad and why we had to find out with a phone call from somebody else that the ad was placed. I'd like to know who developed the criteria and I think that's very very important. The criterial for the ad is very very specific in that it requires two things, a master's degree in a government related field and police, I'm sorry, policing at the executive level. I'd like to know who had the authority to develop the criteria specifically. Who chose to put that in the ad and why that specific criteria was chosen. I'd like to know also with regards to the criteria including the police officer experience, why do we need that experience now as opposed to city planning, opposed to city financing, opposed to municipal law (not law enforcement) but municipal law and I'd also like to know why police officer experience is such a high importance in the advertisement especially when the city's major crime rate has dropped nearly 40% and the crime across the country is down, why is that issue more important than the other issues that the city is facing. I'd like to know if Mr. Laffey was in involved in any way shape or form in drafting or placing the ad for the position for which he holds."

In response, the Council President said that "It has to do with the hiring process" and reiterated that any discussion should occur during an executive session, for the issues constitute a personnel matter.

Later in the exchange, the Council President indicated that he would provide answers to the Councilman's questions in writing, but only after having received an "assurance" that "anything that will be discussed in executive session given to you in writing does not find its way into the public..."

From my perspective, the foregoing indicates that the Council President and perhaps Council members do not properly understand either the Open Meetings Law or the Freedom of Information Law. It is emphasized that the term "personnel" appears in neither of those statutes, and that the characterization of an issue as a "personnel matter" does not necessarily to lead to a conclusion that the matter is confidential. On the contrary, frequently discussions concerning personnel matters, for reasons to be described in the ensuing commentary, must be conducted in public. Similarly, there are numerous aspects of personnel records that must be disclosed to comply with the Freedom of Information Law.

By way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that the subject matter under consideration may properly be discussed during an executive session.

It is noted that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, 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 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.

Second, while one of the grounds for entry into executive session may relate to personnel matters, the language of that provision is precise. 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. 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 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 §105(1)(f), I believe that a discussion under that provision 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 personnel matter involves "the hiring process", as it was described by the Council President, rather than a "particular person", I do not believe that §105(1)(f) may be asserted to justify

holding an executive session. Further, having reviewed the questions raised by Councilman Hennessey that were quoted earlier, none, in my view, pertains to a particular person, and discussions of and answers to those questions must, in my opinion, occur in public to comply with law. I point out that even though an issue or an action taken might relate only to one employee, when that action would affect or serve as precedent in cases arising in the future pertaining to other persons in similar situations, there would be no basis for entry into executive session. In a decision involving different facts but in my opinion the same principle, it was held that the "personnel" exception for entry into executive session was not validly asserted. The Appellate Division, Second Department, determined that:

> "In relying on the exception contained in paragraph f, the town asserts that its decision 'applied to a particular person, the Appellant herein'. While the town board's decision certainly did affect petitioner, and indeed at the time the decision was made affected only him, the town board's decision was a policy decision to not extend insurance benefits to police officers on disability retirement. Presumably this policy decision will apply equally to all persons who enter into that class of retirees. Thus, it cannot be said that the purpose of the meeting was to discuss 'the medical, financial, credit or employment history of a particular person'" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

In sum, only to the extent that the matters considered by the City Council might have focused on a particular person in conjunction with one or more of the qualifying topics appearing in §105(1)(f) may an executive session properly be held.

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305).

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

Next, with respect to written responses to questions or any other documentary materials, the Freedom of Information Law governs rights of access. That statute is expansive in its coverage, for it pertains to all records of an agency, such as a city, 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."

In a case in which an agency claimed, in essence, that it could remove various documents from the coverage of the Freedom of Information Law, the Court of Appeals found that:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly

> defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

Based on the foregoing, it is clear in my opinion that any documents that may relate to the issue constitute agency records subject to whatever rights of access may exist under the Freedom of Information law.

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

A request for or promise of confidentiality is irrelevant in determining the extent to which City records may be withheld under the Freedom of Information Law. The Court of Appeals has held that a request for or a claim or promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available. In Washington Post v. Insurance Department [61 NY2d 557 (1984)], the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court of Appeals reversed a finding that the documents were not "records" subject to the Freedom of Information Law, thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Moreover, it was determined that:

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

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

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

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would

> accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

As suggested earlier, there is nothing in the Freedom of Information Law that deals specifically with personnel records or 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. Typically, two of the grounds for denial are relevant to an analysis of rights of access to personnel records.

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 an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, copies of this opinion will be forwarded to the Council President and the members of the Council to whom you referred.

I hope that I have been of assistance.

RJF:tt

cc: Hon. Leonard G. Remo
Hon. James P. Hennessey
Hon. Thomas R. Sofield, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 3, 2006

E-MAIL

TO: Howard Schuman

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. Schuman:

We have received your letter in which you questioned the propriety of a denial of access by the Town of Washington to drafts of a proposed wetlands ordinance. The Town contends that the drafts are "inter-office communication and it was attorney-client privilege[d]." Based on your information, the draft was submitted to the Town attorney, who returned it to the Town Board. The comments were used to prepare a revised draft at the meeting, which was then sent back to the attorney. In this regard, we offer the following comments.

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

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

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

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

Third, although §87(2)(g), the provision pertaining to inter-agency and intra-agency materials, potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

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

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

With regard to the Town's assertion that the materials are protected from disclosure pursuant to the attorney-client privilege, we note 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, we believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has 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 our 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, those portions of the records which reflect the attorney's legal advice or opinion 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. To the extent that the attorney's advice was disclosed during an open meeting and utilized to create another draft, however, it is likely that the privilege has been waived. In short, insofar as the content of the materials at issue were effectively disclosed during a meeting or meetings open to the public, we believe that they must be disclosed, for the ability to deny access would have been waived.

Finally, you question whether documents can be made available in electronic format, and whether a record is created or stored on a Board member's personal computer would have any impact on its availability. In this regard, we offer the following comments.

Most significantly, as indicated earlier by citing the definition of "record", documentary materials need not be in the physical possession of an agency, such as a town, 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.

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, we believe that electronic records must be treated in the same manner as traditional paper records for the purpose of their consideration under the Freedom of Information Law, it would therefore be irrelevant, in our opinion, whether the document was created or maintained on the individual's personal computer.

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in

> conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

Based upon the foregoing, a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or disk) to which data is transferred. If, for example, the duplication of the data involves a transfer of data from one disk to another, computer time is minimal, likely a matter of seconds. If that is so, the actual cost may involve only the cost of the disc.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

cc: Town Board

From: Robert Freeman
To: [redacted]
Date: 4/4/2006 2:29:20 PM
Subject: http://www.dos.state.ny.us/coog/ftext/f12302.htm

http://www.dos.state.ny.us/coog/ftext/f12302.htm

Dear Ms. Everett:

I have received your inquiry concerning a chief of police who informed you that motor vehicle accident reports are not accessible to "civilians." In short, according to the state's highest court, the chief is mistaken. Accident reports are available to anyone, irrespective of whether the person seeking the report is involved in any way with the event.

Attached is an advisory opinion that refers to the decision to which I alluded and a detailed explanation of rights of access to accident reports. You may print the opinion and do with it as you see fit.

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
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April 5, 2006

Mr. Edward Schunk
[redacted]

The staff of the Committee 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. Schunk:

This is a follow-up to our recent advisory opinion addressed to you pertaining to the Custom Lighting Services Street Light Business Plan prepared for the Town of Amherst. Based on our telephone conversation earlier today, the Plan was prepared, not for the Town to use in its negotiations with Niagara Mohawk over the purchase of streetlight equipment, but in order to determine the basis for contracting with Custom Lighting Services for maintenance of the Town's streetlights. Separately, part of Custom Lighting Services' contractual obligations involves assisting with negotiations between the Town and Niagara Mohawk. That being the case, 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 Court of Appeals expressed and confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

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

> *Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from that cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

The first provision upon which the Board relied to deny access, §87(2)(c), permits an agency to deny access to records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in that provision in our opinion is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers.

As 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 of those bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor a bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied.

In a decision rendered more than twenty-five years ago, however, it was held that after the deadline for submission of bids or proposals has been reached and a contract has been awarded, "the

successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Conversely, the Court of Appeals sustained the assertion of §87(2)(c) in Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], in which the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

Based on our conversation, the document which you seek, the Plan, serves as the basis for the contract awarded by the Town to Custom Lighting Services. As indicated in Contracting Plumbers, supra, and confirmed in a case involving a request for a copy of a successful proposal following an award: "Once the contract was awarded...the terms of [the] RFP response could no longer be competitively sensitive" [Cross-Sound Ferry v. Department of Transportation, 219 AD2d 346, 634 NYS2d 575, 577 (1995)].

The second provision upon which the Board relied to deny access to the records, §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 our 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).

The ability to justify a denial of access subsequent to resolution of the contract with Custom Lighting Services would, in our opinion, be dependent on the degree of detail contained within the record, their specificity, the extent to which there is real competition, and the ability to demonstrate that disclosure would indeed cause substantial injury to Custom Lighting Service's competitive position. While it is possible that *some* aspects of the Plan might have been properly withheld, it is unlikely in our opinion that the entire Plan may be justifiably withheld.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Alan P. McCracken

STATE OF NEW YORK
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April 5, 2006

Mr. Wallace S. Nolen
[redacted]

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

Dear Mr. Nolen:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for a copy of the "judgment docket book" maintained by the New York City Parking Violations Bureau. You wrote that in the past this record has been made available to you, however, you have recently been denied access on the ground that the information may be inaccurate. 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, from our perspective, it is likely that only one of the grounds for denial, §87(2)(g), is pertinent to an analysis of rights of access. Specifically, that provision permits an agency to withhold records that:

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

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

Further, from our perspective, records indicating the names of those found to have engaged in violations and whether they paid fines would be accessible.

We 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, we 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 our opinion be accessible.

With regard to whether an agency can charge for reproduction of a computer disc, we point out that §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 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.

Finally, with regard to your inquiry about the authority of an agency to request a pre-paid envelope, we note that there is nothing in the Freedom of Information Law that deals directly with the issue. Further, we know of no judicial decisions that have considered an imposition of a fee for postage.

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.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Gerald Koszer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15892

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April 5, 2006

Mr. George T. Marino
[redacted]

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

Dear Mr. Marino:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Town of Carlisle and the Schoharie County Department of Health. Based on the information you have provided, the Town has already provided all records responsive to your requests, and the County has indicated that it does not have the records you are requesting. In this regard, 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.

Further, we recommend that in the future you direct your request to the Records Access Officer of the agency from which you seek access to records. Responsible for "coordinating" responses to requests made under the Freedom of Information Law, one or more records access officers are required by law to be designated as such by each agency subject to Freedom of Information Law (see 21 NYCRR §1401.2).

Finally, with respect to any documents which you believe have been inadvertently omitted from the response to your requests, 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.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Town Clerk
Records Access Officer, Schoharie County Department of Health

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 6, 2006

E-Mail

TO: Kelly Jo Landers

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. Landers:

I have received your letter in which you asked the following question: "If a town councilman uses his private email address (not paid for by the town) to conduct business for the town, does that require those emails that pertain to material matters of town business constitute a public record subject to foil requests?"

From my perspective, email kept, transmitted or received by a town official in relation to the performance of his or her duties is subject to the Freedom of Information Law, even if the official "uses his private email address" and his own computer. 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 town officials In my view, when the officials communicate with one another in writing, in their capacities as government officials, 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)].

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, 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).

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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April 6, 2006

Mr. Emilio Colaiacovo
Associate Counsel
Erie County Water Authority
350 Ellicott Square Building
295 Main Street
Buffalo, NY 14203-2494

The staff of the Committee 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. Colaiacovo:

As you are aware, I have received your letter concerning a denial by the Department of Correctional Services of the Authority's request for records. Please accept my apologies for the delay in response.

In your capacity as Associate Counsel for the Erie County Water Authority, you sought personnel records concerning a former employee of the Department, "namely any job evaluations, determinations as discipline, or notices indicating termination..." Although some aspects of your request were granted, the records were withheld "relative to the evaluation of the employee's resourcefulness, quantity of work, work habits, relationship with others, quality of work, attendance and punctuality..."

You have sought an advisory opinion concerning rights of access to the records at issue. 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 of access, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §50-a of the Civil Rights Law, specifies that personnel records pertaining to correction officers that are used "to evaluate performance toward continued employment or promotion" cannot be disclosed, unless the subject

of the records consents to disclosure or a court orders disclosure. You indicated by phone that the subject of the records that you requested was not a correction officer. If that is so, §50-a would not apply or serve as a basis for a denial of access. Moreover, based on the holding in Village of Brockport v. Calandra [745 NYS2d 662, aff'd 305 AD2d 1030 (2003)], I do not believe that §50-a is applicable when a person no longer serves as a correction officer.

Second, assuming that the Freedom of Information Law is the governing statute, I note that 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.

In my view, 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].

With specific respect to employee evaluations, while their content 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.

Next, 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 or unsubstantiated charges 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)]. Therefore, to the extent that allegations were dismissed or were found to be without merit, I believe that those charges and records relating to them may be withheld.

You also referred to "attendance and punctuality." In that regard, it has been held that materials indicating the days and date of sick leave claimed by a particular employee must be disclosed [Capital Newspapers v. Burns,67 NY2d 562 (1986)]. Based on that decision and the preceding commentary, I believe that attendance records indicating time in or out and leave time accrued or used should be accessible. Again, those materials would be factual in nature and relate to the performance of one's duties.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 6, 2006

Mr. Andrew Kime
[redacted]

The staff of the Committee on 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. Kime:

We are in receipt of your request for an advisory opinion concerning the application of the Freedom of Information Law to requests made to the Gordon Heights Fire District. Specifically, you have requested access to or a copy of the sign-in book maintained by the Fire District in conjunction with a recent election, and documents reflecting the basis for postage spent in November and December.

With respect to your questions about the timing of the 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 specific question, whether "very little secretarial and clerical staff" constitutes a legitimate ground for failing to comply with the provisions of the law, we are of the opinion that it is not. Further, it is our opinion that the sign-in book for the election which you request and records reflecting postage spent should be made available to the public, and that there is likely no reasonable basis for taking more than five business days to disclose them.

We note initially that the voter list maintained by a county board of elections is based on "actual voting" by citizens; if a person fails to vote within a certain number of years, his or her name is removed from the list.

Second, §89(6) of the Freedom of Information Law states that:

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

As such, if records are available as a right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access [see e.g., Szikszay v. Buelow, 436 NYS 2d 558, 583 (1981)]. Relevant in this instance is §5-602 of the Election Law, entitled "Lists of registered voters; publication of", which states that voter

registration lists are public. Specifically, subdivision (1) of that statute provides in part that a "board of elections shall cause to be published a complete list of names and residence addresses of the registered voters for each election district over which the board has jurisdiction"; subdivision (2) states that "The board of elections shall cause a list to be published for each election district over which it has jurisdiction"; subdivision (3) requires that at least fifty copies of such lists shall be prepared, that at least five copies be kept "for public inspection at each main office or branch of the board", and that "other copies shall be sold at a charge not exceeding the cost of publication." As such, §5-602 of the Election Law directs that lists of registered voters be prepared, made available for inspection, and that copies shall be sold.

The provisions of the Election Law cited above pertain to voter registration lists prepared and maintained by county boards of elections. However, the information at issue would be available to any person, irrespective of the intended use, from the County Board of Elections and/or the Fire District. That being so, and in consideration of the direction provided in the Election Law, we do not believe that there is any basis for withholding the sign in sheet or list of those who voted in the Fire District. Since §5-602 of the Election Law confers unrestricted public rights of access to voter registration lists, the same or similar records maintained by a fire district should, in our view, be equally available.

Finally, 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. Because it is unlikely that there are any grounds for refusing to disclose records reflecting monies spent by the Fire District for postage, it is our opinion that the records, if they exist, should be made available.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Hon. Patricia A. Eddington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 10, 2006

Mr. Nahshon Jackson
95-A-2578
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403

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

Dear Mr. Jackson:

I have received your letter in which you referred to a request made to your facility under the Freedom of Information Law that has been "ignored."

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

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

From: Robert Freeman
To: [redacted]
Date: 4/10/2006 12:37:40 PM
Subject: Dear Mr. Rhodes:

Dear Mr. Rhodes:

Because the Freedom of Information Law includes all government agency records within its coverage, an agency may, in my view, charge a fee in any instance in which a copy of a record is requested.

I hope that the foregoing serves to clarify your understanding.

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

From: Robert Freeman
To: [redacted]
Date: 4/10/2006 12:34:48 PM
Subject: Dear Mr. Kearns:

Dear Mr. Kearns:

I have received your inquiry. In this regard, the State Technology Law provides that an agency may choose to accept a communication transmitted via email and respond by email, but that it is not required to do so.

It is suggested that you might phone the records access officer at the ESDC or the office of the person to whom an appeal is made in order to ascertain whether your appeal transmitted via email has been accepted as valid. The records access officers are: in Albany, Lisa Bonacci, (518)292-5120; in New York City, Antovk Pidejian, (212)803-3100.

I hope that I have been of assistance.

Robert J. Freeman
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From: Robert Freeman
To: [redacted]
Date: 4/10/2006 12:27:15 PM
Subject: Dear Ms. Levy:

Dear Ms. Levy:

I have received your inquiry concerning your right to gain access to records of a homeowners' association and to attend its meetings.

In this regard, the Freedom of Information Law pertains to rights of access to records maintained by entities of state and local government. Similarly, the Open Meetings Law is applicable to meetings of government bodies, i.e., town boards, city councils, boards of education, etc. Neither of those laws would apply to the records or meetings of a homeowners' association or other private entity.

It is suggested that you attempt to review the by-laws of the association. They would serve as the source of rights of access, should any such rights currently exist. If no rights of access are conferred in the by-laws, you and others might take the necessary steps to attempt to amend the by-laws to guarantee rights of access to records and meetings.

I hope that I have been of assistance.

Robert J. Freeman
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From: Robert Freeman
To: Connie Sowards
Date: 4/10/2006 2:20:40 PM
Subject: Re: Question

As in nearly all other situations, the content of the records and the effects of disclosure are the key elements in determining rights of access. I would conjecture that many of the records would be intra-agency materials, in which case, those portions consisting of opinions, advice, etc., may be withheld, while other portions consisting of statistical or factual information or which reflect a determination (i.e., the cause of a fire) would be accessible. If the fire was the result of arson, some of the records may have been compiled for law enforcement purposes, in which case, for example, the names of witnesses or informants might be withheld.

If you can find out more about the content of the records, I could likely offer better guidance.
>>> "Connie Sowards" [redacted]> 4/10/2006 1:56:01 PM >>>
Hi Bob,

Hope all is well.

I received a FOIL today from a law firm for our fire department. Their request was simply "permission to review and copy all records related to a particular fire that happened in 2002 in the village. I checked my pamphlet and fires are not addressed.

What is your opinion?

Connie Sowards

Village Administrator

Village of Seneca Falls

Seneca Falls,NY 13158

315-568-8107

Robert J. Freeman
Executive Director
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April 10, 2006

Professor William Crain
The City College of New York
North Academic Center, Rm. 7/120
Convent Avenue at 138th Street
New York, NY 10031

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

Dear Professor Crain:

We are in receipt of your request for an advisory opinion concerning a recent ruling by the Court of Appeals, Perez v. City University of New York [5 NY3d 522 (2005)], and its applicability to proceedings of the Faculty Senate or a Faculty Council of the City College of New York. Specifically, you asked whether such entities, "as true governing bodies", are required to "deliberate *and* vote in public." In this regard, we offer the following.

First, the Open Meetings Law is intended to open the deliberative process to the public and provide the right to know how public bodies reach their decisions. As stated in §100 of the Law, its Legislative Declaration:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Second, it has been found that the governing body of a CUNY student government association, could not elect its officers by secret ballot vote (Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000).

In this regard, we direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually concerning particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, we believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration set forth above. 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)].

Most recently, as you note, the Court of Appeals confirmed that members of public bodies cannot vote by secret ballot (Perez v. City University of New York, supra).

Third, while a public body may vote during an executive session, the Open Meetings Law requires the following two elements with respect to the executive session: (one) that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session, and (two) that minutes are to be prepared.

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.

Further, 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.

We point out that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From our 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)].

In sum, while a public body could vote during an executive session, from which the public is excluded, such a vote is required to be recorded in the minutes and made available to the public within one week of the executive session.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 10, 2006

E-MAIL

TO: Patty Croissant

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. Croissant:

I have received your inquiry concerning the obligation of "the Board of Commissioners of a public housing authority...to keep minutes from executive sessions."

In this regard, first, the governing bodies of all public authorities, including public housing authorities, constitute "public bodies" required to comply with the Open Meetings Law [see §102(2)].

Second, 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 a board reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. I note that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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April 10, 2006

E-Mail

TO: Doug Branches

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. Branches:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests which you intend to make to the New York City Police Department. In an attempt to address the various issues you raise, we offer the following.

First, the federal Freedom of Information Act (5 U.S.C. §552) applies only to agencies of the federal government. The New York Freedom of Information Law, Article 6 of the Public Officers 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, while the Police Department is an agency subject to the Freedom of Information Law, a courts is not. 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.

We point out that Judiciary Law, §255 provides that:

> "...[A] clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

Based on the foregoing, unless court records are sealed or exempted from disclosure by statute, we believe that they are accessible.

Further, with respect to your rights of access to photographs which may have been introduced into evidence at a trial, of likely relevance is a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, but in which it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 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.

Second, as a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception to that rule relates to one of the subjects 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 New York City Department of Records and Information Services (DORIS) 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 Department. Alternatively, you could request a copy of the schedule from DORIS.

A third issue of possible significance involves the extent to which your 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, 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 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 Department, to extent that the photographs sought can be located with reasonable effort, we believe that the request would meet the requirement of reasonably describing the records. On the other hand, if the photographs 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. It is possible that photographs falling within the scope of the request may be maintained

in several locations by a variety of units within the Department, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its photographs regarding a particular incident or location in a single file or perhaps in a series of files that can be readily located, it may be a simple task to retrieve the records. If, however, records are not maintained in that manner, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

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

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, 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.

Although in our opinion it is unlikely that the release of twenty and thirty year old photographs would result in the harmful effects enumerated above, if retrievable, the Department would have to review the photographs in order to make that determination.

On behalf of the Committee on Open Government we hope this is helpful to you.

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15904

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April 10, 2006

E-Mail

TO: Justin Dugard

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 Mr. Dugard:

We are in receipt of your request for an advisory opinion concerning application of the federal Freedom of Information Act to a request made to the Federal Bureau of Investigation for two mugshots, one of a deceased person and one of a person serving a life sentence in a Federal penitentiary. In this regard, we offer the following.

The federal Freedom of Information Act (5 U.S.C. §552) applies only to agencies of the federal government. The New York Freedom of Information Law, Article 6 of the Public Officers Law, does not apply to the Federal Bureau of Investigation. 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 advise with respect to the availability of records from the federal government.

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

The provision of greatest significance is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted invasion of privacy. From our perspective, that standard is flexible and is subject to a variety of interpretations. A reasonable person viewing a particular item of personally identifiable information might feel that disclosure

would be offensive, thereby resulting in an unwarranted invasion of personal privacy. An equally reasonable person might contend that disclosure of the same item would be appropriate or inoffensive, thereby resulting in what might be characterized as a permissible invasion of privacy.

With respect to the subjects of mugshots, it is assumed that individuals arrested could have been seen during judicial or other proceedings (i.e., arraignments) that were open to the public. If the public can be present at or view a proceeding during which an arrestee can be identified, it is difficult to envision how a photograph of that individual would constitute an unwarranted invasion of personal privacy.

While disclosure of mugshots might embarrass or humiliate the individuals in those photos, there are many instances in which records have been determined to be available even though they represent events or occurrences that may be embarrassing. When individuals are arrested and/or convicted, their names and other details about them are generally made available and may be published; when a public employee is the subject of disciplinary action, that person's name and other details about him or her are accessible to the public, irrespective of whether the individuals to whom the records pertain may be embarrassed by their actions [see e.g., Daily Gazette v. City of Schenectady, 673 2d 783, (A.D. 3 Dept. 1998); Anonymous v. Board of Education for Mexico Central School District, 616 NYS 2d 867 (1994); Scaccia v. NYS Division of State Police, 520 NYS 2d 309, 138 AD 2d 50 (1988); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981]. In short, in many cases, even though individuals may be embarrassed by particular aspects of their lives, that factor may have little or no bearing upon public rights of access to records concerning what might be considered as public events in which the public interest in disclosure outweighs an individual's interest in privacy.

In the only decision of which this office is aware that dealt with relevant facts, the court determined that the mugshots regarding all persons arrested must be disclosed, unless charges were dismissed in favor of the accused. In general, when charges against an accused are dismissed or terminated in favor of the accused, the records pertaining to the event become sealed under the Criminal Procedure Law, either §160.50 or §160.55. When the records are sealed, they are exempted from disclosure under the Freedom of Information Law [§87(2)(a)]. With respect to disclosure of the mugshots of those persons against whom the charges were pending in which the records had not been sealed, the court held that the agency could not meet its burden of proving that the privacy exception could validly be asserted [Planned Parenthood of Westchester, Inc. v. Town Board of the Town of Greenburgh, 587 NYS2d 461, 463 (1992)].

In sum, unless cases against individuals charged are considered to have been terminated in their favor, in which instances the mugshots would be sealed, we believe that mugshots maintained by New York State or local agencies must be disclosed pursuant to the Freedom of Information Law.

With respect to your question about where to direct your request, we note that a death certificate for a person who expired in Brooklyn is most likely maintained by the New York City Department of Health, Office of Vital Statistics, 125 Worth Street, New York, NY 10013 (212) 788-4500.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15905

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April 11, 2006

Supervisor John K. Coutant
Town of Esopus
P.O. Box 700
Port Ewen, NY 12466

The staff of the Committee on 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 Coutant:

As you are aware, I have received your correspondence concerning repeated requests and appeals by a resident of the Town of Esopus, Ms. Susan Boice Wicks, for "Esopus History Scrapbooks."

Ms. Wick wrote to this office last year and indicated that the scrapbooks were created by the Town Historian and maintained "at an offsite storage location" for the Town. Based on her rendition of the facts, it was advised that the scrapbooks were Town records subject to rights of access conferred by the Freedom of Information Law. It appears, however, that her understanding of the matter is inaccurate, for you wrote that the scrapbooks "are owned by the Klyne Esopus Museum" and are neither in the legal custody nor the possession of the Town.

Among the items that you enclosed is a letter addressed to you by the President of the Klyne Esopus Museum, who wrote that:

> "On information and belief, the Town of Esopus donated these scrapbooks to the Klyne Esopus Historical Society Museum completely and permanently to be part of the Museum's collection. We are not merely an 'off-site storage location' but rather the owners of these scrapbooks.
>
> "Further, it is standard museum practice not to accept items on a long term basis when they will not be a part of the museum's collection.
>
> "With this in mind, interested individuals may review the scrapbooks during our regularly scheduled business hours by appointment, as the books are secured."

In consideration of the foregoing, it appears that the scrapbooks might once have been in the possession of the Town, but that the Town relinquished custody of the scrapbooks to the Museum. If that is so, the scrapbooks would no longer constitute Town records, nor would they be subject to the Freedom of Information Law; rather, as indicated by the President of the Museum, they are now the property of the Museum.

I point out that most government records are not required to be kept permanently. Pursuant to §57.25 of the Arts and Cultural Affairs Law, the Commissioner of Education is authorized to develop "records retention and disposition schedules establishing minimum legal retention periods" for the various records maintained by local governments. The length of a retention period generally relates to the significance of the records. Minutes of meetings of town boards, for example, must be kept permanently; other records may be discarded or destroyed in lesser periods of time, and some may be destroyed or disposed of immediately. In the context of this situation, once the minimum retention period was reached, the Town could legally have destroyed or disposed of the scrapbooks. Instead, however, it appears that the scrapbooks were validly and legally donated to the Museum. Once that occurred, the scrapbooks were no longer Town records that fell within the scope of the Freedom of Information Law, but rather became the property of the new owner and beyond the Town's custody or control.

Lastly, the Klyne Esopus Museum is not governmental entity and, therefore, is not required to give effect to the Freedom of Information Law. Nevertheless, as indicated by the President, the scrapbooks may be reviewed by members of the public by appointment. That being so, it is difficult to understand the reason for Ms. Wick's repeated requests to the Town to review them. In an effort to clarify her understanding of the matter, a copy of this response will be sent to her.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan Boice Wick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15906

41 State Street, Albany, New York 12231
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April 11, 2006

Mr. H. Gene Samuel
[redacted]

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

Dear Mr. Samuel:

We are in receipt of your request for an advisory opinion concerning fees charged by the Penfield Central School District for copies of records which, although attached to copies of the agenda made available to Board members and discussed at Board meetings, are not made available to the public at the time of discussion. It is your understanding that extra copies of the attachments are made and later destroyed. In this regard, we offer the following.

First, 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 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.

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

Second, we know of no provision in the law which requires the production of a record to the public simultaneous to discussion of that record at an open meeting. More importantly, however, 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).

While the Freedom of Information Law does not require the disclosure of records to the public prior to or in conjunction with discussion of those records at an open meeting, in our view, making the records available at the time of the meeting would be consistent with the intent of the law.

On behalf of the Committee on Open Government, we hope this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4175
FOIL-AO-15907

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April 11, 2006

Mr. John F. 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:

We are in receipt of your letter of February 15, 2006, and have taken the liberty of construing it as a request for an advisory opinion concerning what was characterized as your appeal of a denial of access by the Valhalla Union Free School District. As the basis for your request for minutes of executive sessions, you referred to minutes of District meetings which indicate the appointment of a person for purposes of taking minutes during executive sessions. In an effort to enhance understanding of the Freedom of Information and Open Meetings Laws, we offer the following.

First, although §106(2) of the Open Meetings Law refers to minutes of executive session when action is taken, 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.

Second, if a public body reaches a consensus upon which it relies, we believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

Therefore, if the Board reaches a "consensus" that is reflective of its final determination of an issue, we believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. We 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.

Perhaps more importantly in your case, however, the Freedom of Information Law pertains only to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Again, to the extent that records which you have requested do not exist, the Freedom of Information Law does not apply. If there are no records, it is our opinion that the provisions for appealing a denial of access contained within the Freedom of Information Law would not apply to the circumstances of your request, for no records would have been withheld.

On behalf of Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Diane Ramos-Kelly

FOIL-AO-15908

From: Robert Freeman
To: Comments
Date: 4/13/2006 1:00:10 PM
Subject: Re: FOIL question

I believe that the fees sought to be charged by the City are contrary to law.

Section 87(1)(b)(iii) of the Freedom of Information Law specifies that an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches, unless is a different fee is prescribed by statute. The term "statute" has been construed in judicial decisions to mean an act of the State Legislature. I know of no statute that authorizes the City to charge a fee for copies in excess of twenty-five cents per photocopy. Moreover, the regulations promulgated by the Committee on Open Government, which have the force of law, specify that an agency cannot charge for search or personnel time (21 NYCRR §1401.8).

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

>>> "Comments" <Comments@WPNY.us> 4/13/2006 12:47:47 PM >>>
When requesting to view records on a particular piece of property from the White Plains Building Department, you must first pay a $20.00 records search fee. After paying the fee, you will be brought a folder with all of the various plans, permits, inspections, and reports that pertain to the property that you can then inspect in the office. I was under the impression that an agency could not levy this type of charge.

a copy of the form is attached.

..don

dhughes (at) WPNY.us
White Plains, NY

FOIL-AO-15909

From: Robert Freeman
To: [redacted]
Date: 4/17/2006 10:14:12 AM
Subject: Dear Mr. Lynde:

Dear Mr. Lynde:

In general, records relating to the assessment of real property are accessible to the public. There may be certain records that may be withheld (i.e., federal tax forms submitted by senior citizens to qualify for exemptions, detailed financial information submitted by commercial entities, etc.), but most are available to the public.

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-15910

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

April 17, 2006

E-Mail

TO: Kelly Jo 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 Ms. Landers:

I have received your letter in which you wrote that a member of the Town Board "uses his private email address (not paid for by the town) to conduct business for the town." You asked whether "those emails that pertain to material matters of town business constitute a public record subject to foil requests."

In my view, email communications made or received by a government officer or employee in relation to his or her governmental functions fall within the coverage of the Freedom of Information Law. 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 town, 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 constituents or others 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.

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)."

The definition of "record" 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.

Second, the foregoing is not intended to suggest that the email communications 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.

When there are either traditional paper or email communications between or among agency officials, those records 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, 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, when a Board member communicates with constituents, §87(2)(b) may be pertinent, for it authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Names, email addresses or other personal details, depending on the content of those communications, might properly be withheld based on considerations of privacy.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15911

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April 18, 2006

Ms. Patti Greenberg
[redacted]

Dear Ms. Greenberg:

I have received your letters of March 2 and March 12 in which you requested advice concerning your efforts in obtaining records from the Jericho Union Free School District.

Having reviewed the opinion addressed to you on December 19, as well as other materials forwarded to this office, I do not believe that I can significantly add to previous remarks.

You have continually requested copies of contracts and agreements between the District and Ms. Mary Marks. I do not understand why that is so, for in a letter of December 12, 2005 addressed to you by the Superintendent, he indicated that he was enclosing "copies of all executed agreements with Mary Marks." That being so, it appears that your request was satisfied.

In short, I cannot ascertain which records have been requested that have not been made available by the District. 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."

I note, too, that you referred in your letter to Article 6-A of the Public Officers Law. This is to reiterate that Article 6-A is the Personal Privacy Protection Law, and that Article 6-A does not apply to a school district or any other unit of local government.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Henry L. Grishman, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15912

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April 20, 2006

Hon. Nicol L. Baker
Town Clerk
Town of Vienna
P.O. Box 250
North Bay, NY 13123

The staff of the Committee on 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. Baker:

I have received your letter in which you expressed concern relating to your ability to perform your duties as records access officer. You wrote that when a request is made under the Freedom of Information Law and you do not have physical possession of the records:

> "...[you] have to go to other departments or the Supervisor to try to retrieve the information for the constituents. The Supervisor does not (or is willing) to make sure that I have the information that I need to respond to FOIL Requests."

You have sought guidance on the matter. From my perspective, several provisions of law are pertinent to the matter. In this regard, I offer the following comments.

First, §30(1) of the Town Law provides in relevant part that a town clerk "Shall have the custody of all the records, books and papers of the town." That being so, the clerk is the legal custodian of all town records, irrespective of where or by whom the records are kept.

Second, in a related vein, the Freedom of Information Law is expansive in its scope, for it pertains to all agency records and defines the term "record" in §86(4) to mean:

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

In view of the foregoing, any record maintained by or for a town constitutes a town record that falls within the coverage of the Freedom of Information Law.

Third, with respect to the implementation of the Freedom of Information Law, §89(1) of that statute requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

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

As such, the Town Board has the duty to promulgate rules and ensure compliance.

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

> "The records access officer is responsible for assuring that agency personnel...
>
> (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..."

Based on provisions quoted above, the records access officer must "coordinate" an agency's response to requests, and it appears that you have been designated by the Town Board as records access officer. As part of that coordination, I believe that other Town officials and employees are required to cooperate with you as the records access officer in an effort to enable you to carry out your official duties.

Next, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments.

For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

While others may have physical possession of town records, it is reiterated that §30(1) of the Town Law indicates that you are the legal custodian of all town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

A failure to share the records or to inform you, as Clerk, of their existence may effectively preclude you from carrying out your duties as records management officer, and as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if you do not know the existence or location of Town records, or cannot obtain them, you would lose the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law.

In an effort to enhance the members' understanding of the provisions referenced in the preceding commentary, as well as your functions and duties as Town Clerk, a copy of this response will be sent to the Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 20, 2006

E-Mail

TO: Phil Church

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. Church:

I have received your letter in which you asked whether certain information concerning a public employee's use of an agency's computer is accessible under the Freedom of Information Law. Specifically, you referred to "Internet cache folders, Internet History folders and Internet Favorites folders."

In this regard, while I am not an expert concerning information technology, it is my understanding that the items to which you referred involve the use of a computer and reflect the internet sites visited by the user of a computer as well as email communications, all of which are stored in a computer's hard drive.

I know of no judicial decision pertaining to the Freedom of Information Law that has focused on the issue that you raised. However, assuming that the data is maintained and can be retrieved or extracted by an agency, it appears that it would fall within the coverage of the Freedom of Information Law.

That statute pertains to all agency records and defines the term "record" expansively in §86(4) to mean:

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

From my perspective, when data stored in a computer can be brought up on a screen or printed, it constitutes a record that falls within the coverage of the Freedom of Information Law.

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

The record of internet use on an agency computer might be analogized to a public employee's use of an agency telephone and access to phone bills or logs indicating telephone usage.

Perhaps most pertinent under the circumstances 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].

Based on the decisions cited above, when a public officer or employee uses a telephone in the course of his or her official duties, bills or logs involving the use of the telephone would, in my opinion, be relevant to the performance of that person's duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to an officer or employee serving as a government officer or employee.

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended by some that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call. Nevertheless, when phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call. Therefore, an indication of the phone number would ordinarily disclose little or nothing

regarding the nature of a conversation. Further, even though the numbers may be disclosed, nothing in the Freedom of Information Law would require an individual to indicate the nature of a conversation.

Again, if my understanding of the nature of data in question is accurate, there would be no basis for withholding items involving visits to websites. However, if the data includes the contents of email, as in the case of any other records, their nature would serve as the means of determining rights of access. For instance, depending on the content of those records, it is possible that disclosure would constitute an unwarranted invasion of personal privacy with respect to persons other than the employees using the computer. Further, many email communications might consist of inter-agency or intra-agency materials falling within §87(2)(g). Based on the structure of that provision, those communications may be accessible or deniable, in whole or in part, based on their content.

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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April 20, 2006

Ms. Carrie L. Pena
[redacted]

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

Dear Ms. Pena:

I have received several letters from you in which you raised questions concerning access to various records.

First, you questioned the extent to which a contract awarded by the New York City Department of Homeless Services to operate and manage a shelter could be redacted.

Without knowledge of the content of document, I cannot offer specific guidance. However, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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).

Before a contract is awarded, §87(2)(c) is pertinent, for it 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.

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)].

The other exception that might be pertinent, §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, only those portions of a contract may be withheld which if disclosed would cause *substantial injury* to the competitive position of a commercial enterprise.

Second, you referred to a request for copies of "all prostitution complaints filed within New York County during January, February and March, 2003", except those that have been sealed pursuant to §160.50 of the Criminal Procedure Law. A possible issue involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the recordkeeping systems of the City, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing 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.

From my perspective, the content of those records would be the key factor in determining rights of access. Names of witnesses or others might be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see §87(2(b)]; if a matter is ongoing, disclosure might interfere with an investigation or judicial proceeding, and portions of records might properly be withheld under §87(2)(e). In short, an agency's duty to disclose may vary depending, again, on the contents of the records and the effects of disclosure.

I point out that when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there are often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the ground for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record. While portions of certain records must be disclosed but others may be redacted, an agency could seek payment of the requisite fee for photocopies, which would be made available after the deletion of certain details (see Van Ness v. Center for Animal Care and Control and the New York City Department of Health, Supreme Court, New York County, January 28, 1999).

Next, you asked whether you may gain access to "mental health evaluations" in possession of the Division of Parole. In this regard, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

I note that §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests for records of such "satellite units" by individuals pertaining to themselves may be directed to the

Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. It is also noted that under §33.16, there are certain limitations on rights of access.

Next, you asked whether rap sheets disclosed during a public judicial proceeding are accessible. Although the courts are not subject to the Freedom of Information Law, records maintained by state courts are generally available pursuant to other statutes (see e.g., Judiciary Law, §255). I am unfamiliar, however, with statutes concerning public access to federal court records.

Lastly, you questioned your right to obtain your rap sheet "where there is a 'non-disclosure agreement'." It is my understanding that a rap sheet must be made available by the Division of Criminal Justice Services to the subject of such record upon presentation of the required proof of identity.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 20, 2006

Ms. Marty Calderon
[redacted]

The staff of the Committee on 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. Calderon:

I have received your letter concerning what you described as denial of your request to inspect and copy "records of all traffic violations issued to drivers in Ossining, New York for the last five years." You wrote that you were also informed that you cannot inspect notices of claims filed against the Village.

In this regard, I offer the following comments.

First, I am unaware of the manner in which records of traffic violations are kept or filed. To the extent that they can be located and retrieved with reasonable effort, I believe that your request would "reasonably describe" the records as required by §89(3) of the Freedom of Information Law. On the other hand, insofar as those records are kept or filed with other records and locating them would involve a review of hundreds or perhaps thousands of records individually, it is likely that your request would not meet that standard and could be rejected [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Second, to the extent that the Village maintains records of traffic violations that 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. Four of the grounds for denial are in my opinion relevant in considering access to records involving traffic violations.

One of the grounds, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." While an allegation concerning an individual's conduct could in my view and under appropriate circumstances be

withheld as an unwarranted invasion of personal privacy, a finding of a violation which indicates that an individual has failed to comply with law, i.e., by means of the issuance of a traffic ticket, would in my opinion result in a permissible invasion of one's privacy when disclosed.

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

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

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

The issuance of citations or summonses indicates that a violation has been found. I believe that such a finding would consist of "factual" information accessible under §87(2)(g)(i), as well as a final agency determination accessible under §87(2)(g)(iii).

The remaining ground for denial of potential relevance is §87(2)(e), which states that an agency may withhold records that:

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

The language quoted above is based upon potentially harmful effects of disclosure and is generally cited in the context of criminal law enforcement. From my perspective, the effects of disclosure described in §87(2)(e) would rarely, if ever, arise in relation to traffic summonses. Further, it is questionable, in my view, whether the records in question could be characterized as having been "compiled for law enforcement purposes." Even if they could be so characterized, it does not appear that any of the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e) would arise by means of disclosure.

Lastly, in a case involving a request by a newspaper for speeding tickets issued by the State Police, the Court of Appeals held that the records must be disclosed, unless they were sealed pursuant to §160.50 of the Criminal Procedure Law [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)]. When records are sealed, they fall within §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute.

Based upon the foregoing, unless sealed under the Criminal Procedure Law, the records indicating traffic violations are in my view available under the Freedom of Information Law, for I do not believe that any of the grounds for denial could appropriately be asserted to withhold those records.

With respect to notices of claim, §50-f of the General Municipal Law provides specific direction concerning the maintenance of certain records pertaining to litigation. That provision states in relevant part that:

> "Wherever a notice of claim is required by section fifty-e of this chapter as a condition precedent to the commencement of an action or proceeding against a municipal corporation or any authority or commission heretofore or hereafter continued or created by the public authorities law, or any officer, appointee or employee thereof, every such municipal corporation and every such authority or commission shall make and keep a record, numbered consecutively and indexed alphabetically according to the name of the claimant, of each notice of claim filed in compliance with such requirement and of the disposition of the claim so noticed...The record shall be made and kept by an officer or employee designated for that purpose by the by the governing body of such municipal corporation or of such authority or commission...The record of each claim shall be preserved for a period of five years after the date of the final disposition thereof."

In my view, an index referring to notices of claim must be disclosed. It is possible, however, that portions of notices of claim themselves may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. That may be so when a notice of claim describes a medical condition or injury or contains an unsubstantiated allegation against a public officer or employee.

If a lawsuit is initiated after a notice of claim has been filed and records are publicly available from a court, I believe that copies of those records maintained by a municipal agency would be accessible under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Mary Ann Roberts

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not a
F-1596

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 20, 2006

E-Mail

TO: Kyle York

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. York:

As you are aware, I have received your letter concerning your efforts in gaining access to records from Saratoga County and the New York State Department of Environmental Conservation (DEC).

With respect to the County, you wrote that:

> "The Saratoga County Water Plan intends to draw water near a stretch of the Hudson with 8 acres of highly-contaminated river sediments. The toxic waste has been on the DEC registry of toxic sites since 1992 as site #557012. AND YET...the County DEIS refuses to include a map of the sediment in their appendix with 37 maps. I've spoken to the Project managers and even presented them with the detailed DEC map from 2001. The continue to refuse to inform the public of this serious problem."

It is unclear on the basis of your comments whether a "map of the sediment" exists or whether any such map that has been prepared has been excluded from the appendix to which you referred.

In this regard, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency need not create a record in response to a request. Therefore, if no map of the sediment exists, the Freedom of Information Law would not apply. If such a map exists, I believe that it would be accessible for the reasons that follow, irrespective of whether it is included in an appendix.

With respect to the other aspect of your letter, you wrote that:

> "...Niagara-Mohawk has been working to clean the site since signing Consent Order #A5-0277-91-11 back in 1992. My own research at DEC offices in Ray Brook shows a clean-up plan titled 'SFS for OU-2' was first presented on June 23, 2003. My Sources tell me the detailed remediation plan 'might be' released with two months. YET the DEC REFUSES to release the report. Even after a FOI request by myself and the City of Saratoga Springs...the DEC claims it is still a "Draft.' Yet the DEC documents from the FOI request show a steady stream of orders placed, vendors approved, and money spent.
>
> "The DECs 'June 2003 Draft Supplemental Feasibility Study Report' prepared by the engineering firm of Foster-Wheeler. It is CLEARLY a work-in-progress and NOT a 'Draft.'"

In regard to rights of access to a "map of the sediment" if it exists, as well as the "draft" referenced above, I offer the following comments.

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

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

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

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

Third, although §87(2)(g), the provision pertaining to inter-agency and intra-agency materials, potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals, the State's highest court, stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

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

I note that in another case that reached the Court of Appeals, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

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

In short, whether a record was prepared by agency employees or by a consultant, I believe that it could be characterized as intra-agency material. However, that it is a draft is not determinative of rights of access. Again, insofar as that record or the map in question consists of statistical or factual information, I believe that either must be disclosed.

I hope that I have been of assistance.

RJF:jm

cc: Records Access Officer, Saratoga County
Ruth Earl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4181
FOIL-AO-15918

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April 20, 2006

E-Mail

TO: Daina Beckman

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. Beckman:

As you are aware, I have received your letter concerning your right to gain access to records involving the expenditure of public monies by the Town of Hartsville.

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, records reflective of the expenditure of public monies are clearly accessible under the Freedom of Information Law.

In addition, those records must be maintained and made available pursuant to §29(4) of the Town Law. That provision states that the supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

Further, subdivision (1) of §119 of the Town Law states in part that:

> "When a claim has been audited by the town board of the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours."

You also referred to an executive session held by the Town Board "without any explanation except it was personal." Here I direct your attention to the Open Meetings Law, which applies to public bodies, such as town boards. Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that the subject of discussion may properly be considered in executive session. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Before an executive session may be held, a procedure must be accomplished in public. Specifically, the introductory language of §105(1) states that:

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

It is suggested that you review the provisions of the Open Meetings Law, which is available on our website, and particularly the grounds for entry into executive session.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 20, 2006

Mr. John F. D'Amico
[redacted]

The staff of the Committee on Open 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'Amico:

As you are aware, your letter of February 10 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions pertaining to the Freedom of Information Law.

Based in the correspondence sent to this office, you received no response to a request made under the Freedom of Information Law to the City of Mount Vernon in June of 2005. In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee, each agency, including the City of Mount Vernon, is required to designated on or more persons as "records access officer" (see 21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be directed to that person. Although I believe that the individual to whom your request was made should have responded directly or forwarded your request to the records access officer, it is suggested that you contact the Mayor's office, ascertain the name of the records access officer and resubmit the request.

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

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

> the approximate date, 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: Records Access Officer
Gerrie Post

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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April 20, 2006

Mr. Janusz Muszak
[redacted]

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

Dear Mr. Muszak:

I have received your letter in which you questioned the legality of a ten dollar fee imposed by the Department of Motor Vehicles for searching for records.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law limits the fee for photocopying to twenty-five cents per photocopy, unless a different fee is prescribed by statute. In this instance, §202(2) of the Vehicle and Traffic Law specifies that the Department of Motor Vehicles may charge the fee to which you referred. Paragraph (a) of §202(2) states that: "The fee for a search which is made manually by the department shall be ten dollars."

Based on the foregoing, it is clear that the search fee imposed by the Department of Motor Vehicles is authorized by statute.

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
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April 20, 2006

Mr. Thomas A. Bucaro
[redacted]

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

Dear Mr. Bucaro:

I have received your letter in which you sought an advisory opinion "on the question whether certain information contained in *curriculum vitae* of employees of City University of New York (CUNY) was wrongfully redacted under a Freedom of Information Law request."

You wrote that you requested the *curriculum vitae* pertaining to the records access officer at the College of Staten Island and two faculty members. In response to the request , the records were disclosed after the redaction of the following items:

> "Presentations, Awards, Editorials, Social Security numbers, Dates of birth, Home Addresses, Home-Telephone Numbers, and Personal References, Current Memberships in Professional Societies and Lectures and Papers Presented."

The denial of access to those items was sustained on appeal on the ground that disclosure would constitute "an unwarranted invasion of personal privacy", citing §89(2)(b)(i) and (v) of the Freedom of Information Law.

In my opinion, while the redaction of certain items was proper, other items cannot justifiably be withheld.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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." Section 89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, two of which were cited in the denial of your appeal.

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 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].

As you are aware, 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 consisting of information detailing one's public employment must be disclosed. The Committee's opinion stated that:

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

"The Opinion further stated that:

> "Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles

and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

From my perspective, social security numbers, dates of birth, home addresses and home telephone numbers may be properly withheld, for those items are unrelated to the performance of one's duties as an employee of a government agency. Further, §89(2)(b)(i) specifies that personal references may be withheld. The other items to which you referred, such as presentations, awards, memberships in professional societies, lectures and papers presented involve activities that clearly relate to one's duties and which in many instances are carried out during public events. That being so, I believe that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

In an effort to encourage CUNY to reconsider the determination of your appeal, a copy of this response will be forwarded to CUNY officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jeannette P. Woloszyn
Kathleen Galvez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15922

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April 20, 2006

Mr. Mark E. White
[redacted]

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

Dear Mr. White:

I have received your correspondence concerning an unanswered request made pursuant to the Freedom of Information Law to the Village of Hoosick Falls the records sought appear to relate to an incident involving you and the Hoosick Falls 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, 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, without knowledge of the nature of the incident to which the records relate, I can not offer specific guidance. However, insofar as there are records falling within the scope of your request, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested or the effects of their disclosure, I am unaware of the extent to which they may be withheld. 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 blanket 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

cc: Hon. Laura Reynolds
Chief Robert Whalen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15923

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April 20, 2006

Ms. Kathy Barrans
Special Projects Producer
WNYT TV
P.O. Box 4035
Albany, NY 12204

The staff of the Committee on 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. Barrans:

I have received materials from you concerning the obligations of the Department of Correctional Services in response to a request made pursuant to the Freedom of Information Law.

By way of background, in an effort to learn of convicted felons who acquire hunting licenses, despite a law forbidding them from owning or carrying firearms, on January 5, you requested a database pertaining to convicted felons who have been paroled from the Department of Correctional Services. The receipt of your request was acknowledged the following day, and you were informed that you could expect a response by February 6. On February 17, you were notified that two computer tapes containing the requested data had been prepared and would be made available upon payment of eighty dollars. You paid the fee and received the tapes.

The data was stored in "cartridges that appear to be from the 80's" and were unintelligible and could not be read. Having contacted representatives of Intel, the manufacturer of the cartridges:

> "...they said the Dept. Of Corrections probably gave these to me because their data is probably on a data base that uses these - they also said they have no idea why they couldn't download it to a disk or a floppy, they believe it would have been easy enough. They said the only way to read the tape is to find a computing service bureau that has the ability to read an IBM mainframe 3480 tape cartridge. They are becoming obsolete...
>
> " They said they can't believe the state gave these to me. They said they are at least ten to 15 years old."

When you contacted the Department to ask whether the data can be made available on a disk that renders it readable, you were told that "they can make a disk but...won't", and that there is no

obligation to "create different formats." You contacted me to discuss the matter and then the Department's assistant to the public information officer, and described your conversation as follows:

> "I told him what Bob said about case law saying that if they can make a disk and I'm willing to pay, then they have to do it. He said then that the information is available on their website. I asked how to access it. He didn't know but said if our IT guys were really good they might be able to figure it out."

In this regard, I offer the following comments.

First, the Freedom of Information Law has been construed expansively in relation to matters involving records stored electronically. As you are likely 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 disk. 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 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, the courts have directed that an agency must follow that course of action.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

In another decision which cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

In short, assuming that the Department is able to transfer the requested data to a storage medium usable to you and you are willing to pay the requisite fee, based on judicial decisions, the Department is required to do so.

Second, because the cartridges made available to you are, according to the manufacturer, obsolete, it would be reasonable in my view for the Department to refund your payment of eighty dollars and calculate the fee for data transferred to disks based on §87(1)(b)(iii) of the Freedom of Information Law. That provision authorizes an agency to assess a fee for the copying of records by means other than photocopying, based on the actual cost of reproduction.

Lastly, the delay that you experienced, in my opinion, reflected inconsistency with the Freedom of Information Law as recently amended. The statute provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

> 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Darren Ayotte
Chad Powell
Anne Marie McGrath

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15924

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April 20, 2006

Mr. Gene D. Mentzer
[redacted]

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

Dear Mr. Mentzer:

I have received your letter in which you asked that I "investigate the response by the NYS Teachers' Retirement System (NYSTRS) to [your] Freedom of Information Law request of January 17, 2006 for public information concerning pensions for 38 retired Wappingers Central School District (WCSD) teachers." You added that the teachers had "effective retirement dates in July and August of 2005." The request involves "Service Credit (Years-Months), Final Average Salary (FAS), Number of Years on which FAS was based, and Maximum Monthly Retirement Allowance" pertaining to the thirty-eight teachers.

In response to your request, the records access officer for the Teachers Retirement System wrote that:

> "The processing of retirement applications of each of the 38 individuals on your list is not yet complete. Therefore, I cannot provide you with the information you seek at this time.
>
> "NYSTRS typically requires nine to 12 months to fully process a retirement application. To that end, the retirement applications of those individuals you inquired about will not be complete until between March 31-June 30, 2006."

In consideration of the response, I point out that the Freedom of Information Law pertains to existing records and that an agency is not required to create a record that it does not maintain [see §89(3)]. As I understand the records access officer's response, the records sought had not been prepared. If that is so, the Retirement System would not have the ability to grant your request.

In short, when information requested does not yet exist in the form of a record or records, the Freedom of Information Law does not apply, and that appears to have been so in the context of your request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Stephen Saland
Hon. Joel Miller

FOIL-AO-15925

From: Robert Freeman
To: Debra Cohen, Esq.
Date: 4/20/2006 8:51:20 AM
Subject: Re: [FOI-L] Computerized records

Hi -

First of all, the twenty-five cent fee pertains to photocopies; it does not apply when a page is printed out. The fee in that and all other instances in which records are reproduced by means other than photocopying is based on the actual cost of reproduction (in this context, likely computer time, paper and ink), which would be far less than twenty-five cents per photocopy. Second, based on case law, if an agency has the ability to transfer records to a computer tape or disk, it is required to do so [see Brownstone Publishers, Inc. v. NYC Dept. of Buildings, 550 NYS2d 564, aff'd 166 AD2d 294 (1990)].

I hope that the foregoing will be useful.
>>> "Debra Cohen, Esq." [redacted] > 4/19/2006 3:20:21 PM >>>
Your thoughts would be appreciated for the following: A member of the public has requested certain records from the police department that are maintained on a computerized database. Rather than have the agency individually print each record (estimated to be about 900) and charge him the 25 cents per page allowed by New York law, he would like the records downloaded on to a disk that he will provide. Assuming this is technologically possible, less burdensome on the agency, and less costly for the citizen can the agency "reasonably" refuse this request and insist on printing out the records and charging him accordingly?

Debra Cohen, Esq.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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FOIL-AO-15926

From: Robert Freeman
To: [redacted]
Date: 4/20/2006 11:14:35 AM
Subject: Re: Fwd: FOIL Request From The E-Accountability Foundation

I have received your letter concerning the ability of the New York City Department of Education to review and/or confiscate personal notes that you prepared while reviewing records made available to you pursuant to the Freedom of Information Law.

In short, government agencies are subject to the Freedom of Information Law; private indiduals are not government agencies and are not required to comply with that law. Further, from my perspective, your notes are your personal property, and the Department would have no right either to review or take possession of your property.

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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>>> [redacted] > 4/20/2006 9:40:56 AM >>>
Dear Mr. Freeman,

I request an expedited verbal opinion on the following Freedom of Information request and incident. Please call me at 212-794-8902 as soon as possible.

On friday,April 14, 2006 I made an appointment with Ms. Mishea Ashton of the NYC DOE Office of New Schools, to go over the charter application of the Ross Global Academy Charter School at Tweed at 2 o'clock on April 18.

On tuesday, April 18, 2006 at 2PM I arrived at Tweed, ms. Ashton met me downstairs, and subsequently took me upstairs to her office. She gave me a table in the corner, upon which she placed the 1919 pages she had received back from NYSED of the Ross charter application, and told me that all charter applications were that long and to please let me know if there was anything that I needed, and she went to her desk.

I looked over the documents and jotted down on my pad the names of the Board of Trustees as well as relevant sections of the Charter School Act of 1998 and other information on the 501 (C) 3 (Ross Institute and Ross Global Academy Charter School).

At approximately 5PM Ms. Ashton came over to me and told me that she had to take all my notes and look at them. I asked why. She told me that there was private information in the documents and she had to make sure I had not copied any information down. as a long-time admirerer of your work, and the FOIL law, I have some knowledge of what is private information and what is not, and I believed that I had no private information in my notes, so I gave her my pad. I did not want to dispute her assessment at the time, and she told me that I had to give all my notes to her. She removed two pages: the list of

From: Robert Freeman
To: [redacted]
Date: 4/21/2006 2:29:41 PM
Subject: Dear Mr. Petrucci:

Dear Mr. Petrucci:

For purposes of clarification, I would like to stress that the State Technology Law provides that an agency **may** accept a communication, such as a request made under the Freedom of Information Law, via email or fax, but that it is **not required** to do so. Similarly, an agency may choose to respond by email or fax, but again, it is not required to do so.

I hope that the foregoing serves to clarify your understanding of agencies' obligations in relation to the Freedom of Information Law.

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

From: Robert Freeman
To: CC
Date: 4/21/2006 10:36:41 AM
Subject: Re: Dear Mr. Caesar:

Dear Mr. Caesar:

The only entity that can compel an agency to comply with the Freedom of Information Law is a court. To challenge an agency's action, an initial request must be denied, the applicant must appeal the denial to the head of the agency or that person's designee, and if the appeal is denied, the applicant may initiate a proceeding under Article 78 of the Civil Practice Law and Rules in the county in which the denial of access occurred. An Article 78 proceeding must be initiated within four months of an agency's final determination to deny access.

I know of no organization that represents individuals in court for free in an effort to gain access to government records.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Website - www.dos.state.ny.us/coog/coogwww.html

>>> "CC" [redacted] 4/21/2006 4:40:02 AM >>>
Mr. Freeman,

Thank you for your response.

??

I understand (I think) the regulation and opinion. I am trying to get them to comply.

I feel they are not satisfying the regulation.

Can you refer me to any organization that accepts a complaint about their lack of responsiveness?

Perhaps they can acquire the information I cannot.

Chris Caesar .

PS I am not the bad guy. I would like to pack my tent up but it isn't that simple. Always nice when I

can find someone who cares.
----- Original Message -----
From: "Robert Freeman" <RFreeman@dos.state.ny.us>
To: <amber111@earthlink.net>
Sent: Thursday, April 20, 2006 4:53 PM
Subject: Dear Mr. Caesar:

> Dear Mr. Caesar:
>
> I have received your recent communication. Having reviewed the advisory
> opinion previously prepared at your request in relation to the same
> matter, I do not believe that I can add anything of substance to the
> remarks offered in that opinion.
>
> 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-15929

41 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 21, 2006

Mr. Janusz Muszak
[redacted]

Dear Mr. Muszak:

I have received your letter in which you wrote as follows:

> "Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby ask that you provide the information on how the citizen of the New York State could initiate a "Judicial Review" of violations of the Freedom of Information Law."

Although I have chosen to respond within a day of the receipt of your letter, I do not believe that it may be characterized as a request made pursuant to the Freedom of Information Law.

Please note that the title of the Freedom of Information Law may be somewhat misleading, for that statute does not require the disclosure of information *per se*, nor does it require government agencies to supply information in response to questions. Rather, that law pertains to requests for existing records and agencies' obligations to respond to those requests. You have sought information rather than a record, but as a service to you, I will offer information responsive to your question.

When a request is made to an agency and the request is denied, the person denied access has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

If the appeal is denied, the person denied access may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [see §89(4)(b)]. Such a proceeding may be initiated only after an appeal is denied in writing or due to a failure to respond to the appeal within the statutory time. Stated differently, the person denied access must exhaust his or her administrative before initiating a judicial proceeding. He or she cannot initiate such a proceeding following an initial denial of access by an agency; that person must appeal, and have the appeal denied to do so.

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4183
FOIL-AO-15930

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

April 24, 2006

Ms. Rebecca H. Albright
[redacted]

The staff of the Committee 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. Albright:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information and Open Meetings Laws to Niagara County Head Start, of which you are a member of the Board of Directors. You wrote that

> "Niagara County Head Start is a non-profit agency that administers a Federal Grant for the purpose of providing Head Start programming for needy children in Niagara County New York. The agency is in no way connected to Niagara County Government, however it was many years ago before becoming incorporated. Federal funds are granted to Niagara County Head Start for the sole purpose of administering and providing the Head Start program in Niagara County."

Further, you wrote that

> "...minutes and agendas are not made available to the staff of the agency or parents of the children in the program, and staff have been directly told that they may not attend meetings of Policy Council or Board of Directors. I am very uncomfortable with both of these practices and would use a letter from you to strongly advise the Executive Director to make the appropriate changes."

From our perspective, it is not entirely clear whether Niagara County Head Start is subject to the requirements of the Freedom of Information Law, however, we have reason to believe that Niagara is required to disclose its records, with exceptions.

By way of background, the New York 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 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."

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government. Although it appears that Head Start performs a governmental function, it is questionable whether it constitutes a "governmental entity" or, therefore, is an agency subject to the Freedom of Information Law.

It is also our understanding that Head Start programs are created by means of the authority conferred by the federal government, pursuant to updated provisions of the Economic Opportunity Act of 1964. Located within Title 42 of the United States Code, §9831 of Chapter 105, sets forth the purposes and parameters for Head Start programs as follows:

> "to promote school readiness by enhancing the social and cognitive development of low-income children through the provision, to low-income children and their families, of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, ..." (§9831).

The Secretary of Health and Human Services is authorized under this federal law to designate any local public or private nonprofit or for-profit agency within a community as a Head Start agency, which agency can then transfer such responsibility to a "delegate agency" [§9832(2)]. As such, by means of the delegated authority, those entities apparently perform federal duties for the previously designated organization.

Subchapter II of Chapter 105 expresses an intent to enhance public participation as well as disclosure of information regarding the functions and duties of community action agencies. Specifically, §9839(a) states in relevant part that:

> "Each Head Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter and the objective of providing assistance effectively, efficiently, and free of any taint of partisan political bias or personal or family favoritism. Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. Each agency shall also provide for reasonable public access to information,

> including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible."

Again, while it is unlikely that the Freedom of Information Law applies to records maintained by a delegate agency, we believe that the federal legislation quoted above indicates an intent to ensure accountability to the public by providing "...reasonable public access to information, ... and reasonable public access to books and records of the agency...."

Turning now to your questions pertaining to access to meetings of the Policy Council or Board of Directors, the Open Meetings Law applies to public bodies, entities that carry out governmental function for governmental entities. In view, it does not appear that the Policy Council or Board of Directors would constitute a "public body" subject to the Open Meetings Law. Section 9839(a) indicates an intent to ensure "...reasonable public access to information, including public hearings at the request of appropriate community groups...". Accordingly, it is unclear whether the intent of the legislation was to provide public access to meetings of the Policy Council or Board of Directors.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

FOIL-AO-15931

From: Robert Freeman
To: Mason, Paul (LABOR)
Date: 4/24/2006 2:27:59 PM
Subject: FW: [wiaattorneys] Re: Can we release names of minors in youth programs

Hi Paul - -

There is no special consideration for minors in either the Personal Privacy Protection Law or the Freedom of Information Law, just as there is no special consideration for senior citizens. However, it has been advised that list of persons identified or who participate by means of an age characteristic, by its nature, may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Similarly, when eligibility is based on income qualification, i.e., that individuals must have an income below a certain amount to qualify, we have advised that any identifying details pertaining those persons may be withheld based on consideration of privacy.

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

>>> "Mason, Paul (LABOR)" <Paul.Mason@labor.state.ny.us> 4/24/2006 1:45:27 PM >>>
Bob - Please accept this an informal opinion. I am on a listserv of attorneys working on the federal Workforce Investment Act programs, which we have discussed before. Per the email below there is clearly an exception for unwarranted invasions to personal privacy. Are there any special considerations for minors participating in government programs relative to the Personal Privacy Protection Act provisions? I know there are a line a cases regarding medical information. Thanks.

Paul Mason
Associate Attorney
State Office Campus
Building 12, Room 509
Albany, NY 12240
phone: (518) 457-4380
fax: (518) 485-1819
paul.mason@labor.state.ny.us <mailto:paul.mason@labor.state.ny.us>

From: Robert Freeman
To: [redacted]
Date: 4/24/2006 3:51:11 PM
Subject: http://www.dos.state.ny.us/coog/explaination05.htm

http://www.dos.state.ny.us/coog/explaination05.htm

Dear Ms. Stack:

I have received your inquiry concerning a situation in which an agency has failed to acknowledge the receipt of your request for records. You added that you know that the agency has received the request.

In brief, when an agency fails to respond to a request within five business days of the receipt of the request, the person seeking the record may consider the request to have been denied and, therefore, may appeal the denial. The appeal, according to §89(4)(a) of the Freedom of Information Law, would be made to the governing body (the Commission this instance) or a person or body designated by the governing body to determine the appeal.

Attached is a lengthy explanation of an agency's responsibility to respond to requests and appeals in a timely manner.

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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FOIL-AO-15933

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(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

April 25, 2006

Mr. Jack Campisi
[redacted]

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

Dear Mr. Campisi:

As you are aware, we have received your letter concerning your efforts in gaining access to books of account maintained by the Supervisor of the Town of Milan. Based on your remarks, I offer the following comments.

First, the Town Law, §29(4) concerning the powers and duties of town supervisors states that a town supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

From my perspective, a significant word in §29(4) is "reasonable", and I do not believe that "reasonable" can be equated with "immediate." If, for example, the records sought are in use by the Supervisor or other Town officials, it would be reasonable in my view to delay disclosure; if there is insufficient staff to supervise the inspection of records at a particular time, I do not believe that the Town would be required to disclose the records immediately. However, although the Freedom of Information Law permits an agency to take up to five business days to respond to a request, the five business day period is in my opinion intended to represent a maximum limitation; when records are readily retrievable and can be disclosed quickly, compliance with that law, particularly in terms of its spirit and intent, would in my view require disclosure as soon as practicable and in fewer than five business days.

Lastly, while I do not believe that an agency may require that an applicant complete a request form prescribed by the agency, I believe that it may require that a request be made in writing in accordance with §89(3) of the Freedom of Information Law and the general grant of authority conferred by the Town Law (see e.g. §§63 and 64). With respect to requests generally, the Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (21 NYCRR 1401.5), which have the force of law and govern the procedural aspects of the Law, require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [21 NYCRR 1401.5(a)]. As such, neither the Law nor the regulations refers to, requires or authorizes the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

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 possesses 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 for responding to requests. 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 in my opinion be asked to complete the standard form as his or her written request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: John V. Talmage, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15934

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

April 25, 2006

Mr. Bert Irons
Administrator
Evangelical Church of God
1205 Washington Avenue
Bronx, NY 10456-4368

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

Dear Mr. Irons:

I have received your letter concerning the substance of an agency's subject matter list. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply. An exception 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 required to be prepared by local governments outside of New York City. In New York City agencies, a similar function is carried out by the Department of Records and Information Services (DORIS). It is suggested that you might contact that agency to review the retention schedule applicable to the City agencies of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jim Macron

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15935

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

April 25, 2006

Ms. Grace A. Searby
[redacted]

The staff of the Committee on 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. Searby:

We have received your letter concerning the time within which the Oyster Bay - East Norwich School District must respond to requests 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 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 compliance with and understanding of the Freedom of Information Law, copies of this response will be sent to District officials.

I hope that I have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: P. Harrington
Sydney Freifelder

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15936

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

April 26, 2006

Ms. Trina Carollo
97-G-0064
Bedford Hills Correctional Facility
247 Harris Road
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 information presented in your correspondence.

Dear Ms. Carollo:

I have received your letter in which you asked how you may obtain your presentence report. You also requested information concerning new legislation and court decisions that deal with Prisoners' Legal Services and sentencing guidelines.

In this regard, first, the Committee on Open Government is authorized to provide advice concerning access to government information, primarily under the state's Freedom of Information Law. This office does not maintain information concerning the legislation and court decisions in which you are interested. It is suggested that you contact your facility librarian in an effort to obtain that information.

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

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

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically

> required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

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

It was also confirmed that "Criminal Procedure Law Sec. 390.50 is the exclusive procedure concerning access to such reports, as they are confidential and specifically exempted from disclosure pursuant to State and Federal Freedom of Information Laws. Petitioner...must make a proper application to the Court which sentenced him" (Matter of Roper v. Carway, Supreme Court, New York County, NYLJ, August 17, 2004).

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

I hope that I have been of 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-15937

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

April 26, 2006

Mr. Daniel Clay
99-A-0386
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. Clay:

I have received your letter in which you complained that, as of the date of your letter to this office, you had not received a response to your Freedom of Information Law appeal directed to Counsel of the Department of Correctional Services.

In this regard, §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."

Section 89(4)(b) was recently 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 law, a copy of this letter will be forwarded to Anthony J. Annucci, Counsel to the Department of Correctional Services.

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-15938

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

April 26, 2006

Mr. Craig Godfrey
96-A-0178
Otisville Prison Facility
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. Godfrey:

I have received your letter in which you complained that you submitted a Freedom of Information Law request to the Kings County District Attorney's Office in November of 2004 and that office notified you that you would receive a response in 180 days. Since then, you have sent follow up letters and received responses indicating that additional time would be needed to procure 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..."

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 letter will be forwarded to Ms. Trudy Dako.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Trudy Dako

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15939

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

April 26, 2006

Mr. Genaro Campos
94-A-5037
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. Campos:

I have received your letter in which you asked for assistance in obtaining various records under the Freedom of Information Law from the Westchester County Supreme Court.

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-15940

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

April 28, 2006

Mr. Allen J. Gormely, Jr.
92-A-4989
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. Gormely:

I have received your letters in which you complained that you have not received any responses to your Freedom of Information Law requests directed to the New York City Fire Department. Please accept my apologies for the delay in response.

In this regard, I offer the following comments.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

It is noted that the person designated by the New York City Fire Department to determine appeals is Ms. Elena Ferrera.

With respect to your request for a fee waiver, 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)].

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to officials at the New York City Fire 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: Sabrina Jiggetts, Records Access Officer
Elena Ferrera, Records Appeals Officer
Nicholas Scoppetta, Fire Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15941

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April 28, 2006

Ms. Bonnie Barkley
[redacted]

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

Dear Ms. Barkley:

I have received your letter in which you criticized an article that appeared in the Dundee *Observer*. You asked how you might "go about getting the information that [you] have foiled for from the Observer."

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

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

Based on the foregoing, the Freedom of Information Law generally applies to entities of state and local government; it does not apply to private entities, such as newspapers. For that reason, it is clear in my view that the *Observer* is not required to give effect to the Freedom of Information Law or disclose its records to the public in response to a request made pursuant to that law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: George Lawson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4184
FOIL-AO-15912

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May 2, 2006

E-Mail

TO: Dianne Berardicurti

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. Berardicurti:

I have received your letter in which you questioned your right to gain access to records and attend meetings of a local soccer organization, which has apparently been created as a not-for-profit corporation.

In this regard, the Freedom of Information and the Open Meetings Laws apply to governmental entities.

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

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

Since the organization in question 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 organization.

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 organization, it would not constitute a public body, for it does not perform a governmental function. Therefore, its meetings 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, notwithstanding the foregoing, I believe that not-for-profit corporations are required to disclose a form 990 to the general public. As I understand its content, the form 990 is a general financial statement filed with the Internal Revenue Service.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15943

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

May 1, 2006

E-MAIL

TO: Dennis McCullough

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. McCullough:

I have received your letter in which you indicated that you requested records from the City of Jamestown on January 20, but that you have received no response.

In this regard, first, I note that each agency, such as a city, is required to designate one or more persons as "records access officer." That person has the duty of coordinating an agency's response to requests for records (see 21 NYCRR §1401.2). While I believe that the person in receipt of your request should have responded directly to you in a manner consistent with law or forwarded the request to the records access officer, it is suggested that you resubmit your request to the records access officer. I recommend that you contact the office of the Mayor or City Manager to ascertain the name of 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 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: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1594

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

May 2, 2006

Mr. David V. Morris
[redacted]

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

Dear Mr. Morris:

I have received your letter in which you asked whether a Departmental Disciplinary Committee is subject to the Freedom of Information Law.

In my view, the entity in question is not required to give effect to the Freedom of Information Law. In this regard, I offer the following comments.

First, that statute pertains to agency records, and §86(3) defines the term "agency" to include:

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

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

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

As such, the Freedom of Information Law excludes the courts from its coverage.

Second, with respect to the discipline of attorneys, §90(10) of the Judiciary Law states that:

> "Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct

> or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Therefore, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable. I note, too, that a different entity, one that also performs a function on behalf of the Appellate Division in relation to §90 of the Judiciary Law, was found to exercise a judicial function, is part of the judiciary and, therefore, is outside the coverage of the Freedom of Information Law [see Pasik v. State Board of Law Examiners, 102 AD2d 395 (1984)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15945

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

May 3, 2006

Mr. Blaine Alvarez-Backus
[redacted]

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

Dear Mr. Alvarez-Backus:

I have received your letter and the materials attached to it. You referred to the ability of the public to raise questions relating to the "drug problem and prevention programs" at the Florida Union Free School District. Having reviewed the correspondence, I offer the following comments.

First, 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. Section 89(3) states in part that an agency is not required to create a record in response to a request, and as the Superintendent indicated, the Freedom of Information Law does not require that agency officials respond to questions. They may choose to do so, but they are not required to do so to comply with the Freedom of Information Law. In the future, instead of seeking information by raising questions, it is suggested that you request records.

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

If, for example, records exist that include the kinds of breakdowns or statistics that you requested, I believe that they would be accessible. Similarly, if there are policies, procedures, directives or similar materials involving the District's efforts to deal with drug use, they would likely be accessible to the public in great measure, if not in their entirety. Both categories of any such records would fall within the scope of §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

I 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: Douglas W. Burnside

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15946

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

May 3, 2006

E-Mail

TO: Michael Falzarano

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. Falzarano:

I have received your letter in which you wrote that a request for records made under the Freedom of Information Law to the Village of Bayville has not been answered. You did not describe the records that you requested.

In this regard, although I have no knowledge of the nature of the records sought, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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. 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: Maria Alfano-Hardy, Village Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15947

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

May 3, 2006

Mr. Gregory L. Jackson
00-B-0720
Franklin Correctional Facility
P.O. Box 10
Malone, NY 12953

Dear Mr. Jackson:

I have received your letter in which you appealed a denial of access to your Freedom of Information Law request to this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning access to government information, primarily under the state's Freedom of Information Law. It is not empowered to determine appeals or compel an agency to grant or deny access to records.

The provision concerning the right to appeal, §89(4)(a) 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 submit your appeal to the Tompkins County District Attorney or his or her designee.

I hope that this clarifies your understanding of the matter.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15948

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

May 4, 2006

E-MAIL

TO: A. Troy

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. Troy:

As you are aware, I have received your letter in which you wrote that you are employed by a state agency that provides services to persons with disabilities, and that when a client "has police contact, is arrested, or is the victim of a crime, the Commissioner's office has to be notified." Part of your duties involves obtaining police reports and other documents maintained by law enforcement agencies. However, you indicated that some police departments "have become unwilling to cooperate with [y]our need to follow up and obtain information quickly." You have asked for suggestions to facilitate the process.

First, when, in your capacity as an employee of a government agency, you seek records from another entity of government, you would not be doing so under the Freedom of Information Law. That statute deals with requests by and rights of access conferred upon members of the public. When records are sought under the Freedom of Information Law, it has been held that an applicant does so as a member of the public and that the status or interest of the applicant is irrelevant to rights of access [see M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984) and Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976)]. In the situation that you described, you would not be requesting records as a member of the public, but rather as a government employee in the performance of your official duties.

In that kind of circumstance, it has been advised that, in the spirit of cooperation, agencies should share records with one another, so long as there is no statute that prohibits disclosure. It has also been suggested that a request by an agency employee should be accompanied by written documentation indicating that the request is being made in the performance of the agency's official duties. Often in that kind of situation, the agency in possession of the records is willing to share records with another agency, even if the records or portions thereof could properly be withheld from a member of the public seeking the same records under the Freedom of information Law.

Lastly, it is recommended that your commissioner or other person in a position of authority write to those agencies that resist disclosure to explain your agency's responsibilities, its legal duty to obtain the records, and to encourage cooperation.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15949

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

May 5, 2006

Mr. Janusz Muszak
[redacted]

Dear Mr. Muszak:

I have received your letter of May 2 in which it appears that you believe that this office maintains "articles of FOIL in response to [your] request" that would describe how you may seek "Judicial Review." You also indicated that you could not appeal a denial of access to records within thirty days because your Freedom of Information Law was ignored.

In this regard, it is noted that the Freedom of Information Law does not describe the manner in which a proceeding may be initiated pursuant to Article 78 of the Civil Practice Law and Rules (CPLR), and this office does not maintain any such records.

With respect to your belief that you cannot appeal a denial of access because your request was ignored, your request was not ignored. Again, the Freedom of Information Law does not include the information that you appear to be requesting, and this office does not maintain that information. When a valid request is ignored or denied, 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 the foregoing serves to clarify your understanding 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-15950

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May 5, 2006

E-Mail

TO: Ms. Monica Iken

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, unless otherwise indicated.

Dear Ms. Iken:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request made to the Lower Manhattan Development Corporation ("LMDC"), a subsidiary of New York State Urban Development Corporation ("UDC"), doing business as the Empire State Development Corporation ("ESDC"). Based on our telephone conversation with representatives of ESDC and LMDC, it is our understanding that they are under the mistaken impression that they have complied with the legal requirements pertaining to response times set forth in the Freedom of Information Law. Further, it is our opinion that if certain materials which you have requested exist, they should be made available to you, at least in part.

The following is an outline of our understanding of correspondence exchanged between yourself, ESDC and LMDC:

ESDC received your initial request for records on February 13, 2006, and acknowledged its receipt on February 21, 2006, indicating that further response would be forwarded on or before March 7, 2006. Because ESDC failed to inform you of the grounds for further delay past its self-imposed deadline, and because ESDC failed to respond on or before March 7, 2006, in our opinion, the provisions of §89(3) were not met, and access was constructively denied. In fairness, we note that ESDC now submits that the Records Access Officer was out of the office for several days during that time period due to a death in his family. However, that information was not expressed in our early April telephone conversation with the Records Access Officer, nor in subsequent correspondence from ESDC dated March 17, April 4, April 10 or April 17, 2006.

Your appeal of ESDC's constructive denial of your request was received on March 8, 2006. Your intention to appeal the denial is clear from your subject line, "Freedom of Information Law Appeal", and your opening sentence, "I hereby appeal the denial of access regarding my request...".

On March 17, the FOIL Appeals Officer of ESDC acknowledged receipt, characterized your appeal as a "request", and wrote as follows:

> "ESDC is granting you access to those documents which are responsive to your request, on file at our offices and not exempt from disclosure.... We are currently gathering and reviewing these documents which should be available by March 30, 2006."

ESDC asserts now, that on March 30, 2006, you were informed by telephone to contact LMDC regarding the documents, and that on April 3, 2006 you spoke by telephone to an LMDC representative.

Without reference to your appeal, by correspondence dated April 4, 2006, LMDC forwarded copies of generic environmental impact statements, which are available on its website, and a copy of one email dated June 20, 2005. You were informed that "the remaining portion of the records responsive to your request that are not exempt will be made available at a later date."

In response to your appeal, ESDC responded by letter dated April 10, 2006, (23 business days later) indicating the following:

> "The responsive emails, correspondence and consultants' reports are exempt from disclosure pursuant to Section 87, subsection 2, subdivision (g) of the Freedom of Information Law ..."

And further:

> "Please be advised that LMDC is continuing to review emails responsive to item 3 of your February 10th request in accordance with the Freedom of Information Law (Public Officers Law, Section 84 et seq.) and its rules concerning access to the records of the Corporation. ESDC will notify you of its determination with respect to these emails within five (5) business days from the date hereof."

The only other information the writer indicated was that you could direct your appeal of this determination to General Counsel of UDC.

Crossing in the mail at that time was your correspondence of April 10 requesting explanation of the denials of access, and certification, pursuant to §89(3) of the Freedom of Information Law, that the agency does not possess or has diligently searched for any records which are publicly available, and to which you have not been provided access.

On April 17, 2006, ESDC forwarded copies of some records and indicated that all other documents identified in response to your third request were "not to be released", citing §87(2)(g), but providing no further explanation. The letter indicated "LMDC is continuing to review emails responsive to item 3 of your February 10th request..." and "ESDC will notify you of its determination with respect to these emails within five (5) business days from the date hereof." The writer indicated you could direct your appeal of this determination to General Counsel of UDC.

Finally, by correspondence dated April 19, 2006, ESDC set forth its position that it has responded in a timely manner to your requests by indicating it was "continuing to review documents responsive to your request", and that because your April 10, 2006 appeal does not address "ESDC's final determination regarding items 1,2, and 4 of your request and ESDC's April 17, 2006 final determination regarding item 3 of your request, [it] cannot give a final determination regarding your April 10, 2006 appeal." The closing paragraph of this letter, written by the FOIL Appeals Officer, "Senior Vice President - - Legal and General Counsel", indicated that you could address an appeal of ESDC's "final determinations" to her attention.

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. 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. [See also, Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

It is our opinion, based on the facts presented above, that because neither ESDC nor LMDC responded to your initial request within the self-imposed March 7, 2006 deadline, you were correct to construe the lack of response as a denial and to appeal. Further, it is clear in our view that ESDC's efforts to inform you of its "continuing review of documents responsive to your request" without setting forth any basis for any delay evidence its lack of understanding of or compliance with the provisions of §89(4) of the Freedom of Information Law, which require an agency to respond to an appeal within ten business days of receipt thereof, fully explaining in writing to the person requesting the record the reasons for further denial or providing access to the records sought.

We also note that you were informed of repeated opportunities to appeal certain communications to the FOIL Appeals Officer, and in conjunction with its most recent correspondence, you were informed of an opportunity to file an appeal of the FOIL Appeals Officer's "final" determination with the FOIL Appeals Officer. A careful reading of §89 of the Freedom of Information Law indicates that there is no provision for such an appeal. While we are not advising you to do so, it is our opinion that you have exhausted your administrative remedies and have the right to pursue the denial of your request pursuant to Article 78 of the Civil Procedure Law and Rules.

Turning now to the substantive aspects of your request, we offer the following comments with respect to each of the documents requested.

Your first request was for "... copies of any supporting documentation related to the reasons why the number of entry and exit ramps at the memorial was reduced from 4 to 2...". As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In consideration of the nature of the records sought, the provision of primary significance under that statute is §87(2)(g), which enables an agency to withhold records that:

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

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

With respect to the substance of §87(2)(g) and the capacity to withhold records similar to that at issue, it has been held that:

> "There is no exemption for final opinions which embody an agency's effective law and policy, but protection by exemption is afforded for all papers which reflect the agency's group thinking in the process of working out that policy and determining what its law ought to be. Thus, an agency may refuse to produce material integral to the agency's deliberative process and which contains opinions, advice, evaluations, deliberations, policy formulations, proposals, conclusions, recommendations or other subjective matter (National Labor Relations Bd. v. Sears, Roebuck & Co., supra, pp 150-153; Wu v. National Endowment for Humanities, 460 F2d 1030, 1032-1033, cert den 410 US 926). The exemption is intended to protect the deliberative process of government, but not purely factual deliberative material (Mead Data Cent. v United States Dept. of Air Force, 566 F2d 242, 256, supra). While the purpose of the exemption is to encourage the free exchange of ideas among government policy-makers, it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memo (Wu v. National Endowment for Humanities, supra, p1033). The question in each case is whether production of the contested document would be injurious to the consultative functions of

> government that the privilege of nondisclosure protects..." [Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 182-183; motion for leave to appeal denied, 48 NY 2d 706 (1979)].

Insofar as intra-agency materials in which officials or employees of the ESDC expressed their opinions in relation to ESDC's final decision, we believe that those materials ordinarily may be withheld. However, insofar as the documents in question include opinions or recommendations adopted by ESDC and reflective of ESDC's collective determination, they would, in our view, be available.

It has been held that a record adopted by a decision-maker as the agency's determination is accessible under §87(2)(g)(iii). In Miller v. Hewlett-Woodmere Union Free School District #14 (Supreme Court, Nassau County, NYLJ, May 16, 1990), the court wrote that:

> "On the totality of circumstances surrounding the Superintendent's decision, as present in the record before the Court, the Court finds that petitioner is entitled to disclosure. It is apparent that the Superintendent unreservedly endorsed the recommendation of the Term [sic; published as is], adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting 'the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers' (Matter of Sea Crest Construction Corp. v. Stubing, 82 A.D. 2d 546, 549 [2d Dept. 1981], but the Court bears equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intraagency views, when deliberation has ceased and the consensus arrived it represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of governmental decision making. The Team's decision no longer need be protected from the chilling effect that public exposure may have on principled decisions, but must be disclosed as the agency must be prepared, if called upon, to defend it."

In sum, we do not believe that §87(2)(g) may serve as a basis for withholding to the extent that the documentation in question has been adopted as a final agency determination. If that is the case, we believe that it would be accessible under §87(2)(g)(iii).

With respect to your second request, for "LMDC studies performed internally or by outside consultants from 3/14/2003 to the present that pertain to the projected number of visitors to the future memorial and memorial museum...", we note ESDC's refusal to disclose on the ground that it does not reflect statistical or factual information. Pertinent in our view is a decision rendered by the Court of Appeals in which the Court focused on what constitutes "factual data", stating that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, 463 N.Y.S.2d 122, mod on other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182. 417 N.Y.S.2d 142)" [Gould v. New York City Police Department, 89 NY2d 267, 276, 277 (1996)].

From our perspective, the specific language of §87(2)(g), coupled with the direction offered by the Court of Appeals, provide the basis for reviewing and determining the extent to which the records in question might justifiably be withheld. Reference was made earlier to the thrust of the Freedom of Information Law, and the Court in Gould reiterated its stance expressed in previous decisions, stating that:

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

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered and held 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 foregoing, the agency is required to review the records sought in their entirety to determine, which portions constitute statistical or factual information or any other material required to be disclosed pursuant to subparagraphs (I), (ii), or (iii) of §87(2)(g).

With regard to your third request, for "[i]nternal or external emails addressed or copied to or from" certain named individuals, we note that 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 ESDC employees or between those persons and others would clearly constitute "records" that fall within the coverage of the Freedom of Information Law.

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

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

In the context of your request, it would be important to ascertain the appropriate minimum retention periods pertinent to the substance of the emails identified. Assistance may be obtained by contacting State Archives at (518) 474-6926.

With respect to any documents which you believe have been omitted from the responses to your requests or may have been destroyed prior to your 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."

We note that ESDC has chosen to disregard your April 10, 2006 request for such certification. In our opinion, its inaction serves as a failure to comply with law. It is our opinion that on request, an agency must provide such certification.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to ESDC and LMDC officials. Should you have any further questions or comments, please contact me directly.

CSJ:tt

cc: Anita W. Laremont
Antovk Pidejian
Avalon Simon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1595

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May 5, 2006

Mr. Scott A. Lucas
[redacted]

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

Dear Mr. Lucas:

I have received your letter in which you sought an advisory opinion "as to whether the Freedom of Information Law permits an individual to obtain from the New York State Liquor Authority a copy of a completed liquor license application that was used to obtain a liquor license."

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

From my perspective, one of the grounds for denial of access is clearly relevant with respect to portions of the applications. Another may be pertinent in some but perhaps not all instances.

Section 87(2)(b) authorizes an agency to withhold information contained in records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Historically, information pertaining to those persons or entities obtaining licenses, permits and similar certifications has been available to the public, for it is intended to enable the public to know that those persons or entities are qualified to engage in certain activities in which the government has a substantial interest. The fact that a license has been issued to engage in the practice of a variety of

professions (i.e., medicine, law, architecture, social work, etc.) and other kinds of activities, (i.e., selling real estate, being a barber or cosmetologist, driving an automobile or possessing a firearm) involve matters all of which enable the public to know that the recipient has met the required conditions for licensure or engaging in certain activities.

Although the standard in the law relating to unwarranted invasions of personal privacy is not specific, the Court of Appeals has held that the "essence" of the exception involves an intent to enable an agency to withhold items "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. As the foregoing relates to the information contained in liquor license, I believe that several items may properly be withheld. Having reviewed the application forms accessible on the Authority's website, home addresses, dates of birth, fingerprints, personal financial and banking information, for instance, may be withheld, in my opinion, as an unwarranted invasion of personal privacy.

Also of possible significance in 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.

The applications, especially those involving wholesale licenses, include a variety of financial information pertaining to commercial entities. In some instances, disclosure of information of that nature may be innocuous; in others, particularly if the information is current, disclosure to a competitor could be damaging. In short, as suggested earlier, the commercial conditions and degree of competition in the vicinity of the licensee would likely serve as the factors in determining the extent to which portions of the application might justifiably be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Michael Smith, Records Access Officer

OML-AO-4193
FOIL-AO-15952

From: Robert Freeman
To: [redacted]m
Date: 5/10/2006 10:59:52 AM
Subject: Dear Mr. Smith:

Dear Mr. Smith:

I have received your inquiry concerning agendas of town board meetings.

In short, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires the preparation of an agenda. Therefore, while a public body, such as a town board, may choose to prepare an agenda, it is not required to do so. Further, if an agenda is prepared, there is no requirement that it be followed.

I note that when an agenda is prepared, it constitutes a "record" as that term is defined in §86(4) of the Freedom of Information Law. Based on that statute, assuming that the agenda briefly identifies the topics to be considered, it would be accessible under the Freedom of Information Law as soon as it exists.

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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15953

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May 10, 2006

Mr. Vincent L. Valenza
McNamee, Lochner, Titus & Williams, P.C.
677 Broadway
Albany, NY 12207-2503

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

Dear Mr. Valenza:

We are in receipt of a request from your office for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to Heritage Springs Sewer Works, Inc., a sewage-works corporation created pursuant to Article 10 of the New York Transportation Corporations Law. It is your contention that Heritage, as a sewage-works corporation entity which "(a) would not exist but for the permission of a municipality; and (b) exercises a governmental function on behalf of or instead of a municipality; and (c) the municipality exercises close oversight (here, including approving the rates charged to the public and requiring financial guarantees, including holding the corporation's stock in escrow), ... is subject to FOIL."

In this regard, we offer the following.

First, as you may be aware, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

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

It is not clear whether a sewage-works corporation is an "agency." 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 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 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).

Here, a certificate of incorporation for a sewage-works corporation cannot be filed without proof of consent from a local governing body attached thereto [Transportation Corporations Law, §116(1)], and a sewage-works corporation is required to set "reasonable and adequate rates agreed to between the corporation and the local government body or bodies..." (Transportation Corporations Law, §121), and a sewage-works corporation may acquire land by condemnation (Transportation Corporations Law, §124). "Condemnation" as defined by Black's Law Dictionary, Sixth Edition, is the "process of taking private property for public use through the power of eminent domain." In our experience, the power to acquire land by eminent domain is only vested in federal, state and local government entities.

Based on the foregoing, because the relationship between Heritage and the permissive municipality, governed by the explicit parameters of Article 10 of the Transportation Corporations Law is similar to that of the BEDC and the City of Buffalo, it is our opinion that the Heritage would likely be found by a court to constitute an "agency" required to comply with the Freedom of Information Law.

Further, in consideration of Heritage's relationship with a municipality, it appears that some of Heritage's records may fall within the scope of the Freedom of Information Law, regardless of whether it is considered an "agency.". For purposes of that statute, the term "record" is defined to include:

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

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

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

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

Insofar as records maintained by Heritage are "kept, held, filed, produced or reproduced...*for* an agency", i.e., for the purpose of providing services that would otherwise be provided by that entity, we believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law.

In other circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency. 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 Heritage maintains records for the municipality, a request should be made to the municipality's records access officer. To comply with the Freedom of Information Law and the implementing regulations, the records access officer would either direct Heritage to disclose the municipality's records in a manner consistent with law, or acquire the records from Heritage in order that he or she could review the records for the purpose of determining rights of access.

To reiterate, even if Heritage is determined not to be an "agency" pursuant to case law outlined above, the responsibility to give effect to or comply with the Freedom of Information Law may not involve Heritage, but rather the government agency whose records are maintained by Heritage on its behalf.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 10, 2006

Ms. Aimée deChambeau
Electronic Resources Acquisitions and
Access Librarian
Stony Brook University Libraries
Frank Melville Jr. Memorial Library
Stony Brook, NY 11794-3300

The staff of the Committee on 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. deChambeau:

I have received your letter concerning the difficulty you have encountered in attempting to gain access to records of the Town of Brookhaven.

In this regard, while an agency, such as a town, may choose to respond to an informal oral request, based on §89(3) of the Freedom of Information Law, an agency may require that a request be made in writing. Irrespective of the manner in which a request is made, when records are clearly public and readily retrievable, there is no valid reason for unnecessarily delaying disclosure.

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

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

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 Supervisor.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Brian Foley, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4192
FOIL-AO-1595S

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May 10, 2006

E-Mail

TO: Christine Iacobucci

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Iacobucci:

As you are aware, I have received your letter and a variety of materials concerning disclosures that you have made as a member of the Lansing Central School District Board of Education. In short, you have been criticized in relation to those disclosures by the President of the Lansing Administrators & Supervisors Organization and in a letter signed by six members of the Board.

From my perspective, the controversy associated with your comments represents an overreaction and misapplication of law.

According to your letter, you could not attend a Board workshop, and you later received "handouts from the session and the notes the board president had taken." You forwarded a copy of the notes, which state in items 3 and 4 in relevant part as follows:

> "f. Bonita
> i. Relationships - Above All & Never Ending
> ii. Short term: interim positions
> iii. John Gizzi (i.e., review records, evaluate, mentor, develop, options re: tenure
>
> 4. Mark will have to support Debra and her interactions with the faculty as she does her work. Need to help her overcome resistance. Board agrees to support Mark as he works with Debra."

At an ensuing meeting, you wrote that "you read aloud item 3.f.iii., asked its meaning and were told that the matter would not be discussed during the current meeting." You then read aloud item 4, asked what it means, and were told by the Board President that "it had to do with Deborah Pichette and her role in faculty development." You indicated that "that's all that was said."

Following the meeting during which you read aloud the preceding, the President of the Administrators & Supervisors Association, Michelle Stone, addressed a memorandum to Mark Lewis, the Superintendent, and Bonita Lindberg, the Board President, and wrote as follows:

> "As you are aware, during the board of education meeting on 2/13/06, a member of the board of education revealed personnel information regarding two members of the administrative staff. To the best of my knowledge, that information was read from a set of minutes kept during a board of education retreat, considered a closed (executive) session. The incident was shocking, demoralizing, and illegal.
>
> "As the president of the Lansing Administrators and Supervisors Organization and on behalf of that unit, I am requesting that action be taken against the board member who acted inappropriately. Although nothing can take away the humiliation caused by her statements, it is important that she be held accountable."

In response to that memorandum, Ms. Lindberg wrote to Ms. Stone, stating that:

> "The Board wants you to know that it sincerely regrets the fact that information we had discussed privately during our workshop in January was read aloud by a board member during the public session of the meeting held on February 13th. That board member had chosen not to attend the workshop.
>
> "I have discussed the matter with Board Counsel and, while the workshop topics did not rise to the level of confidentiality afforded to an Executive Session, certain information, comments and general conversation regarding some of the ancillary matters, did relate to items and views concerning some of our employees. As such, the comments and observations of board members offered privately were of a personal enough nature that they should have been treated by all board members in the same manner as we treat such items at the public sessions of board meetings. As you know, the board generally attempts to avoid discussion of matters relating to confidential personnel information in open session.
>
> "It simply should not have been discussed by the board member at that time. It only served to create a bad impression and to cause needless embarrassment to the individuals and to the board.

> "During the days immediately following the meeting I contacted Debra and John and offered my apology and that of the board."

In a separate letter addressed to you signed by six Board members referencing your comments made aloud, you were chided, for it was stated that the workshop:

> "...involved board comments and advice on pending and future personnel matters and therefore, should not have been discussed in open session. Without regard to the sensitivities of John and Debra, you chose to share with the general public input that we provided Dr. Lewis at his request. The comments we gave to Dr. Lewis regarding staffing and personnel matters were for the sole purpose of helping him establish his work agenda as our Superintendent. They were offered to him with the expectation that, for various reasons, the confidentiality of the subjects and the privacy rights of the employees would be respected, as we've always tried to do. The notes of that workshop were given to you, as a member of our board – with every expectation that you would recognize and respect the confidential nature of their content. The detrimental effect your actions had on our administrators is immeasurable. To have personnel matters discussed in the manner you chose invites severe criticism and complaints as well as the potential for litigation. We have an obligation to our administrators, faculty and staff to address their employment related issues in an appropriate manner and we trust you would understand the concern they would have about dealing with these confidential matters in a public meeting. In the future, we expect that you will refrain from discussing personnel matters outside of executive session."

Although I would like to offer a personal commentary concerning the reaction to your comments, I will refrain from so doing. Rather, my remarks will be limited to an analysis based on the law and its judicial construction. In brief, however, I do not believe that you violated any law or that the matters that you read aloud may be characterized as confidential.

First, the terms "personnel" and "confidential" arose frequently in the materials relating to your action. A careful reading of the Open Meetings Law indicates that the word "personnel" appears nowhere in that statute. To be sure, there are some issues that relate to "personnel" that may properly be considered during executive sessions. Nevertheless, there are many others that do not fall within any of the grounds for entry into executive session. Moreover, there is simply nothing in the Open Meetings Law that specifies that personnel-related issues are confidential.

As you are likely aware, the language of the provision generally cited to discuss personnel matters is limited and precise. Specifically, §105(1)(f) of the Open Meetings Law authorizes 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..."

In my view, there is nothing in the information that you read aloud that would appear to justify entry into executive session, for the topics appearing in that provision do not appear to have been pertinent or related to the information that you read aloud.

Second, even when there was a basis for entry into executive session, there is no obligation to convene in private. Section 105(1) prescribes a procedure that must be accomplished in public before an executive session may be held. That provision states that:

> " Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

If no motion is made to enter into executive session, which was so in the context of the situation that you described, or if a motion to conduct an executive session is not approved, a public body is generally free to discuss issues in public.

Further, based on our conversation, it is my understanding that the items that you read aloud were initially discussed at the Board's workshop that was open to the public and could have been attended by any member of the public. If that is so, there appear to be no rationale for your fellow Board members' criticism of you.

Third, the only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential. In my opinion, there was nothing confidential about your remarks or the subject matter to which your remarks related. When a public body has the discretionary authority to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential."

At this juncture, I note that one of the items discussed at the workshop that you could not attend involved a review by the District's attorney of a ruling by the Commissioner of Education, and the summary states that: "Individual members who breach confidentiality of exec session may be removed from their Board seat. Same for confidential information." The Commissioner's decision in Application of Nett and Raby (No. 15315, October 24, 2005) states as follows:

> "In addition to a board member's general duties and responsibilities, General Municipal Law §805-a(1)(b) provides that no municipal officer or employee (including a school board member) shall 'disclose confidential information acquired by him in the course of

> his official duties or use such information to further his personal interests.' It is well settled that a board member's disclosure of confidential information obtained at an executive session of a board meeting violates §805-a(1)(b) (see Applications of Balen, 40 Ed Dept Rep 250, Decision No. 14,474; Application of the Bd. of Educ.of the Middle Country Central School Dist., 33 id. 511, Decision No. 13,132; Appeal of Henning and Rohrer, 33 id, 232, Decision No. 13,035).
>
> "Less clear is what constitutes 'confidential' information. The term 'confidential' is not defined in the General Municipal Law and the legislative history of §805-a does not provide any additional guidance into the meaning of that word...
>
> "Absent a clear statutory definition, and given the importance of ensuring a uniform application in the educational system, the interpretation of 'confidential' in the school context is a matter best left to the Commissioner (see Komyathy v. Bd. of Educ. Wappinger Central School District No. 1, 75 Misc. 2d 859). Information that is meant to be kept secret is by general definition considered to be 'confidential' (see Black's Law Dictionary [8th Ed. 2004])."

While some interpretations of law might be "best left to the Commissioner", I point out that each of the precedents cited in the excerpt of the decision quoted above involve the Commissioner's own decisions. Avoided, however, are judicial decisions that are contrary to his conclusion.

Many judicial decisions have focused on access to and the ability to disclose records, and this office has considered the New York Freedom of Information Law, the federal Freedom of Information Act, and the Open Meetings Law in its analyses of what may be "confidential." To be confidential under the Freedom of Information Law, I believe that records must be "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a). Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

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

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

In like manner, in construing the equivalent exception to rights of access in the federal Act, it has been found that:

> "Exemption 3 excludes from its coverage only matters that are:
>
> > *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
>
> "5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

In short, to be "exempted from disclosure by statute", both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records.

In contrast, when records are not exempted from disclosure by a separate statute, both the Freedom of Information Law and its federal counterpart are permissive. Although an agency *may* withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals held that the agency is not obliged to do so and may choose to disclose, stating that:

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" (Capital Newspapers, supra, 567).

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose. Stated differently, there is nothing inherently confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).

The same analysis is applicable in the context of the Open Meetings Law. While that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), again, there is no requirement that an executive session be held even though a public body has the right to do so. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

Since a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not "confidential." To be confidential, again, a statute must prohibit disclosure and leave no discretion to an agency or official regarding the ability to disclose.

By means of example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

The Commissioner failed to include reference to the only judicial decision of which I am aware that dealt squarely with the assertion that information acquired during an executive session

is confidential. In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality. Again, the Freedom of Information Law states that an agency *may* withhold records in certain circumstances; it has discretion to grant or deny access. The only instances in which records may be characterized as "confidential" would, based on judicial interpretations, involve those situations in which a statute prohibits disclosure and leaves no discretion to a person or body.

Based on the foregoing, I believe that the Commissioner's conclusion that information that *may* be withheld or that information that *may* be discussed in executive session is confidential is inaccurate and contrary to the weight of judicial authority.

In sum, I do not believe that your disclosure involved a matter that could properly have been considered during an executive session. As I read the words that you read aloud, they are innocuous. There was no reason in my opinion for the reaction that you elicited. Even if an executive session could have been held to discuss the matter, and I am not suggesting that you or any other board member should intentionally disclose information that could clearly be damaging to an individual or the operation of a governmental entity, I reiterate my belief that the Commissioner's conclusion is inconsistent with both state and federal judicial decisions.

Lastly, I refer once again to the letter addressed to you and signed by six Board members. Because the first line in that letter says that "We are writing this letter out of concern for your conduct...", I question when the six members determined to prepare or approve the content of the letter. It appears that those six members may have taken action in a manner that contravened the requirements of the Open Meetings Law, and that their action represents a more serious lapse than that which is the subject of their disapproval and critical assessment of your conduct.

From my perspective, voting or action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference.

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, or a convening that occurs through videoconferencing.

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, by e-mail, or perhaps by signing a letter in serial fashion at different times, would be inconsistent with law.

I point out that the definition of the phrase "public body" in §102(2) refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote through the use of a telephone of via e-mail, for example, or by means of the members signing a letter at different times.

Conducting a vote or taking action in that manner or via e-mail or a series of telephone calls, would not, according to case law, constitute a valid meeting. In a decision dealing with a vote taken by phone, 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 as formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 Affd 45 NY2d 947).
>
> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

I direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote by phone, by mail, by e-mail or by signing a letter at different times.

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

RJF:jm

cc: Board of Education
Mark Lewis
Michelle Stone
Ben Ferrara

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May 10, 2006

Mr. William R. Galloway
[redacted]

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

Dear Mr. Galloway:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request made to the City of Oswego. The City denied your request and the appeal of its denial of your request, citing the provisions of §87(2)(g) of the Freedom of Information Law.

Your request involved correspondence between a particular City Alderman and the City Assessor, regarding particular properties. Based on your description, these are letters requesting that assessments be increased, and include a "value chart." Except for setting forth the text of the law, the FOIL Appeals Officer offered no explanation as to why §87(2)(g) might apply.

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 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 confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency

> to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). 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 City 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 that agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In short, we believe that the blanket denial of the request was inconsistent with law.

Second, the provision of the Freedom of Information Law relied on by the City to deny access to the records, §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.

While there may be a basis for denying access to portions of the records requested, based on your description of the records, it is likely that others, including the value chart, are required to be disclosed.

Pertinent in our view is the direction offered in Gould focusing on what constitutes "factual data", for it determined that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, 463 N.Y.S.2d 122, mod on

other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182. 417 N.Y.S.2d 142)" (id. 276, 277).

From our perspective, the specific language of §87(2)(g), coupled with the direction offered by the Court of Appeals, provide the basis for reviewing and determining the extent to which the records in question might justifiably be withheld. It is our opinion, therefore, that the "value chart" and any other statistical or factual information contained in the records should be released.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Nancy Sterio

STATE OF NEW YORK
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May 11, 2006

E-Mail

TO: Hon. Debra Hughey

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. Hughey:

I have received your letter concerning the sufficiency of minutes of the Brookhaven Town Board.

In this regard, the Open Meetings Law prescribes what might be viewed as minimum requirements concerning the contents of minutes. 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, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the.

You referred to the transcription of verbatim minutes and the burden that such a practice creates. It is suggested that reasonable alternative exists and is practiced by many municipalities. In order to have a verbatim account of statements made at meetings, the meetings can be audio tape recorded or perhaps video recorded. If there is a question concerning the accuracy of minutes or a need for detail not ordinarily included in typical or abbreviated minutes of a meeting, the tape can be reviewed to ensure accuracy, to resolve a dispute or to refresh one's memory. I note, too, that minutes of meetings must be retained permanently pursuant to the records retention schedule issued by the State Archives at the State Education Department, but that tapes are required to be maintained for a period of months. At the expiration of the retention period, the tapes could be preserved, or if they are no longer of value, they could be erased and reused.

Lastly, 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)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, although there is no requirement to do so, records of votes will appear in minutes.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15958

41 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 11, 2006

Mr. David Snyder
00-A-0025
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. Snyder:

I have received your letter in which you indicated that you have encountered difficulty in obtaining your case file under the Freedom of Information Law from the Greene County Supreme Court. The Court Clerk wrote that he did not have the case file and suggested that you write to Judge Pulver.

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.

I also point out 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 consider it worthwhile, you may request a certification from the clerk that a search for the records has been made and the records cannot be located.

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-15959

41 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 11, 2006

Mr. Nathaniel Jay
05-A-0151
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. Jay:

I have received your letter in which you indicated that you have requested records from the Manhattan House of Detention and the North Facility on Rikers Island, but that you received no responses to your requests or appeals.

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, 2005 (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 point out that the facilities to whom you submitted your requests are part of the New York City Department of Correction. It is suggested that you submit a request for the records of your interest to the records access officer of that Department. You may address the request to Thomas Antenen, Records Access Officer, New York City Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

I hope that I have been of assistance.

Sincerely,

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-15960

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May 11, 2006

Mr. Paul Priore
35-40 163 Street, #F2
Flushing, NY 11358

The staff of the Committee on Open 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 raised issues concerning delays in responding to your requests for records of the New York City Police Department.

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

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

From: Robert Freeman
To: townclerk@townofhamburgny.com
Date: 5/11/2006 3:10:28 PM
Subject: http://www.dos.state.ny.us/coog/ftext/f10325.htm

http://www.dos.state.ny.us/coog/ftext/f10325.htm

I have received your inquiry concerning the Town's obligation to acquire and disclose certified payrolls.

If those records are not maintained by or for the Town, the Town would not be required to obtain them to satisfy a person seeking the records. If they are maintained only by the fire company, the request should be made to that entity. I note that although most fire companies are not-for-profit corporations, the Court of Appeals, the state's highest court, determined in 1980 that volunteer fire companies are subject to the Freedom of Information Law.

If either the Town or a fire company maintains certified payrolls, it has been advised and confirmed judicially that the names, addresses, social security numbers or other personal identifiers pertaining to the employees of private companies may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. However, other portions of the records indicating the amount of time worked and the rate of pay would be available following the deletion of identifying details. That conclusion was reached in the attached opinion. Please note the opinion includes reference to the Personal Privacy Protection Law, which applies only to state agencies. Therefore, reference to that statute may be disregarded.

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-15962

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

May 11, 2006

Mr. Daniel 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:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Town of Ava. At issue is the accessibility of records indicating legal fees paid by the Town in a "fight" against attempts to locate a dump within the Town. The Town Supervisor has indicated that all monies spent were "listed on an abstract presented to the board at a public meeting and approved for payment by that board" and that the bills "are stored away with all of the other records." The Supervisor has further indicated that "anyone wanting this information can FOIL it from the Records Access Officer at any time." In this respect, we offer the following.

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 in our 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 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 short, in Knapp, even though portions of the records containing the time billed and the amount paid for the time were made available, 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. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

In the context of your request, insofar as the records requested include information in the nature of a description of legal advice, legal strategy or similar information reflective of communications falling within the scope of the attorney-client privilege, we believe that the Town would be permitted to redact such information.

To the extent that the Supervisor has directed your request to the Records Access Officer, we note that this is in keeping with the provisions of the Freedom of Information Law and relevant regulations adopted by the Committee on Open Government.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation (i.e., a county, city, town, village, school district, etc.) to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

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

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

> "The records access officer is responsible for assuring that agency personnel...
>
> (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 must "coordinate" an agency's response to requests. Frequently the records access officer is an agency officer or employee who has familiarity with an agency's records. For example, the town clerk is designated as records access in the great majority of towns, for he or she, by law, is also the records management officer and the custodian of town records.

Finally, we note that any request for records must "reasonably describe" the requested records. 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 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. 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 Town staff can locate the records of your interest with a reasonable effort analogous to that described above, i.e., even 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 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.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Hon. David C. Mathis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1596

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May 11, 2006

Mr. Bruce Golding
The Journal News
1 Gannett Drive
White Plains, NY 10604

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

Dear Mr. Golding:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request made to the New York Lottery, as well as copies of correspondence between yourself and the Lottery reflecting your efforts to obtain access to records "pertaining to the information used to develop the Lottery's last ten (10) Basic Financial Statements (with Independent Auditors Reports Thereon)" and "gross annual wages as reported on W-2 for 2005 for all employees." Because it appears that the Lottery has already provided copies of the independent auditor's reports, we will limit our comments to issues pertaining to the accessibility of the contents of monthly tabular reports which the Lottery has already identified and gross wage information.

With respect to your first request, the Lottery has indicated that it has identified 120 monthly tabular reports, each of which consist of over 1,000 pages. At a cost of $.25 per page, the Lottery estimates that the total cost of copying will be more than $30,000, and "there are no electronic copies available." Assuming that such costs would be prohibitive, the Lottery recommended that you narrow your request.

In this regard, as you may be aware, the Freedom of Information Law pertains to existing records, and§86(4) defines the term "record" expansively to include:

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

Based upon the language quoted above, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. "Form" or "format" in our view involves the medium by which information is stored; whether information is stored on paper or on a computer tape or in a computer disk, it constitutes a "record."

In what may be the leading decision relating to an agency's obligations regarding disclosure in an electronic medium, Brownstone Publishers Inc. v. New York City Department of Buildings [166 AD2d 294 (1990)], the question involved an agency's duty to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division:

> "The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" (id. at 295).

In short, assuming that some of the records contained within the monthly tabular reports are maintained in electronic format, when it is requested that they be released in such format or another format which conversion can be accomplished by the agency, the agency would be obliged to do so. If, for example, the monthly reports are printouts, they could only have printed from information stored electronically.

The Lottery has indicated its position that "there is no obligation under FOIL, however, for the Division to go on a fishing expedition which results in the work of the Division ceasing." We agree that production of records pursuant to the Freedom of Information Law is not intended to overwhelm an agency's operations to the point of cessation of its activities. Nevertheless, it is our opinion, which is based on the judicial construction of the Freedom of Information Law, that the contents of the report that exist in electronic format must be made available to you in an electronic format in order to minimize the burden on Lottery employees while concurrently making the records sought available in a manner useful to you.

With regard to the Lottery's obligation to conduct a "fishing expedition" we note that the Lottery has already identified the records responsive to your request. Here we note that 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 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 Lottery, to the extent that the records sought have already been located, 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 those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

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

As indicated in Konigsberg, only if it can be established that the Lottery 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. Accordingly, to the extent that there are additional reports which the Lottery is capable of identifying as responsive to your request, and with respect to the monthly tabular reports which it has already identified, is it our opinion that such records would be required to be made available pursuant to Freedom of Information Law.

With regard to your request for copies of those portions of W-2 statements which reflect gross annual wages, as you know, a payroll record 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, we believe that the payroll record and other related records identifying employees and their wages, including compensation for unused sick, vacation or personal leave, must be disclosed.

Of primary relevance is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372

NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

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

Based upon the direction provided by the Freedom of Information Law and the courts, we believe that other records reflective of payments made to public employees are available. For instance, insofar as W-2 forms of public employees indicate gross wages, they must be disclosed. In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, 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. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in our view be disclosed. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Robert McLaughlin
Michelle Mattiske

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 12, 2006

Mr. Henry Terry
[redacted]

The staff of the Committee on Open 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:

I have received a variety of materials from you concerning your requests made under the Freedom of Information Law to the Village of Patchogue. You have sought an advisory opinion, and based on a review of the materials, I offer the following general comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) provides in relevant part that an agency is not required to create a record in response to a request. Similarly, although an agency may choose to supply information in response to questions, it is not required to do so.

Related is the breadth of the Freedom of Information Law, for that statute pertains to all records of an agency, such as a village, 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, when information exists in some physical form and is maintained by or for the Village, I believe that it constitutes a Village record subject to rights conferred by the Freedom of Information Law.

Second, an issue appears to involve instances in which records have been requested and the Village has indicated that a record cannot 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." It is emphasized that when a certification is requested, an agency "shall" prepare the certification; it is obliged to do so.

Third, another issue likely involves the ability of Village officials to locate requested records. 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 Village, to extent that records sought can be located with reasonable effort, I believe that a request would meet the requirement of reasonably describing the records. 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 Village 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 Village maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Fourth, when a request does reasonably describe 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. 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.

It is noted that it has been held that a challenge to a denial of a second request for records that had initially been denied in response to a preceding request and appeal must be dismissed on the ground that initiation of the suit was time barred [Garcia v. Division of State Police, 302 AD2d 755 (2003)]. Insofar as your requests involve records that had previously been denied both initially and following an appeal, it is my view that the Village is not required to respond, unless there is a change in circumstances that would alter the authority of the Village to deny access. I point out, too that in Moore v. Santucci [151 AD 2d 677 (1989)] it was found that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, only if you can "in evidentiary form" demonstrate that you do not maintain records that had previously been disclosed would an agency be required to respond to a request for the same records.

Fourth, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record 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.

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.

In short, when some portions of records must be disclosed and others may be withheld, an agency may seek payment of the requisite fee for photocopies, which would be made available after the deletion of certain details (see Van Ness v. Center for Animal Care and Control and the New

York City Department of Health, Supreme Court, New York County, January 28, 1999). Again, however, if a record is available in its entirety, I believe that you would have the right to inspect it free of charge.

Lastly, certain records relating to the employment of a certain Village employee were withheld. Relevant in that regard is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy.

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

In conjunction with the foregoing, I note that it has been held by the Appellate Division 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, supra).

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

> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the

> performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: J. Lee Snead
Patricia M. Seal

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15965

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May 12, 2006

Mr. Norman Schachter
02-A-3134
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

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

Dear Mr. Schachter:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made for a subject matter list from a state agency. Specifically, you express your frustration at having to "pay $8-9 for this subject matter list so that you can find which records you would like to pay a second time to receive." In this regard, we offer the following comments.

First, when a record is available in its entirely under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there are often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the ground for denial appearing in §87(2). In that event, 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. Due to the nature of the contents of a subject matter list, which the agency is required to maintain pursuant to §87(3) of the Freedom of Information Law, however, no preliminary redactions would be necessary. Accordingly, it is our opinion that you should be able to inspect the subject matter list at no charge during normal business hours.

Second, we note that it has been held that an agency may charge its established fee, even when the applicant for records is indigent [see *Whitehead v. Morgenthau*, 552 NYS2d 518 (1990)]. Notwithstanding the foregoing, there is nothing in the Freedom of Information Law that prohibits an agency from waiving the fee for copies. Many agencies waive fees as a matter of policy when the request involves a minimal number of copies. Their finding is that it costs more to accomplish the administrative tasks associated with taking in a small amount of money than the amount of the fee.

Third, as you may be aware, the Freedom of Information Law pertains to existing records, and§86(4) defines the term "record" expansively to include:

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

Based upon the language quoted above, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. "Form" or "format" in our view involves the medium by which information is stored; whether information is stored on paper or on a computer tape or in a computer disk, it constitutes a "record."

In what may be the leading decision relating to an agency's obligations regarding disclosure in an electronic medium, Brownstone Publishers Inc. v. New York City Department of Buildings [166 AD2d 294 (1990)], the question involved an agency's duty to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division:

> "The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that

> the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" (id. at 295).

In short, assuming that the subject matter list is maintained on a hard drive or disc, maintained in an electronic format, when it is requested that it be released in such format or another format which conversion can be accomplished by the agency, the agency would be obliged to do so. If, for example, the subject matter list can be printed out from information stored electronically, it would be possible to copy the record to disk or email the record to you.

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

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

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

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

Based upon the foregoing, it is likely that a fee for reproducing a computer printout would involve the cost of computer time, plus the cost of an information storage medium (i.e.,paper or disk). The actual cost of emailing the document to you would likely be nothing.

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)].

Finally, it is our experience that the subject matter list might not provide you with sufficient information to locate particular records. In some cases, it is more helpful to request assistance from the Records Access Officer.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation (i.e., a county, city, town, village, school district, etc.) to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

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

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

> "The records access officer is responsible for assuring that agency personnel...
>
> (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 must "coordinate" an agency's response to requests. Frequently the records access officer is an agency officer or employee who has familiarity with an agency's records. For example, the town clerk is designated as records access in the great majority

of towns, for he or she, by law, is also the records management officer and the custodian of town records. In this respect, the Records Access Officer may be able to help you identify and describe records which are of interest to you.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

From: Janet Mercer
To: Thomas W Clothier Sr
Date: 5/15/2006 9:39:23 AM
Subject: Re: freedom of information

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

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

Committee on Open Government
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Albany, NY 12231
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Website: www.dos.state.ny.us/coog/coogwww.html

>>> "Thomas W Clothier Sr" [redacted]> 5/12/2006 4:05:24 PM >>>
Hello I would like to know what the time span is for getting my request for information from the Town. I submitted a request 21 April and haven't heard anything as of yet did the law change so as to give them more time or that they don't have to give information as requested. Thanks Tom

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 16, 2006

J. Mark Reimer
Deputy Mayor
Village of Sloatsburg
96 Orange Turnpike
Sloatsburg, NY 10974

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

Dear Mr. Reimer:

I have received your letter and thank you for your kind words regarding my presentation. You have sought clarification concerning the Village of Sloatsburg's obligations in relation to the Freedom of Information Law. In this regard, I offer the following remarks.

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

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

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability

> under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

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

While I am unfamiliar with the record keeping systems of the Village, to the extent that the records sought can be located with reasonable effort, I believe that a request would meet the requirement of reasonably describing the records. As indicated in Konigsberg, only if it can be established that the Village maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Second, it has been held that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence" [Moore v. Santucci, 151 AD2d 677 (1989)].

I hope that the foregoing clarifies 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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May 16, 2006

Ms. Lisa A. Menze
05-G-0109
Bedford Hills Correctional Facility
Bedford Hills, NY 10507-2499

The staff of the Committee on 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. Menze:

I have received your letter concerning unanswered requests for records. In this regard, I offer the following comments.

First, there appears to be some confusion in relation to the state and federal provisions. Applicable in the context of your requests is the New York Freedom of Information Law, which pertains to records of entities of state and local government in New York. Separate is the federal Freedom of Information Act, which pertains to records of federal agencies. I note, too, that the federal Act includes provisions concerning fee waivers, but that the New York law does not.

Second, since one of your requests involves a court, I point out that the courts are excluded from the coverage of the Freedom of Information Law. This not intended to suggest that courts are not required to disclose their records. On the contrary, most court records are available under different provisions of law (see e.g., Judiciary Law, §255). When seeking court records, it is suggested that you request them from the clerk of the court, citing an applicable provision of law as the basis for the request.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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: Records Access Officer, Westchester County Department of Probation
Records Access Officer, Westchester County Medical Center

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 17, 2006

E-Mail

TO: Mr. 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 information presented in your correspondence.

Dear Mr. Schuman:

I have received your letter in which you contend that planning board minutes prepared by the board clerk at her home on her personal computer should be available to you, on request, "electronically either by email or on a disk."

In this regard, first, 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)].

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, I believe that documentary materials prepared for the planning board by its clerk on her home computer constitute town records that fall within the coverage of the Freedom of Information Law.

Second, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than twenty-five years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved with reasonable effort, an agency is required to disclose the information. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disc.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered on a keyboard. While some have contended that those kinds of minimal steps involve 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 is required to do so.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. In holding that the agency was required to make the

data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

In another decision which cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

Lastly, §305(1) of the State Technology Law 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 an agency may choose to respond to a request by emailing records to an applicant, it is not required to do so. However, when the agency is able to make the information available on a disk, for reasons offered earlier, I believe that it is required to do so.

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 17, 2006

Mr. Mario Belanich
Ms. Edna Belanich
[redacted]

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

Dear Mr. and Ms. Belanich:

I have received your letter and the correspondence attached to it. In brief, you are interested in obtaining the name of a person who complained to the Village of Sleepy Hollow Police Department concerning the white driveway lines in front of your residence.

In my opinion, the Village is not required to disclose the identity of the complainant.

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, such as a village, are available, except to the 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 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 complaint may, in my view, be withheld.

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. Philip E. Zegarelli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 17, 2006

E-Mail

TO: Mr. Joe Latwin

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. Latwin:

As you are aware, I have received your letter in which you wrote that the Westchester County Clerk makes certain records available online, but that "there is a $1089 annual fee to be able to access these documents." You asked whether "this fee violate[s] the 25 cents per page limit set forth in the Public Officers Law."

In this regard, the provisions concerning fees in the Freedom of Information Law pertain to the reproduction of records. If I understand the matter accurately, the fee of $1089 does not involve the reproduction of records, but rather a service provided by the County in which subscribers may gain online access to a variety of records. There is nothing in the Freedom of Information Law that requires agencies to make records available online via the Internet. When they choose to do so, they would be acting above and beyond the responsibilities imposed upon them by law, and in those cases, the provisions in the Freedom of Information Law pertaining to fees, in my view, do not apply.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4200
FOIL-AO-15972

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

May 17, 2006

Mr. Antovk Pidejian
Empire State Development Corporation
633 Third Avenue
New York, NY 10017-6754

Dear Mr. Pidejian:

Thank you for forwarding a copy of the unpublished January 7, 2005 Decision and Judgment in NY1 News v. New York State Urban Development Corporation, New York County. In response to your request, we have removed Advisory Opinion No. 14583 from our website.

Although you have not requested it, we would like to take this opportunity to comment on the contents of the decision and perhaps offer some clarification. In its decision, the court acknowledged the existence of the jury as an agency, as defined by the Freedom of Information Law, but failed to include any consideration of the Open Meetings Law, limiting its discussion to application of the Freedom of Information Law only. In our opinion, had the court considered application of the Open Meetings Law, it is likely that it would have reached a different result.

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

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

A public authority is a public corporation. Therefore, any public authority, such as the New York State Urban Development Corporation and its subsidiary the Empire State Development Corporation, would constitute an "agency", a governmental entity, that is subject to the Freedom of Information Law.

On pages three and four of its decision, the court indicates the rationale for its determination that the "jury" is an "agency" within the meaning of the Freedom of Information Law. As described by the court, the jury consists of thirteen individuals charged with the responsibility of conducting

a competition and ultimately selecting a plan for a permanent memorial at the World Trade Center site. Contrary to petitioner's argument, the court concluded that the jury was not merely advisory, but rather,

> "... invested with complete decision-making authority, as evidenced by the guidelines for the memorial competition. . . . [which] clearly underpinned the understanding of the committee itself, as it thanked the respondent, the governor, the mayor, and the public in its January 13, 2004 statement for having granted it 'complete authority and automomy to make this very difficult, but crucially important decision.' [Emphasis Added]." P. 4.

The court further held that:

> "Petitioner's further argument that such a complete delegation of authority would have been illegal is unfounded as a matter of law."

We are in agreement with the judicial determination that the jury fits the definition of agency. In our opinion, if the jury would not exist but for its relationship with a public authority, and if it carries out its duties solely for or on behalf of an agency, it, too, would constitute an "agency" required to comply with the Freedom of Information Law.

What is lacking from the judicial decision, however, is the corresponding analysis regarding the Open Meetings Law. If the preceding assumptions and conclusions are accurate, the jury would be subject to the Open Meetings Law. That statute is applicable to public bodies, and §102(2) defines the phrase "public body" to include:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Again, assuming that the court is correct and that the jury carries out its duties solely for or on behalf of an agency, we believe that it is an entity that conducts public business and performs a governmental function for a public corporation, i.e., a public authority. If that is so, it is a public body that falls within the coverage of the Open Meetings Law.

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be conducted in accordance with §105(1) of the Open Meetings Law. When the jury met, on August 7, 2003, with Mayor Michael Bloomberg, Governor George Pataki, and former Mayor Rudolph Guiliani, therefore, it is our opinion that the meeting should have been open to the public.

The court's further analysis, that those portions of the video recording which reflect inter-agency communications between the Empire State Development Corporation, the Mayor and the Governor which are not statistical or factual information or data would be inconsistent with a finding that the jury's meetings are subject to the Open Meetings Law. If the press and the public should have been permitted to attend the meeting of the jury (assuming a quorum was present), it is our opinion that there would be no ground for denying access to the videotape recording in its entirety. Further, we disagree that the exchange between the jury and former Mayor Giuliani could properly be characterized as "inter-agency" in nature. In short, Giuliani was not a public officer or employee during that exchange and therefore would not have been an officer or employee of an agency.

In short, if the jury is an "agency" and a "public body", which we believe it to be, meetings of the jury would be governed by all aspects of the Open Meetings Law, including provisions concerning notice, minutes and public access.

Thank you for bringing this decision to our attention.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Monica Iken

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15973

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May 17, 2006

Ms. Mary Tichenor
Mr. Frank H. Brunstetter
[redacted]

The staff of the Committee on 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. Tichenor and Mr. Brunstetter:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Town of Mendon, for the following:

> "1) I would like copies of all engineering information considered by the Town Board in 2005, regarding the potential library building on Monroe St., West Main Street and Semmel Road.
> 2) Information to include all specific engineering problems that were identified, Cost estimates to be in compliance with appropriate NY State Laws, and Conclusions and recommendations made by the engineering studies."

Because you did not receive a written response to your February 10, 2006 request, you appealed the constructive denial of your request, by correspondence to the Town Supervisor dated March 25, 2005. In response, you have now been advised as follows:

> "Because of other duties and responsibilities, I have not been able to meet with the Town Engineers to determine if they have any further records pertaining to their summary sheet. That is not an excuse, just a statement of fact. I will contact them today to set up an appointment to discuss this matter. After I meet with them, I will notify you of the result. If any further records exist, you shall have access to them."

By correspondence dated April 15, 2006 you again wrote to the Town, and it is our impression that you have had no response to your March 29, 2006 appeal. In this regard, 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. While we do not recommend taking legal action, you are within your rights to do so.

Turning now to your substantive request, from our perspective, records prepared for an agency by a consultant constitute intra-agency materials that should be made available in part. In this 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 §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.

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 our 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 engineer, would be accessible or deniable, in whole or in part, depending on its contents.

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, we believe that a consultant would be a person or firm "retained" for compensation by an agency to provide a service.

We note that your request is for "all engineering information considered by the Town Board in 2005" involving three potential sites for the library. From our perspective, this aspect of your request is not necessarily a request for records as envisioned by the Freedom of Information Law, for a response would involve making a series of judgments based on opinions, some of which would be subjective, mental impressions, the strength of one's memory, and perhaps some research.

For instance, in a situation in which an individual sought provisions of law that might have been "applicable" in governing certain activity, it was advised that the request was inappropriate. Specifically, the request involved "copies of the applicable provisions and pages of the Civil Service Law and applicable rules promulgated by the Department of Civil Service which govern the creation and appointment of management confidential positions" (emphasis added). In response, it was suggested that:

> "...the foregoing is not a request for records. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions of law might be "applicable", and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 209 of the Civil Service Law", no interpretation or judgment is necessary, for sections of law appear numerically and can readily be identified. That kind of request, in my opinion, would involve a portion of a record that must be disclosed. Again, a request for laws that might be "applicable" is not, in my view, a request for a record as envisioned by the Freedom of Information Law."

In like manner, ascertaining which records might have been considered by the Board would involve an attempt to render a judgment regarding the use, utility, accuracy or value of records. As in the case of locating "applicable law", equally reasonable people, even those within the same agency, may reach different conclusions regarding which records were considered with regard to a particular project.

Further, there may be a variety of records from an array of sources used in and outside the scope of one's governmental duties in consideration of the relocation, including articles from professional journals or magazines, reference materials and/or similar documentation read or seen over the course of years. Those kinds of materials may contribute to one's breadth of knowledge and may, consciously or otherwise, have been part and parcel of the Town Board's consideration.

Identifying or recalling those kinds of materials, however, would, in our opinion, frequently involve an impossibility. Moreover, for purposes of the Freedom of Information Law, a request for such materials would not meet the standard of "reasonably describing" the records sought, for such a request would not enable the Department to locate and identify the records in the manner envisioned by that statute [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Finally, with respect to any documents which you believe to have been omitted from a response, 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.

On behalf of the Committee on Open Government, we hope this is helpful to you. 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 Town officials.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Hon. James Merzke
Hon. Morris W. Bickweat

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 17, 2006

Mr. John Hepsen
[redacted]

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

Dear Mr. Hepsen:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the New York City Police Department regarding the death of your brother in August of 2004. To date, you have received a copy of the complaint report, records from the Office of the Chief Medical Examiner, and a letter from a Sergeant in the Office of the Commanding Officer of the 90th Precinct Detective Squad explaining the circumstances of your brother's death.

Based on the additional information provided to you in the Sergeant's correspondence, which is not contained within any of the other records in your possession, it appears likely that there are records maintained by the NYPD which have not been provided to you.

In this regard, the Freedom of Information Law is expansive in its scope, for it pertains to all records of an agency, such as a police department, and §86(4) defines the term "record" to mean:

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

Based on the foregoing, it is clear in our opinion that any and all written material generated by and/or provided to the Department would constitute agency 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). From our perspective, and based on the information which you have provided which indicates that there is no ongoing criminal investigation involving the circumstances of your brother's death, the records in question should be made available to you or your parents in great measure.

In our view, there are only two grounds for denial on which the Department could rely to refuse to disclose access to the requested records. The first involves the situation in which, due to the nature of their contents, disclosure of the requested records would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law §§87(20(b and 89(2)]. The second involves records which are inter-agency or intra-agency materials.

As stated by the Court of Appeals, the state's highest court, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. Here, because the records pertain to your brother, and because your parents may have a need to establish a legal claim or right, any identifying information pertaining to the alleged wife of your brother should, in our view, be released. By means of analogy, in the case of death records, which are typically exempted from public disclosure under §4174 of the Public Health Law, there are exceptions that authorize disclosure, i.e., "when a documented medical need has been demonstrated" or "when a documented need to establish a legal right or claim has been demonstrated." That kind of justification provides town and city clerks with the flexibility to make judgments regarding their ability, upon a showing of a good reason, to disclose items which otherwise would result in an unwarranted invasion of personal privacy. Similarly, such analysis would be appropriate here, where determination of the identity of the next of kin may be an issue.

Section 87(2)(g) of the Freedom of Information Law, authorizes an agency to withhold records that:

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

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

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

Just as importantly, it is emphasized 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 Department could withhold the records on either of the grounds mentioned above, it would not be required to do so.

Further, we note that certain information from the complaint report provided to you was redacted, specifically your brother's age, date of birth, and address. Release of such information to you and your family, in our opinion, would not constitute an unwarranted invasion of personal privacy and must be provided to you.

Finally, with respect to any documents which may have been omitted from the Department's response, when an agency indicates that it does not maintain any other records which are responsive to your request, 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.

On behalf of the Committee on Open Government, we offer our condolences to you and your family on the circumstances of your brother's death and burial. We hope that this advisory opinion is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Jonathan David
Lt. Daniel Gonzalez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 18, 2006

Mr. Michael D'Agostino
[redacted]

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

Dear Mr. D'Agostino:

I have received your letter and the materials attached to it. You described a situation in which you requested certain records pursuant to the Freedom of Information Law from the office of the Onondaga County District Attorney last September. In response, you were informed that no records could be found. Later, however, you were told that "due to some internal failure", the matter to which the records relate "was never logged into [its] computer system", and that the "physical file" was found but had been "sealed under Court order." You have sought an opinion concerning your right to obtain the records under the Freedom of Information Law.

You referred to the foregoing as "a somewhat strange situation", and I agree with your assessment. Nevertheless, I do not believe that the Freedom of Information Law can serve as a vehicle to require the District Attorney to disclose the records at issue.

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

Of critical significance in the context of the facts that you presented is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §160.50 of the Criminal Procedure Law, which provides in subdivision (1) that "[u]pon the termination of a criminal action or proceeding against a person in favor of such person", "the record of such action or proceeding shall be sealed", and notification so indicating must be given by the clerk of the court in which the action or proceeding occurred. Paragraph (c) of subdivision (1) involving the notification states that:

> "all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution,

> including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency."

Despite the error made by the office of the District Attorney, I do not believe that agency or any other has the authority to disclose records that have been sealed by order of a court. As I understand §160.50 of the Criminal Procedure Law, only a court has the authority to seal records, and similarly, only a court has the authority to remove the seal. That being so, it appears that the proper course of action would involve an attempt to appear before the court that sealed the records, describe the situation, and request that the records be unsealed and made available to you for a specified and limited use.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

From: Robert Freeman
To: McGinty, Tom
Date: 5/18/2006 10:21:35 AM
Subject: Re: DOT

Hi Tom - -

I guess I should offer congratulations, despite the issues that you raised. For the moment, I point out that §89(3) of the FOIL states that, on request, an agency must prepare a certification in writing indicating that records sought are not maintained by the agency or cannot be found after diligent search. If you are unsure of the accuracy of the response concerning whether the materials made available are the most current, you might consider requesting a certification in which a Department official must, in essence, swear in writing that the material that you want does not exist.

Please keep me abreast of developments.

Bob

Robert J. Freeman
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>>> "McGinty, Tom" <mcgintyt@tribune.com> 5/18/2006 10:11:47 AM >>>
Karen and Bob,

I'm happy to report, for once, some progress. You may recall that I FOILed a GIS (map) file that I thought would work with the data, and that they initially said they needed to research some copyright issues. Well, they for once did the right thing and mailed me a CD with the file on May 5. I had already had a clerk here type in the paper lists we received, even though it really galled me that anyone had to waste that much time because they wouldn't send an electronic copy. It turns out I was right: The map is exactly what I was looking for and I now have mapped all of the locations.

Also, last Friday the DOT emailed me an explanation of the column headings in the lists. It's not super detailed, but it filled in some of the gaps.

At this point, I have only two outstanding issues:

1) Are the reports we received, which are labeled as 2002 reports, really the most recent analysis the DOT possesses? They certified as much, but I'm suspicious, given how cute they were about the GIS file we asked for. (They said a search "failed to reveal" the lists in "GIS file format," when what we had really asked for was a GIS file that would relate to the location reference system used in the lists. Obviously, we now know that exists). My cynical guess is that the names of the lists or the program has changed, so their certification is technically correct, but essentially, well, BS.)

2) The list of projects they gave us are pretty much indecipherable and they came with the reference marker locations whited out (it looks like they laid paper over those columns before making the copies). So we can't identify where they did the work.

I've raised these issues with Jennifer Post in the press office, and she seems willing to work with me on them. I'll keep you posted.

Tom

Tom McGinty
Staff Writer
Newsday
(631) 843-2998

OML-AO-4204
FOIL-AO-15977

From: Robert Freeman
To: bethelclerk[redacted]
Date: 5/19/2006 9:40:41 AM
Subject: I have received your letter in which you raised two questions.

I have received your letter in which you raised two questions.

First, you referred to a stenographer who attends Town Board meetings but has not disclosed the identity of the person or firm she is representing. You asked whether that it permissible. In my view, since §103 of the Open Meetings Law states that meetings are open to the general public, the identity of the stenographer or her employer are irrelevant. In short, I do not believe that she can be required to disclose her interest or the name of the person or firm that she may be serving.

Second, you wrote that a person regularly seeks a copy of the tape recording of Town Board meetings under the Freedom of Information Law a day after the meetings. You asked whether you must accommodate him. In this regard, it was held more than twenty-five years ago that tape recordings of open meetings are accessible under the Freedom of Information Law. If the tape recording is being used, i.e., for the purpose of preparing the minutes, there would be no obligation to prepare a copy when he requests it. You have up to five business days to respond to a request, and if more time is needed, the receipt of the request must be acknowledged in writing, including an approximate date within twenty business days indicating when you will be able to grant the request. If it is not inconvenient to copy the tape when it is requested, there would be no reason to delay responding to the request.

I hope that I have been of assistance.

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

FOIL-AO- 15978

From: Robert Freeman
To: townclerk@lewisborogov.com
Date: 5/19/2006 11:06:16 AM
Subject: Hi - -

Hi - -

The only fee that can be charged when a request is made under the Freedom of Information Law involves the reproduction of records. As you are likely aware, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing records that cannot be photocopied (i.e., tape recordings). No fee may be charged for personnel time, search, etc.

I hope that I have been of assistance.

Robert J. Freeman
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Cory. K
(Kathleen Cory
Town

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1597 9

41 State Street, Albany, New York 12231
(518) 474-2518
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May 25, 2006

E-Mail

TO: Ms. Jolie Dunham

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. Dunham:

Your correspondence addressed to Janet Mercer of this office has been forwarded to me. In brief, you referred to requests made to the Kingston City School concerning a variety of matters that apparently were not fully addressed.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

In my opinion, bills, vouchers, contracts, retainer agreements, receipts and similar records reflective of payments made or expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable in most instances.

With specific respect to payments to attorneys, I point out that, while the communications between an attorney and client are often privileged, it has been established in case law unrelated to the Freedom of Information Law that records indicating the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)].

In the first case pertaining to records of payments by a municipality to an attorney sought under the Freedom of Information Law, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter involved an applicant who sought billing statements for legal services provided to the Board by a law firm. Since the

statements made available included "only the time period covered and the total amount owed for services and disbursements", petitioner contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, citing a decision rendered by the state's highest court, it was found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, *the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client.* (Matter of Priest v. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters was not privileged..." (emphasis added).

Also pertinent is Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], which involved a request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.). The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part, and also cited Priest v. Hennessey, supra.

In the decisions cited above, there was no issue regarding the retainer agreements between government agencies and law firms, for they are clearly not privileged and accessible by law; rather the controversies involved more detailed records.

Many of the records, including those prepared for the District by consultants, appraisals and surveys would fall within §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, an appraiser, or a person or firm retained to conduct a survey, may be withheld or must be disclosed based upon the

same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

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

With respect to the contention that the records may be 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 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.

Lastly, you referred to a request for voting records of Board members in relation to certain action taken by the Board. In this regard, the Freedom of Information Law generally pertains to existing records, and §89(3) states in part that an agency need not create records to comply with that law. However, an exception to the rule relates to an obligation to prepare a record indicating the manner in which Board members vote when the Board takes action. Specifically, §87(3) states that:

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

I hope that I have been of assistance.

RJF:jm

cc: Board of Education
Carol Bell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1598O

41 State Street, Albany, New York 12231
(518) 474-2518
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May 25, 2006

Mr. Thomas J. Evangelista
[redacted]

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

Dear Mr. Evangelista:

I have received your letter in which you indicated that agencies "have not complied" with your requests for pistol license files pertaining to you.

In this regard, the statute that deals with licenses pertaining to firearms is §400.00 of the Penal Law, and subdivision (5) states in relevant part that:

> "The application for any license, if granted, shall be filed by the licensing officer with the clerk of the county of issuance, except that in the city of New York, and in the counties of Nassau and Suffolk, the licensing officer shall designate the place of filing in the appropriate division, bureau or unit of the police department thereof, and in the county of Suffolk the county clerk is hereby authorized to transfer all records or applications relating to firearms to the licensing authority of that county. The name and address of any person to whom an application for any license has been granted shall be a public record."

Based on the foregoing, it is clear that the name and address of a person to whom a license is granted are accessible to the public. However, in the decision rendered in Sportsmen's Association for Firearms Education, Inc. v. Kane [680 NYS 2d 411, aff'd 266 AD2d 396 (1998)] it was concluded that other information submitted or acquired in the licensing process is, by implication, beyond the scope of public rights of access. However, there is nothing in §400.00 of the Penal Law that *forbids* disclosure of that information. That being so, I do not believe that the information in question *must* be withheld in every instance, but rather that it *may* be withheld. In short, the custodian of the records in question may, in my view, choose to disclose the records in question, in whole or in part, even though there may be no obligation to do so. I note, too, that the

Freedom of Information Law is permissive, and that the Court of Appeals has held that an agency may withhold records in accordance with the grounds for denial, but that it is not required to do so [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. The only instance in which records must be withheld would involve the case in which a statute prohibits disclosure. Again, as I interpret §400.00 of the Penal Law, there is nothing in that statute that precludes the custodian of the records at issue from disclosing the records.

I also 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, 2005 (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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15981

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May 25, 2006

Mr. and Mrs. Willie Lawrence
[redacted]

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

Dear Mr. and Mrs. Lawrence:

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

You referred to a "lack of response" by the Amityville School District to your request made under the Freedom of Information Law relating to an incident involving your son.

In this regard, I offer the following comments.

First, although you referred to records in your request to the District, you sought to obtain information by raising a variety of questions, i.e., "who investigated the alleged incident", "was there any evidence of a weapon ever being present at the scene", etc. Here I point out that the title of the Freedom of Information Law may be misleading, for it does not deal with information *per se*, but rather with a government agency's ability to disclose records. Section 89(3) states in relevant part that an agency, such as a school district, is not required to create a record in response to a request for information. Similarly, although agency officials may choose to supply information in response to questions, they are not required to do so by the Freedom of Information Law. In the future, rather than seeking information, it is suggested that you request records, such as records identifying persons who investigated the incident, or records containing evidence involving the use of a weapon.

Second, and in a related vein, the Freedom of Information Law pertains to all existing records maintained by or for an agency and defines the term "record" expansively 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 definition of "record', the Freedom of Information Law includes tape recordings and notes within its coverage.

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.

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. Concurrently, however, 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 son 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 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.

When 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 merely consist of a factual description of an event, 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.

Next, since you request also makes reference to a subject matter list, I point out that an exception to the general rule that an agency need not create records to comply with the Freedom of Information Law is pertinent in that context. 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 College. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

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, 2005 (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: Brian M. De Sorbe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4204
FOIL-AO-15982

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May 25, 2006

Mr. Jim Nordgren
[redacted]

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

Dear Mr. Nordgren:

As you are aware, I have received your letter in which you sought an advisory opinion concerning a denial of a request for notes pertaining to a gathering that may have involved three members of the Lewisboro Town Board and the Town wetland inspector, Jay Fain. Mr. Fain appears to have been retained by the Town.

Attached to a your letter is a memorandum addressed to you by Kathleen Cory, the Town Clerk, in which she wrote as follows:

> "Mr. Nordgren requested any and all records and memoranda from a gathering that took place on January 26TH at the Town House. The gathering refers to a meeting at the Town House of the Supervisor and Town Board Member Peter DeLucia with Wetlands Inspector and Consultant Jay Fain. Board Member Suzanne Whalen was in the Town House picking up her mail during the meeting. Former Counsel Les Maron ruled that the meeting was not a Board meeting, and Town Clerk Kathy Cory advised Mr. Nordgren of the above.
>
> "On March 3, 2006, Mr. Nordgren requested the notes of two private individuals who are alleged by Mr. Nordgren to have participated in the above referenced meeting by telephone. Mr. Nordgren added that he also wanted any notes Mr. Fain may have taken and asked to appeal Ms. Cory's decision.
>
> "The Supervisor and Councilman DeLucia did not take notes and the two other private individuals deny any knowledge or involvement in the subject meeting. Town Attorney Jessica Bacal advised Ms. Cory

> that any notes Mr. Fain may have taken during the meeting are inter-agency or intra-agency materials and thus are not public information or materials subject to FOIL."

In this regard, I offer the following comments.

First, the gathering in question, as it was described by the Town Clerk, does not appear to have constituted a "meeting" subject to the Open Meetings Law. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law. However, if there is no intent that a majority of public body will gather for purpose of conducting public business, collectively, as a body, I do not believe that the Open Meetings Law would be applicable, for in the same decision as that referenced above, the Court specified that "not every assembling of the members of a public body was intended to be included within the definition", indicating that social events or chance meetings do not fall within the Open Meetings Law (id., 416).

In the situation that you described, it does not appear that three Town Board members gathered for the purpose of conducting public business as a body. If they did so, the gathering in my opinion would have been a "meeting" that fell within the Open Meetings Law. On the other hand, the members may have been in the same building for a different reason. In short, if a majority of the Town Board did not convene for the purpose of conducting public business collectively, there would not have been a meeting, and the Open Meetings Law would not have applied.

Second, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. In the context of your request, if no records exist, the Freedom of Information Law, in my view, would not apply. 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.

Third, the Freedom of Information Law defines the term "record" expansively to mean:

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

Based on the foregoing, notes or other documentary materials prepared by or for the Town constitute Town records that fall within the coverage of the Freedom of Information Law. Further, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Also 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, such as notes, 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. For instance, if Mr. Fain was retained by the Town and prepared notes or other documentation in the performance of his duties for the Town, I believe that those items would fall within the scope of the Freedom of Information Law.

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

Although the provision referenced as a basis for denial, §87(2)(g), potentially serves as one of the grounds for denial of access to records, due to its structure, it may require 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 or others retained by 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)].

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, for example, by Town Board members, a Town employee, or a consultant for the Town would be accessible or deniable, in whole or in part, depending on its contents.

Lastly, you expressed the understanding that you must seek judicial review of a denial of access within forty-five days of an agency's final determination. I do not believe that to be so. It is my understanding that you have up to four months from an agency's final determination to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Kathleen Cory
Jessica Bacal

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15983

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May 26, 2006

George Longworth
Chief of Police
Dobbs Ferry Police Department
112 Main Street
Dobbs Ferry, NY 10522

Dear Chief Longworth:

Once again, I appreciate your invitation to meet with you and your colleagues. I hope that you feel that our meeting was constructive.

As promised, a review of the materials that you distributed has been conducted. In general, I believe that they are excellent, and with few exceptions, fully consistent with law. In the following comments, which I hope you will not consider to be overly technical, I would like to offer clarification.

News Media Relations

In the statement of policy on page 1, reference is made to the "FOIA" and the "Right of Privacy Act." The statute that generally governs rights of access to records of agencies of government in New York is the Freedom of Information Law ("FOIL"). There is no "Right of Privacy Act." Article 6-A of the Public Officers Law, the Personal Privacy Protection Law, is applicable only to state agencies; it excludes units of local government from its coverage.

Release of Information from Police Files

Item 13 states that names of victims will be disclosed, except with respect to:

> "c. Any victim who is actually or apparently a random target and unknown to his/her assailant;
>
> d. Any injured or deceased person until releasing member has personal knowledge that the injured or deceased person's family has first been notified."

While the direction offered above may be generally applicable, instances may arise in which the names of victims, in my view, should be disclosed. For example, a deceased person may have no family or no family that can be found. Public disclosure of his/her identity might lead to the acquisition of information valuable to a police department. The suggestion is merely that the statements quoted above might not be absolute.

Non-Criminal Records

Item 14 provides that certain records "may" be released, specifically, accident reports, the contents of police blotter entries, and statistical summaries.

I believe that accident reports "must" be disclosed pursuant to the Freedom of Information Law when construed in conjunction with §66-a of the Public Officers Law, except to the extent that disclosure would interfere with a criminal investigation associated with an accident.

As we discussed in Dobbs Ferry, the phrase "police blotter" is not defined by law, and the contents of police blotters vary from one Police Department to another. Based on custom and usage, it has been held that a police blotter is a log or diary in which events reported by or to a police department are recorded, it is a summary of events that does not contain investigative information [see Sheehan v. City of Binghamton, 59 AD2d 808 (1987)]. A blotter of that nature was determined to be accessible under the Freedom of Information Law that must be disclosed. However, if a police blotter includes additional information, i.e., names of juveniles arrested, witnesses, etc., portions might properly be redacted.

Criminal Information That May Not Be Released

The Freedom of Information Law states that records or portions of records *may* be withheld in accordance with exceptions liste din §87(2). It has been held, however, by the Court of Appeals that the Freedom of Information Law is permissive; an agency may choose to disclose, even though it has the ability to deny access [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. The only situations in which there is no discretion involve the application of statutes specifying that particular records cannot be disclosed (e.g., Family Court Act, §784, concerning the arrest of juveniles; §160.50 of the Criminal Procedure Law concerning records sealed when charges are dismissed in favor of an accused).

My preference would be a reference to criminal information that "need not be released" or that "generally may be withheld." The same suggestion would apply to paragraph a in item 16.

Photographs

Item 23 states that departmental photographs or mugshots "may" be released. I believe that departmental photographs of staff must be disclosed, unless an officer is undercover, for disclosure in that instance could endanger life or safety [see Freedom of Information Law, §87(2)(f)]. Mugshots have been found to be accessible, unless and until charges are dismissed and records are sealed or returned in accordance with §160.50 [see Planned Parenthood of Westchester, Inc. v. Town Board of Town of Greenburgh, 587 NYS2d 461 (1992)].

Public Information - Freedom of Information

Accessible Records

Item 8 refers to eight categories of deniable records; there are ten.

Deniable Records

Item 8 lists deniable records in a manner inconsistent with §87(2) of the Freedom of Information Law. It is suggested that they be presented in the way the law states.

Fees

Items 9-11 make no reference to a fee for photocopies. Under §87(1)(b)(iii), an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches. I suggest that a statement to that effect be included in item 9.

Denial of Access and Appeal

Item 15a requires that appeals must be determined within seven days of their receipt. Section 89(4)(a) of the Freedom of Information Law refers to ten (10) business days to determine an appeal.

Request Form

Item 3 contains a requirement that requests must be "accompanied by a check or money order for $5.00." The only fee that may be charged involves copying records. As you are aware, the Freedom of Information Law specifies that the fee for photocopies is limited to twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing other records that are larger or that cannot be photocopied.

Check Record Desired

I do not know the meaning of "Aided Report." That may be a phrase commonly used by some but not all police departments.

I hope that the foregoing will be useful to you. If ever I might be of assistance, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1598y

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May 25, 2006

Mr. Gordon M. Boyd
Energy Next Inc.
6 Franklin Square
Saratoga Springs, NY 12866

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

Dear Mr. Boyd:

I have received your letter in which you sought an interpretation concerning a denial of your request made pursuant to the Freedom of Information Law to the New York Power Authority ("NYPA").

The request involved " a list of all Power for Jobs customers, including billing address, contact individual, account information (if available), and annual load requirement under PFJ." In response to your request, NYPA's Associate Secretary wrote that:

> "...Section 89 (2)(b)(iii) of the Freedom of Information Law ('FOIL') specifically prohibits the 'sale or release of lists of names and addresses if such lists would be used for commercial and fund-raising purposes' and classifies such disclosure as an 'unwarranted invasion of personal privacy.' Therefore, please sign and have the attached form notarized attesting that the requested information will not be used for commercial or fund-raising purposes as prohibited by Section 89 (2)(b)(iii) of the FOIL."

You stated in your letter to me that you:

> "...would not sign the attestation because [you] do plan on using the information for commercial purposes - the purpose of saving electric costs for these Power for Jobs customers, a purpose that is entirely in the interests of these customers. Without the information requested, the customers remain captive to NYPA and the information about alternatives for saving money cannot reach them."

In an effort to seek clarification concerning that nature of names and addresses included in the list that has been withheld, I contacted you by phone, and you indicated that the list involves names of business entities and/or names of persons relating to their business activities. Assuming that is accurate, I believe that the list must be disclosed, for the provision cited as the basis for denying your request would not be applicable.

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.

One of the exceptions to rights of access, §87(2)(b), authorizes an agency to withhold records or portions thereof which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article..." One of those provisions, §89(2)(b)(iii), states that an unwarranted invasion of personal privacy includes "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."

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

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

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

Section 89(2)(b)(iii) represents what might be viewed as an internal conflict in the law. As indicated above, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. Nevertheless, due

to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

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

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

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

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

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627

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

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities..."

In short, as determined in the decisions cited above, the exception concerning privacy, including §89(2)(b)(iii), does not apply to a list of business entities or persons in their business capacities.

Consequently, I do not believe that NYPA may condition disclosure on your assertion that you would not use the list for a commercial or fund-raising purpose.

In an effort to enhance understanding of and compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to NYPA's Associate Secretary.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mary Jean Frank

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15985

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May 25, 2006

Mr. David Mack
Investigative and Research Services
P.O. Box 24633
Rochester, NY 14624

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

Dear Mr. Mack:

I have received your letter in which you wrote that your client has been charged with a serious crime and is alleged to be a member of a gang. You asked whether the City of Rochester Police Department would be obliged to disclose certain information pursuant to the Freedom of Information Law, specifically, documents maintained by the Department's Special Investigations Unit pertaining to "any witnesses or involved parties in this case and all known members of [y]our client's gang and one specific opposing gang known to be opposed to [your] client's gang."

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

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

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 or judicial decisions that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding.

While it may be that your client may have the ability to obtain some of the documentation to which you referred in discovery, it is doubtful in my view that the documentation would be required to be made available pursuant to the Freedom of Information Law.

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

Perhaps most significant is §87(2)(e)(iii), which permits an agency to withhold records "compiled for law enforcement purposes and which, if disclosed", would "identify a confidential source or disclose confidential information relating to a criminal investigation." That provision may be asserted to withhold records or portions of records that identify or pertain to informants or witnesses, for example. The other grounds for denial of likely applicability are §87(2)(b) and (f). The former authorizes an agency to deny access when disclosure would constitute "an unwarranted invasion of personal privacy", and the latter when disclosure "could endanger the life or safety of any person."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15986

41 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 25, 2006

E-MAIL

TO: Stuart Zucker

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. Zucker:

As you are aware, I have received your letter in which you expressed concern "about the logistics in requesting information" from a fire district. You referred to a response in which the records access officer described the district's " responsibility as to providing access to existing records, not required to answer questions, create records or interpret what records [you[might be referring to."

In this regard, I offer the following comments.

First, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires 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.

That being so, fire district officials in my view would not be obliged to provide information sought by answering questions or preparing new records in an effort to be responsive. Rather than seeking information or raising questions, it is suggested that you request existing records.

Second, it is emphasized that 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. If information that you seek does not now exist or cannot be retrieved or extracted with reasonable effort, 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.

Lastly, the regulations promulgated by the Committee on Open Government, which have the force and effect of law require that agencies assist those seeking records in making appropriate requests. Specifically, 21 NYCRR §1401.2(b) states that:

> "The records access officer is responsible for assuring that agency personnel:
>
> (2) Assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1598?

41 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 25, 2006

Mr. Don Hughes
[redacted]

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

Dear Mr. Hughes:

I have received your letter in which you wrote that the City of White Plains has adopted the NYS Building Code. Although you indicate that you want to "make copies available, along with other local ordinances" on [your] website, you wrote that the Department of State has informed you that the State Building Code is copyrighted and, in your words, not available for free online. In addition, you attached a notice issued by the City of White Plains indicating that:

> "The fee for a requested search of official records maintained by the Department of Building, limited to Certificates of Occupancy, legal occupancy determinations, notices of violations, etc. shall be as follows:
>
> (I) For one or two family dwellings and vacant lots; eight (**$8.00**) per location.
>
> (II) For all other types of occupancies an uses; twenty (**$20.00**) per location.
>
> (III) Additional fees shall be charged for requested copies of records."

In this regard, I offer the following comments.

First, with respect to the ability of a person to use an access law to assert the right to reproduce copyrighted materials, the issue has been considered by the U.S. Department of Justice with respect to those 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.

I note, too, that reproduction of a minimal aspect of a copyrighted work generally involves a "fair use." When copyrighted materials are obtained for a fair use, I do not believe that there can be a limitation or restriction on their dissemination.

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

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, 226 AD 2d 339 (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations

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

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

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

Based upon the foregoing, it is clear that an agency cannot charge a search fee, and 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 and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael A. Gismondi
Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15988

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

May 30, 2006

Mr. Vincent Bello, Jr.
Shop Steward Plumber's Local #1
35 Springwood Drive
North Babylon, NY 11703

Dear Mr. Bello:

I have received your letter in which you appealed a denial of access to your Freedom of Information Law request to this office.

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

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

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

I hope that this clarifies your understanding of the matter.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15989

41 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 31, 2006

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 facts presented in your correspondence.

Dear Mr. Elentuck:

I have received your letter in which you questioned the propriety of a denial of your request for the email addresses of certain employees of the New York City Department of Education.

In this regard, it has been advised that the email addresses of public employees may be withheld. 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. For that and related reasons, the 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, and adversely impact an agency's operations.

Moreover, a relatively new provision amending §87(2) that is especially pertinent to the matter became effective in October, 2001. Specifically, paragraph (i) states that an agency may withhold records or portions thereof which "if disclosed would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." Via disclosure of email addresses, viruses could be transmitted or other incursions might occur that could result in the harm sought to be avoided by the provision cited 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-15990

41 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 31, 2006

E-Mail

TO: Al and Mary Isselhard

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. and Ms. Isselhard:

As you are aware, I have received your letter concerning a request for the "organizational charter & incorporation papers" pertaining to the Town of Clarendon.

Because I am unfamiliar with the method by which towns are created, I contacted an attorney with the Office of Local Government Services, a unit of the Department of State, to obtain guidance. In short, he informed me that there are no particular records dealing with the creation or incorporation of towns, and that neither town clerks nor other town officials are responsible for maintaining the kinds of records that you requested. I was told further that towns are created by the State Legislature. Very simply, it would appear that the records of your interest do not exist and were not required to have been prepared.

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

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

RJF:jm

cc: Hon. Susan C. Colby, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15991

41 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 31, 2006

E-Mail

TO: Mr. Jonathan Rubin

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 Mr. Rubin:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request made for the personnel file of a former police officer, who, after being convicted of a felony, is now incarcerated. In this regard, we offer the following comments.

As you may be 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. Several 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 our opinion, the rationale for the confidentiality accorded by §50-a is no longer present, and that statute no longer is applicable or pertinent.

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)]. We believe that the tacit approval of the advisory opinion suggests agreement with its content.

In short, it is our view that §50-a of the Civil Rights Law is inapplicable and that the Freedom of Information Law governs with respect to access. 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. It may be that some of the elements of the records would 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 our view be withheld.

In consideration of the foregoing, we believe that portions of records involving charges that were sustained against the officer 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)(g)(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 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.

Lastly, the records might identify witnesses or persons other than the officer who has been convicted of a felony. 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, however, those persons were identified in a public judicial proceeding or in court records, those grounds for denial would not apply [see Moore v. Santucci, 151 AD2d 677 (1989)].

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:jm

OML-AO - 4208
FOIL-AO - 15992

From: Robert Freeman
To: [redacted]
Sent: Thursday, June 01, 2006 3:18 PM
Subject: Dear Ms. Britton:

Dear Ms. Britton:

Notwithstanding your views regarding the seriousness of the matter, I point out first that there is no requirement that minutes of public hearings be prepared. When a hearing is also a meeting subject to the Open Meetings Law, that statute prescribes what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. If none of those events occurs, there is no requirement that minutes be prepared.

Second, anyone present may record the proceedings, unless the use of a recording device is obtrusive or disruptive. That being so, a verbatim account of statements made during a public hearing may be prepared. If the municipality has a recording of a public hearing, the audio or video recording would be subject to the Freedom of Information Law and accessible to the public pursuant to that statute.

Lastly, I do not believe that the presence or absence of minutes of a hearing would bear upon the validity of action taken.

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

CC: jmercer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15993

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

June 1, 2006

E-MAIL

TO: Susan M. Ferguson

FROM: Camille S. 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 Ms. Ferguson:

This is in response to your correspondence regarding a town's refusal to respond to requests for information within the time permitted for you to file an Article 78 proceeding. In this regard, 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.

Second, if the records which you have requested from the town are necessary to pursue another matter via an Article 78 proceeding, we note that it has been held that a failure to respond in a timely manner to a request made under the Freedom of Information Law is irrelevant to the validity of a determination made in a separate proceeding (see Brusco v. NYS Division of Housing and Community Renewal, 170 AD2d 796, 565 NYS2d 87 (1st Dept) appeal dismissed 77 NY2d 939 [1991]).

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

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

Based upon the foregoing, the pendency of litigation would not, in our opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15994

41 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 1, 2006

E-Mail

TO: Ms. Besty Combier

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. Combier:

As you are aware, I have received your letter in which you indicated that you were taking notes while reviewing records of the New York City Department of Education, and that the notes were confiscated in order to be read by Department officials. It was believed that the notes included residence addresses, and those addresses were redacted before the notes were returned to you.

From my perspective, while a government agency is obliged to disclose its records to the public, a member of the public is not required to disclose records that he or she possesses or prepares at the request or insistence of a government agency.

I point out that it has been held that the inadvertent disclosure of records does not create a right of access on the part of the person who viewed the records or the public generally [McGraw-Edison v. Williams, 509 NYS2d 285 (1986)]. However, refusing to permit the inspection or copying of records inadvertently disclosed is distinguishable from confiscating the personal property of an individual, and I do not believe that the Department had a basis for requiring you to provide your notes. Further, the Freedom of Information Law is permissive; while §§89(7) and 87(2)(b) provide that an agency *may* withhold the home addresses of present or former public employees or perhaps others, there is no obligation to do so, and an agency may choose to disclose those items [see Capital Newspapers v. Burns,67 NY2d 562, 567 (1986); Buffalo Teachers Federation v. Buffalo Board of Education, 156 AD2d 1027 (1990)].

I hope that I have been of assistance.

RJF:jm

cc: Michael Best

NO

15995

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15996

41 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 1, 2006

E-MAIL

TO: Robert Doering

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. Doering:

I have received your correspondence in which you alleged that an agency from which you requested documents under the Freedom of Information Law failed to disclose certain records "as a means of willful concealment." Because you consider the agency's failure to constitute a violation, you asked "how is this reported and to whom in order to press charges against the responsible government or government official."

In this regard, §89(8) of the Freedom of Information Law relates to a companion statute, §240.65 of the Penal Law, which includes essentially the same language. Specifically, the latter states that:

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

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

If you believe that §240.65 of the Penal Law may be applicable, it is suggested that you contact either a local law enforcement agency or the office of a district attorney.

Before taking action of that nature, 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."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15997

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

June 2, 2006

David S. Steinmetz, Esq.
Zarin & Steinmetz
81 Main Street, Suite 415
White Plains, NY 10601

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

Dear Mr. Steinmetz:

I have received your letter in which you sought an advisory opinion concerning rights of access to an appraisal of your client's property prepared in connection with eminent domain proceedings in the Village of Croton-on-Hudson.

You wrote that "the Village elected to voluntarily announce to the public during a meeting open to the public, as well as in the newspaper, that the approximate amount of the appraisal is 'roughly $5 million.'" The materials attached to your letter indicate that Village Attorney Marianne Stecich said, "...I'm not going to give much of a hint about what the amount is but I just tell you that it is very, very, very comfortably under five million dollars." It is your contention that the "Village's own actions of disclosing the value set forth in the appraisal....takes it out of the purview of Section 87(2)(c)" of the Freedom of Information Law. That provision authorizes an agency to deny access to records insofar as disclosure "would impair present or imminent contract awards..."

Due to the potential impact on Village taxpayers, I contacted Ms. Stecich to discuss the matter. She informed me that proceeding is far from completion and that the disclosures made by the Village might provide a minimal "hint" as to the appraised value of the parcel, but nothing more. That being so, it is likely in my view that disclosure of the appraisal would, at this juncture, impair the Village's capacity to best serve its residents.

As you are aware, 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 the

context of the facts as I understand them, disclosure of the appraisal to you and, therefore, your client, the owner of the parcel, could "impair" the ability of the Village to consummate a transaction in a manner optimal to taxpayers.

Further, the appraisal, whether it was prepared by Village staff or a consultant retained by the Village [see Xerox Corporation v. Town of Webster, 65 NY2d 131 (1985)], would constitute "intra-agency" material falling within the scope of §87(2)(g) of the Freedom of Information Law. I am mindful that subparagraph (i) requires the disclosure of "statistical or factual tabulations or data" found within inter-agency and intra-agency materials. However, there is precedent specifically relating to the report of a professional appraiser indicating that numerical figures within an appraisal might properly be withheld. In General Motors v. Town of Massena, it was found that:

> "To prepare a real estate appraisal the professional appraiser must necessarily cull through public real estate transaction records from many sources to find properties which he or she, subjectively, deems similar enough to the subject property to warrant further analysis. This is much different, for example, from an appraisal that lists all the sales of commercial properties within a town for a certain period or all the transactions within the State with sales prices in excess of $10 million. Choosing any particular comparable property involves a thought process and professional judgment which cannot be classified as mere data gathering" [180 Misc.2d 682, 684 (1999)].

In short, it appears that the denial of access to the appraisal by the Village was and at this time continues to be consistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marianne Stecich
Richard Herbek

FOIL-AO-15998

From: Robert Freeman
To: [redacted]
Date: 6/2/2006 3:06:03 PM
Subject: Dear Ms. Kerr:

Dear Ms. Kerr:

I have received your correspondence concerning denials of access by the assessor in your community, and you referred specifically to a refusal to disclose "comparison properties used to get the value of [y]our home."

From my perspective, the records in question are accessible under the Freedom of Information Law and have long been available based on judicial decisions that preceded the enactment of that statute.

I would conjecture that the assessor may not be the individual with authority to grant or deny access to records. Pursuant to the regulations promulgated by the Committee on Open Government, each agency is required to designate one or more persons as "records access officer" (21 NYCRR §1401.2). The records access officer has the duty of coordinating the agency's response to requests. In most municipalities, the clerk is the records access officer. It is suggested, therefore, that you contact the clerk to ascertain the identity of the records access officer. That person, not the assessor, would have the authority to determine rights of access.

I note, too, that in any instance in which a request is denied, the applicant must be informed of the reason in writing and the right to appeal. The appeal is made to the governing body of the municipality, i.e., a town board, or to a person designated by that body to determine appeals.

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-15999

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

June 2, 2006

Mr. Daniel Clay
99-A-0386
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

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

Dear Mr. Clay:

I have received your letter and offer the following brief remarks.

First, there is nothing in the Freedom of Information Law that authorizes the imposition of a fine when an agency fails to comply with that statute. I note, however, that §89(4)(c) authorizes a court to award attorney's fees when a person denied access substantially prevails, and the court finds that the agency had no reasonable basis for withholding the records and that the records are of clearly significant interest to the general public. Additionally, §89(8) of the Freedom of Information Law and a companion statute, §240.65 of the Penal Law, contain essentially the same language. Specifically, the latter states that:

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

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

Second, the Freedom of Information Law does not include direction concerning the preservation or destruction of records. Provisions concerning the retention and disposal of records

are found in Articles 57 and 57-A of the Arts and Cultural Affairs Law. It is suggested that you contact your facility librarian to attempt to review them.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16000

41 State Street, Albany, New York 12231
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June 2, 2006

Mr. John Larkin
[redacted]

The staff of the Committee 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. Larkin:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the City of Yonkers for records which identify applicants for positions on a newly created City Ethics Board, and the names of 15 persons who were interviewed for the positions. 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..."

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.

Based on the information which you provided, your initial request for records was received by the City on January 17, 2006. Not having received a response, on January 30, 2006, you forwarded a written appeal. On February 3, 2006, the City acknowledged receipt of your "request" indicated that it would respond in full within twenty business days, and explained that the FOIL Officer "left ... hence that may have been why your request wasn't processed sooner." To date, you have not received any further written correspondence from the City on this matter.

In consideration of the materials that you forwarded, documentation demonstrating the City's failure to respond to your initial request and your appeal of the constructive denial of your request, it is our opinion that you would be within your rights to pursue the matter through an Article 78 proceeding in supreme court.

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 clear that the names and addresses of applicants for appointment to public employment need not be disclosed [see Freedom of Information Law, §89(7)], and that portions of a resume or an application for employment may be withheld under §§87(2))(b) and 89(2) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." The latter provision contains a series of examples of unwarranted invasions of personal privacy, the first of which makes specific reference to the disclosure of employment histories; another refers to information of a

personal nature in some circumstances. However, the latter specifies that disclosure "shall not be construed to constitute an unwarranted invasion of personal privacy....when identifying details are deleted" [§89(2)(c)(I)].

With regard to the nature of membership on the Ethics Board, our research indicates that the text of Local Law No. 10-2005, as approved by the voters on November 8, 2005, states that:

> "All members of the Ethics Board shall be appointed by the Ethics Board Appointing Committee which shall consist of: the Mayor, the Presiding Judge of the Yonkers City Court, and the City Council President."

Members are not entitled to compensation but are permitted to be reimbursed for reasonable costs incurred in the performance of their duties; they are "appointed."

While applicants to serve on the Ethics Board are neither elected officials nor City employees, it is our opinion that their circumstances are more akin to applicants for public employment whose identities are not required to be made available. It is our opinion that the names of those who applied for appointment to the Ethics Board are therefore, not required to be made available to the public.

On behalf of the Committee on Open Government, we hope this is helpful to you. 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 FOIL Officer.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Eric Arena

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16001

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

June 2, 2006

Mr. Thompson
[redacted]

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

Dear Mr. Thompson:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request made to the Port Chester Chief of Police. Specifically, you requested a copy of a report, as indicated by its number. In this regard, we offer the following comments.

First, since 1978 it has been 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 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 Department, 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 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 staff can locate the record 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 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.

To the extent that the request reasonably describes the record, the remaining issues involve rights of access.

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.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to an agency's authority to withhold "records or portions thereof" that fall within the exceptions to rights of access that follow. The phrase quoted in the proceeding sentence indicates that a single record may include both accessible and deniable information, and that an agency is required to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

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. One of the examples of unwarranted invasions o f personal privacy, §89(2)(b)(iv), pertains to:

> "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting it or maintaining it..."

As you indicated in our telephone conversation, the record you have identified by number pertains to your brother, who has clearly indicated to you that he does not wish to have any further contact with you and/or your immediate family. To the extent that the release of the information contained in the report, specifically information as to your brother's current or previous location, may result in economic or personal hardship, we believe that disclosure would constitute an unwarranted invasion of personal privacy, and therefore, that the police department would not be required to release it.

We hope this helps to enhance your understanding of the Freedom of Information Law and is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Port Chester PD

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16002

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June 2, 2006

E-MAIL

TO: Bob and Jenny Petrucci

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 facts presented in your correspondence.

Dear Mr. Petrucci:

This is in response to your April 19, 2006 email request for further clarification on an advisory opinion which was previously forwarded to you.

We believe the advisory opinion previously forwarded addresses the issues you have raised with respect to disclosure of the deputy county executive's financial disclosure statement comprehensively. We reiterate that claims of confidentiality, unless based on statute, are likely meaningless. Moreover, the Freedom of Information Law permits the inspection and copying of records.

We hope the opinion has enhanced your understanding of the Freedom of Information Law.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO-328
FOIL-AO-16003

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June 2, 2006

E-MAIL

TO: Terrence Downey

FROM: Camille S. 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. Downey:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to records maintained by the Finger Lakes Developmental Disabilities Service Office. Specifically, you have requested a copy of your "personnel file, training records, supervised clinical practicums, Finger Lakes DDSO training council minutes, documentation recommendations made regarding [your] training and request for transfer from Conesus IRA, correspondence and documentation presented by [your] supervisory staff - inclusive of nursing and human resources in response to a review of termination." In response you have received "a very limited few papers. In no way did it come close to providing what was requested...." 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..."

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. While it is not our recommendation that you do so, it is our opinion that you would be within your rights to pursue judicial remedy at this time.

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

In consideration of the nature of the records sought, the provision of primary significance under that statute is §87(2)(g), which enables an agency to withhold records that:

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

> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

The limited response from the DDSO may indicate that the records at issue were withheld in their entirety pursuant to §87(2)(g). In this regard, we point out that one of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

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

In short, that intra-agency material does not reflect a final agency policy or determination would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the

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

In our view, insofar as the records at issue consist of recommendations, advice, opinions or constructive material, for example, they could be withheld under Freedom of Information Law; insofar as they consist of statistical or factual information, we believe that they must be disclosed, unless a separate exception is applicable.

A different statute, however, may provide rights of access in excess of those conferred by the Freedom of Information Law. The Freedom of Information Law deals with rights of access conferred upon the public generally; the Personal Privacy Protection Law (Public Officers Law, Article 6A), deals with rights of access conferred upon an individual, a "data subject", to records pertaining to him or her that are maintained by or for a state agency. A "data subject" is "any natural person about whom personal information has been collected by an agency" [§92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

Rights conferred upon individuals by the Personal Privacy Protection Law are separate from those granted under the Freedom of Information Law. Under §95 of the Personal Privacy Protection Law, a data subject has the right to obtain from a state agency records pertaining to herself, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of that section or §96, which would deal with the privacy of others. It is our opinion that because none of the exceptions would apply, the summary should have been made available to you.

Finally, 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.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

cc: Mr. James Whitehead
Mr. John Shave

From: Robert Freeman
To: [redacted]
Date: 6/7/2006 9:59:22 AM
Subject: http://www.dos.state.ny.us/coog/ftext/f13870.htm

http://www.dos.state.ny.us/coog/ftext/f13870.htm

Dear Mr./Ms. Heckman:

I have received your inquiry concerning access to "incident/arrest reports" and have attached an opinion relating to specifically to incident reports. In short, the content of those reports and the effects of their disclosure are the key factors in determining rights of access or, conversely, the extent to which agencies may deny access.

With respect to arrest reports, although it has been held that the names of those arrested are accessible [see Johnson Newspaper Corp. v. Stainkamp, 61 NY2d 958 (1984)], as in the case of incident reports, their contents may differ, and rights of access may differ from one report to another. It is also noted that if charges are dismissed in favor of an accused, the records pertaining to the event typically are sealed pursuant to §160.50 of the Criminal Procedure Law.

I do not understand your last comment, that "They are operated under a private corporation, yet perform certain government powers (arrests, investigations, etc)." In this regard, the Freedom of Information Law is generally applicable to entities of state and local government in New York; it does not apply to private corporations. However, that statute pertains to all records maintained by or for a government agency [see definition of "record", §86(4)]. Therefore, if a private entity maintains records for a government agency, i.e., pursuant to contract, those records are agency records subject to rights of access. In that kind of situation, a request should be made to an agency's "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
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 7, 2006

Mr. Michael L. Bane
[redacted]

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

Dear Mr. Bane:

I have received your letter and the correspondence relating to it. You have questioned the propriety of a denial of a request for "copies of all records held by the New York City Police Department Licensing Division for gun registrations and handgun licenses for the following individuals: Howard Stern, Charles Schumer, Robert DeNiro and William Cosby." The Department denied your request "on the basis of Public Officers Law section 87(2)(f) as such records/information would endanger the life or safety of witnesses." In response to your appeal, several other grounds for denial were cited.

From my perspective, the Department's position is contrary to law, for it represents a failure to give effect to a decision in which it was involved rendered by the Court of Appeals, the state's highest court, and a refusal to recognize clear and unequivocal statutory language. In this regard, I offer the following comments.

First, §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 of any party to records."

Stated differently, when records are available as of right under some other provision of law or by means of judicial interpretation, they remain available, notwithstanding the provisions of the Freedom of Information Law. In the context of your inquiry, a statute other than the Freedom of Information Law clearly requires that the names and addresses of licensees must be disclosed.

By way of background, until November 1 of 1994, §400.00(5) of the Penal Law stated in part that: "The application for any license, if granted, shall be a public record." As amended, it provides

that: "The name and address of any person to whom an application for any license has been granted shall be a public record." Because the statute quoted above requires the disclosure of the names and addresses of licensees, nothing in the Freedom of Information Law may be cited to withhold that information.

The contention offered by the Department that certain exceptions to rights of access, notably paragraph (f) of §87(2) of the Freedom of Information Law, was raised by the Police Department years ago and was rejected by the Court of Appeals. In the dissent in Kwitny v. McGuire [53 NY2d 968 (1981)], it was suggested that §87(2)(f) might properly be asserted to enable agencies to withhold certain aspects of approved pistol license applications. In fact, the dissent referred to an advisory opinion that I prepared in which the potential danger to gun license holders was recognized but in which it was advised that the information must nonetheless be disclosed, absent "amendatory legislation" (id. at 970). The majority, however, construed the statute as I did then and continue to view it, stating that the information in question is available, and "[w]hether as a matter of sound policy, disclosure of the contents of applications should be restricted is a matter of consideration or resolution by the Legislature" (id. at 969).

As indicated above, the State Legislature amended §400.00(5). However, it did not in any way limit the disclosure of the names and addresses of the holders of gun licenses. In short, the Police Department made the same argument years ago that it is making now, and that argument must, in my view, fail for the same reason that it was rejected then by the State's highest court.

While it is clear that the name and address of a person to whom a license is granted are accessible to the public, Sportsmen's Association for Firearms Education, Inc. v. Kane [680 NYS 2d 411, aff'd 266 AD2d 396 (1998)] concluded that other information submitted or acquired in the licensing process is, by implication, beyond the scope of public rights of access. However, there is nothing in §400.00 of the Penal Law that *forbids* disclosure of that information. That being so, I do not believe that the additional information of your interest *must* be withheld in every instance, but rather that it *may* be withheld. In short, the custodian of the records in question may, in my view, choose to disclose additional items of your interest, in whole or in part, even though there may be no obligation to do so. I note, too, that the Freedom of Information Law is permissive, and that the Court of Appeals has held that an agency may withhold records in accordance with the grounds for denial, but that it is not required to do so [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. The only instance in which records must be withheld would involve the case in which a statute prohibits disclosure. Again, as I interpret §400.00 of the Penal Law, there is nothing in that statute that precludes the custodian of the records at issue from disclosing more than a name and address of a licensee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Jonathan David
Sgt. James Russo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 7, 2006

John A. Wenger, Esq.
Getz & Associates
13025 Danielson St., Suite 107
Poway, CA 92064

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

Dear Mr. Wenger:

We are in receipt of your April 18, 2006 "request for assistance" with requests for copies of government building contracts open for bid with various New York State agencies. You indicate that your client's attempts to obtain copies of such contracts "are being frustrated by the Department of Economic Development's contract with Light & Power communications, Ltd. for the NY Reporter Web Portal Project." Apparently requests for copies of building contract bid information made directly to the relevant state agency are being denied and referred to the New York State Contract Reporter website at www.nyscr.org, while requests made for service contracts open for bid are accessible to the public for free by visiting the New York State Office of General Services Procurement Services website at www.ogs.state.ny.us.

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

First, it is our understanding that the Department, which is generally known as the Empire State Development Corporation ("the Corporation") contracts with L& P Media for publication of a newsletter which includes notices of procurement opportunities from various state agencies. Authorized by Economic Development Law §142, the Commissioner of Economic Development sets subscription rates for such publication in order to defray the expenses of preparing, publishing, marketing and distributing the newsletter. We note, however, that this statute does not prohibit the state from releasing bid documents and/or copies of the newsletter pursuant to the Freedom of Information Law, notwithstanding any contractual obligations with L&P Media to the contrary. While the formatted newsletter may not be in the physical custody of a particular state agency, based on the nature of the relationship between the state and L&P Media, it appears that the newsletters,

like the bid documents themselves, are agency records that fall within the framework of the Freedom of Information Law.

In this regard, we emphasize that the Freedom of Information Law pertains to agency records and that §86(4) of the Law defines the term "record" expansively to mean:

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

In 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. 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 NY 2d 410. 417 (1995)].

Insofar as records maintained by L&P Media are "kept, held, filed, produced or reproduced..*for* an agency", such as the Corporation, i.e., for the purpose of providing services that would otherwise be carried out by a state agency, 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 L&P Media into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it possesses 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 your client has attempted. 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 your correspondence, insofar as L&P Media maintains records for the Corporation, to comply with the Freedom of Information Law and the implementing regulations, the records access officer must either direct L&P Media to disclose the records in a manner consistent with law, or acquire the records from L&P Media in order that s/he can review the records for the purpose of determining rights of access.

Second, although agencies are increasingly making data available to the public via the internet, we do not believe that there is any obligation to do so, nor do we believe that the Corporation would be obliged to provide the benefits associated with a subscription to the newsletter to the general public. That a subscription service may be offered electronically does not in our view create a right of access to such service on the part of the public generally. In our opinion, the Corporation, or the appropriate economic development agency, must continue to give effect to the Freedom of Information Law by making the data available upon request in some sort of storage medium, whether it be paper or computer tape or disc, for example.

Third, in a related vein, while a record such as a newsletter may be prepared by a private entity, a contractual assertion of confidentiality in an attempt to control further dissemination, absent specific statutory authority, is in our view essentially meaningless. When confidentiality is conferred by statute, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute." In this instance, however, we do not believe that any statute specifically exempts the records in question from disclosure. If that is so, the records are subject to whatever rights exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. In short, without appropriate statutory authority, we do not believe that L&P Media can impose restrictions on use or dissemination of the newsletter or the bid procurement documents.

Again, records pertaining to building contracts open for bid are subject to Freedom of Information Law and should be made available to the public.

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 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, it must, however, 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.

Should you have any further questions, or if we have misunderstood the information covered in your correspondence, please call me directly. On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Charles A. Gargano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4212
FOIL-AO-16007

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June 7, 2006

E-MAIL

TO: Florence 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 in which you referred to delays in the disclosure of minutes of meetings of a village board of trustees. You wrote that the clerk indicated that the minutes "cannot be made available until after the following bi-monthly meeting where they are read and accepted."

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 or "accepted." Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

You also wrote that you are required to request copies of the minutes in writing. Minutes, like all other records, fall within the coverage of the Freedom of Information Law. Pursuant to §89(3) of that law, an agency, such as a village, may require that a request be made in writing. It is emphasized, however, the statement of legislative intent appearing in §84 of the Freedom of Information Law states that records should be made available "wherever and whenever feasible." Since minutes of open meetings are clearly accessible to the public and can be readily located, there would be no good reason for delaying disclosure, even if a request for them must be made in writing.

I hope that I have been of assistance.

RJF:tt

From: Robert Freeman
To: [redacted]
Date: 6/8/2006 2:46:03 PM
Subject: Dear Mr. Multer:

Dear Mr. Multer:

I have received your letter in which you asked whether the Town of Middlesex is required to honor a "continuing request" for records as they are acquired or developed.

In this regard, it has consistently been advised that an agency, such as a town, is not required to honor an ongoing or prospective request. As you may be aware, the Freedom of Information Law pertains to existing records [see §89(3)]. Consequently, I do not believe that an agency has the ability or the obligation to grant or deny access to records that do not yet exist.

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-16009

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June 8, 2006

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 information presented in your correspondence.

Dear Ms. Weil:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Town of Mamakating. Specifically, you have been unsuccessful in obtaining access to certain affidavits submitted by Town residents, as well as memorandum. 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. Among the grounds for denial is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would result an unwarranted invasion of personal privacy.

In our view, in a typical situation in which an individual complains to a government agency, the identity of the complainant may justifiably be withheld. However, when a petition is circulated, usually those who sign can and often do read the names of others who have signed; often, because their friends and neighbors have signed, that public expression of opinion or support for certain action appearing on a petition encourages others to add their names to it. When people sign a petition, frequently their action represents an exception if not a desire on the part of those who signed the petition that their names will be disclosed, and the submission of a petition generally represents an indication that the signatories have essentially waived the protection of privacy that they might otherwise enjoy. In short, it is our view that a petition signed by citizens is intended to publicly inform an entity of government as well as the public at large that a group of named individuals seeks to express a point of view relative to a particular subject.

Accordingly, without knowing the contents of the affidavits, to the extent that the affidavits are more like a petition than a complaint, they are designed to raise public awareness of an issue rather than remain solely between the person making the complaint and the agency, we would recommend that they be made available to the public.

Second, with regard to the gathering that you described, it is emphasized that a public body cannot conduct an executive session prior to a meeting. Every meeting must be convened as an open meeting, for §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. That being so, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

Based on the foregoing, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

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 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.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Jean Dougherty
Charles Penna

PPPL-AO- 329
FOIL-AO- 16010

From: Robert Freeman
To: Rainbow, Martin
Date: 6/9/2006 2:51:29 PM
Subject: Re: FOILability of FOIL requests

Thank you for your kind words.

If my recollection is accurate, you work for a New York City agency. If that is so, the Personal Privacy Protection Law would not apply. Section 92(1) defines the term "agency" for purposes of that statute to mean state agencies, and it specifically excludes units of local government.

With respect to access to requests made under the Freedom of Information Law, it has generally been advised that they are accessible, unless they include intimate, personal information, in which case, identifying details may be deleted to protect privacy. Please note that our index to advisory opinions includes several available in full text under the heading of "requests for request."

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) 474-2518 - Phone
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>>> "Rainbow, Martin" <[redacted]> 6/9/2006 1:50:50 PM >>>
I hope all is well with you. I have another question for you involving something of interest to our office.

After the petition in a license revocation proceeding was filed here, but before the commencement of the hearing, we received several FOIL requests from members of the public seeking documents from the case file (petition, answer). The lawyer for the licensee then submitted a FOIL request seeking copies of all FOIL requests pertaining to the license revocation matter and the responses we made to those requests.

Is there any basis under FOIL or the Personal Privacy Protection Act to withhold the names and/or addresses of the persons who made the FOIL request? Thanks for your assistance

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16011

41 State Street, Albany, New York 12231
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June 12, 2006

Ms. Alexandra Valicenti
[redacted]

The staff of the Committee 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. Valicenti:

I have received your letter and materials relating to it concerning the propriety of a denial of your request for certain records of the Bronxville Union Free School District.

You submitted the following two requests to the District:

> "Scores on Speech/Language Testing of each student currently taking the course, 7th grade modified Spanish ('05-'06 school year) who are listed as 'foreign language exempt' on their I.E.P.S. Students need not be identified by name - Date may be presented with names, other identifying date omitted" (emphasis yours).

and

> "Scores on Speech/Language Testing of each student in the 7th grade class ('o5-06 school year) who are both 1) exempt from taking any course in foreign language and 2) currently not enrolled in any foreign language class at the Bronxville Middle School. Identifying information should be omitted" (emphasis yours).

The District's initial denial was based on the Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) and its contention that, even with names redacted, disclosure of the remainder of the information would make students' identities easily traceable.

In a response by the Superintendent to your appeal, he referred to a distinction in the characterization of the records described in your request, as opposed to the language of the appeal. He wrote as follows:

> "Your appeal letter states that you requested 'disclosure of the speech language scores of all students currently taking Modified Spanish.' In fact you requested 'scores of speech/language testing of each student currently taking the course, 7th grade modified Spanish ('05-'06 School year *who are listed as 'foreign language exempt' on their I.E.Ps.'* If, in fact, you wish to receive information on the first group of students (all students in the modified Spanish class, without respect to their exempt status) I suggest that you submit a new request to the Records Access Officer for his consideration" (emphasis his).

Whether the distinction suggested by the Superintendent would involve a difference in rights of access is, from this vantage point, conjectural. However, his comments appear to focus on the key issue concerning your request and rights of access.

The Freedom of Information Law pertains to all records maintained by 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.

Relevant in the context of the facts is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In this instance, insofar as disclosure of the records in question would or could identify a student or students other than your child, I believe that they must be withheld, for FERPA is a statute that exempts records from disclosure. 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 pursuant to FERPA define the phrase "personally identifiable information" to include:

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

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

The issue, therefore, involves the extent to which disclosure of the record or records of your interest would make a student's identity easily traceable. As you are aware, in a case dealing with a similar request, the records of test scores were prepared by class, alphabetically, and the school district contended that, even if names of students were deleted, the identities of some students might be made known. In determining the issue, the Appellate Division, Second Department, whose jurisdiction includes Bronxville, ordered that names be deleted from the records and that the records be "scrambled" in order to protect against the possible identification of students [Kryston v. East Ramapo School District, 77 AD 2d 896 (1980)].

In some instances, even if a student's name or other identifier is deleted, due to unique personal characteristics, his or her identity might be "easily traceable". In others, students' identities may be easily traceable if there are references to a small number of students. If, as you suggested to me by phone, there are as many as 15 students in the group of your interest, it is my opinion that the deletion of their names from a record or records and "scrambling", as was required in Kryston, would effectively prevent you or others from identifying the students or rendering their identities easily traceable. If that is so, I believe that the District would be required to engage in those actions and provide access to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: David Quattrone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16012

41 State Street, Albany, New York 12231
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June 12, 2006

Mr. Omar Miller
[redacted]

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

Dear Mr. Miller:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request to the New York City Administration for Children's Services and, that as of the date of your letter to this office, you had not received a response. You asked how to direct and to whom the appeal should be made.

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, 2005 (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."

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 suggested that you direct your appeal to Commissioner William C. Bell. It would be his responsibility to determine the appeal or to forward it to the appropriate person that has been designated to determine appeals.

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)].

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, you asked for the address of a "free lawyer" that would be able to deal with a custody matter in Kings County. Since the jurisdiction of this office involves the state's Freedom of Information Law, I am unfamiliar with attorneys who deal with custody issues.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Commissioner John Matingly
Sheila Stainback

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16013

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June 12, 2006

Mr. Matthew K. Kearns
[redacted]

The staff of the Committee 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. Kearns:

As you are aware, I have received your letter and the materials relating to it. You have sought an advisory opinion concerning the propriety of a denial of access to records by the Empire State Development Corporation ("ESDC").

Your request involved records relating to the possible sale of the Kings Park Psychiatric Center and bids and related documentation concerning an invitation to bid issued in 2001. You indicated the sale had been cancelled, and news articles confirm that to be so. In an article published in *Newsday* on January 15 of this year, it was stated that "the state has dropped the latest redevelopment plan for the form Kings Park Psychiatric Center" and that Senator John Flanagan read portions of a letter from the ESDC stating that it "will not be proceeding with the sale" and that a prior purchase agreement signed December 27, 2004 "but not yet closed on 'is being terminated'...."

Despite the termination of the planned sale of the property, your request and ensuing appeal were denied on the basis of §87(2)(c) of the Freedom of Information Law, which authorizes an agency to withhold records insofar as disclosure would "impair present or imminent contract awards or collective bargaining negotiations..." Reference was also made to the "Terms and Conditions" included in ESDC's "Invitation to Bid Instructions", which state in relevant part that : "No bid for a Property shall be deemed accepted until closing on the Property has occurred under the Purchase and Sale Agreement for such Property."

As I understand the situation, there is no basis at this juncture for a denial of access to records at issue. 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.

Many of the exceptions to rights of access are designed to avoid potentially harmful effects of disclosure, and that is so in the case of the exception cited by ESDC. In many instances, records or portions of records may be withheld for a time with justification. The same records may, however, be accessible in the future because the harmful effects of disclosure have either diminished or disappeared. The key word in §87(2)(c) is "impair", and it is possible if not likely that disclosure during a bidding or negotiation process would have impaired the ability of ESDC to reach an optimal agreement on behalf of the public. Nevertheless, since a decision has been made to terminate plans to sell the property, no longer would disclosure "impair" a "present or imminent" contract award. That being so, although §87(2)(c) might once have served as a proper basis for denying access, I do not believe that it would be applicable now.

Second, in my view, the portion of the Terms and Conditions quoted earlier is irrelevant in considering rights of access conferred by the Freedom of Information Law. That statute pertains to all government 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 a case in which an agency contended, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that claim. As stated by the state's highest court, the Court of Appeals:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency

> pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

Based on the foregoing, that a document is not "accepted" is of no significance; once it is in the possession of an agency, it constitutes an agency record that falls within the coverage of the Freedom of Information Law.

Lastly, the Court of Appeals has held that a request for or a guarantee of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available. In Washington Post v. Insurance Department [61 NY2d 557 (1984)], the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court concluded that "just as promises of confidentiality by the Department do not affect the status of documents as records, neither do they affect the applicability of any exemption" (id., 567).

In short, I do not believe that the Terms and Conditions associated with an invitation to bid can alter or diminish rights conferred by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anita W. Laremont
Antovk Pidedjian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16014

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June 12, 2006

Mr. Robert Burks
97-A-6197
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

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

Dear Mr. Burks:

I have received your letter and have enclosed copies of our guides to the Freedom of Information, Open Meetings and Personal Privacy Protection Laws. Please be advised that the Committee on Open Government is authorized to provide advice and opinions concerning those laws; it is not empowered to compel an agency to grant or deny access to records or otherwise comply with law.

With regard your reference to "20 days", the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16015

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June 12, 2006

Mr. George G. Washington
[redacted]

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

Dear Mr. Washington:

I have received your letter in which you asked that I review the advice rendered by Ms. Drayton Grant concerning "FOIL Requests for Drafts." Having examined her memorandum, I am in general agreement with its content. However, to provide you with a full explanation of the issues relating the matter, I offer the following comments.

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

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

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

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

Third, although §87(2)(g), the provision pertaining to inter-agency and intra-agency materials, potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals, the State's highest court, stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by agency staff or 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 agency staff or a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I note that in another case that reached the Court of Appeals, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

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

In short, when a "draft" is prepared for an agency, I believe that it could be characterized as intra-agency material. However, that it is a draft is not determinative of rights of access. Again, insofar as the "draft" consists of statistical or factual information, I believe that it must be disclosed, unless a different exception may properly be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Drayton Grant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 16016

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June 13, 2006

Mr. Daniel D'Amore
04-A-4231
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

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

Dear Mr. D'Amore:

I have received your letter in which you sought assistance in obtaining medical records pertaining to yourself under the Freedom of Information Law from the Bellevue Hospital Center in New York City.

In this regard, since the facility in question is part of the New York City Health and Hospitals Corporation, I believe that it is a governmental agency subject to the Freedom of Information Law. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

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

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

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 16017

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June 13, 2006

Mr. Rafael Martinez
93-A-9041
Marcy Correctional Facility
P.O. Box 5000
Marcy, NY 13403-5000

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

Dear Mr. Martinez:

I have received your letter in which you indicated that, as of the date of your letter to this office, you had not received a response to your request for a copy of your jail time credit record from the inmate records coordinator at your 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, 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, 2005 (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.

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16018

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June 13, 2006

Mr. Anthony Norris
02-A-0310
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. Norris:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records from the New York City Police Department and the New York County District Attorney's Office that you believe were used against you during your trial.

In this regard, I offer the following comments.

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

In considering the records falling within the scope of your request, relevant is a decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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

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

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

op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

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

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

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

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute

"an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

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

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

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

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

Lasly, 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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June 13, 2006

Mr. LePerry C. Fore
03-A-0270
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. Fore:

I have received your letter in which you asked why the Nassau County Office of the District Attorney sent copies of its determinations of your appeals to this office. You also asked if you may file an appeal with this office when your appeal is denied.

In this regard, the Committee on Open Government is authorized to give advice and guidance concerning access to government information, primarily under the state's Freedom of Information Law. This office has no authority to determine appeals or otherwise compel an agency to grant or deny access to records.

Section 89(4)(a) of the Freedom of Information Law, which deals with your right to appeal, 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."

As such, each agency is required to submit to the Committee a copy of the appeal and the determination.

When an agency denies your appeal, an advisory opinion may be requested from this office or you may initiate an Article 78 proceeding under the Civil Practice Law and Rules.

Having reviewed the appeal determinations by the Nassau County Office of the District Attorney, I would like to 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 in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

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

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

Second, §677 of the County Law refers to autopsy reports and related records. 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."

As such, §677 indicates that such an interest must be demonstrated "upon proper application" to an appropriate court. Further, only a court appears to have the authority to grant such an application, in which case an order to disclose may be made.

Since a court order is necessary to obtain an autopsy report, it is suggested that you confer with your attorney.

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

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

It is suggested that you contact your attorney in an effort to acquire your records or, if he or she no longer possess them, obtain an affidavit to that effect.

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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June 13, 2006

Ms. Barbara Riecker
[redacted]

The staff of the Committee on 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. Riecker:

We are in receipt of your requests for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Town of Islip. Due to the length of time over which you and the Town have corresponded, the volume and types of documents which you have repeatedly requested, and the opposing positions of you and Town with regard to the sufficiency of the Town's responses, we advise that you and a representative from the Town compare responsive documents with documents received in order to resolve any outstanding issues. Due to the breadth of the language contained in your requests and the Town's responses, although it is difficult to advise with respect to the availability of any particular document, we offer the following comments as guidance.

First, and in direct response to comments made in your correspondence with the Town, there are no provisions in the Freedom of Information Law for imposing fines for noncompliance, nor has it been found a failure to comply with the Freedom of Information Law represents a violation of one's civil rights. And, as you may know, the Freedom of Information Law pertains only to the accessibility and production of records, not the answering of questions.

Second, and as we discussed previously, 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 the rule that an agency need not create records 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. Should you require access to the subject matter list for the Town of Islip, therefore, we recommend you send your request to the Town's Records Access Officer. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

Further, 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 (i.e., a county, city, town, village, school district, etc.) 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, and when requests are accepted via email, an email address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

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

> "The records access officer is responsible for assuring that agency personnel...

(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 must "coordinate" an agency's response to requests. Frequently the records access officer is an agency officer or employee who has familiarity with an agency's records. For example, the town clerk is designated as records access officer in the great majority of towns, for he or she, by law, is also the records management officer and the custodian of town records.

Since you requested "all STAR tax records", and certain elements of information were redacted from records provided to you "for privacy purposes", we note that it is our opinion that certain records used in determining assessments may be withheld from public disclosure. For instance, for senior citizens to apply for STAR exemptions, they must submit records that include personal financial details.

Although the Freedom of Information Law is based upon a presumption of access, §87(2)(b) authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." The New York State Tax Law contains provisions that require that confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., §697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning taxpayers' income would constitute an improper or "unwarranted" invasion of personal privacy.

In short, we believe that an agency such as the Town of Islip has clear authority to withhold records and/or portions thereof, insofar as they include intimate or sensitive details of residents' lives, including copies of tax forms and/or tax information relayed in conjunction with an application for a STAR exemption.

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, 2005 (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.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Richard Hoffman, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 13, 2006

Ms. Kathy Barrans
Special Projects Producer
WNYT TV
P.O. Box 4035
Albany, NY 12204

The staff of the Committee on 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. Barrans:

I have received your letter in which you sought an advisory opinion concerning a response by the Division of State Police to your request for records indicating responses by State Police to incidents at the residence of Congressman Sweeney in Clifton Park.

The chronology of your requests and the Division's responses is significant, for your first request for the records was made on December 14, 2005. The request was denied, and apparently you did not appeal the denial. A second request was made, essentially for the same records, on April 13. In response, the Division's records access officer wrote that "your request has previously been responded to and will not be reconsidered." You appealed that denial on May 9, and on May 12, the Division's Administrative Director "determined that your request "has previously been responded to and will not be reconsidered."

Assuming that there is no distinction in facts or the effects of disclosure between the requests made in December and April, I believe that the April response by the records access officer was appropriate. If she believed that a denial of access was proper in December, there would have been no reason to alter or reconsider that initial response. However, because you did not appeal that initial denial or exhaust the administrative remedies available to you, the response to your appeal by the Administrative Director was, in my view, inconsistent with law. There was no determination of an appeal following your first request, and the refusal by the Administrative Director to consider your appeal essentially denied you the right to appeal. As you may be aware, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and states in relevant part that:

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

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

The refusal to consider your appeal in my opinion represents a failure to comply with the requirement that the Administrative Director must "fully explain in writing...the reasons for further denial."

To be distinguished from the facts here is a decision in which the applicant's request and appeal were both denied. Although he exhausted his administrative remedies, he failed to initiate a judicial challenge to the agency's denial within the four month statute of limitations. That failure precluded him from later making an identical request and appeal and then seeking judicial review [see Van Steenburgh v. Thomas, 242 AD2d 802 (1997)]. Again, in your situation, there was no appeal, and administrative remedies were never exhausted. The absence of an appeal following the initial denial of access in my view would not have precluded you from appealing the denial following your second request, nor would it have relieved the Division of its responsibility to respond fully to your appeal.

With respect to the substance of the request, I believe that a record indicating that an incident precipitated a visit to a certain address by a state trooper or police officer must be disclosed. This is not to suggest that detailed or personal information must be made available, but rather that a record including the fact that a visit was made by a law enforcement officer to a particular address is not secret.

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

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

on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

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

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

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

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

Considering the matter in relation to issues that arose concerning the traditional police blotter or equivalent records, I believe that such records would, based on case law, be accessible. In Sheehan v. City of Binghamton [59 AD2d 808 (1977)], it was determined, based on custom and

usage, that a police blotter is a log or diary in which events reported by or to a police department are recorded. That kind of record would consist of a summary of events or occurrences, it would not include investigative information, and would be available under the law.

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

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

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

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

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

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

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information

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

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

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

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline

> to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [id., 276-277 (1996); emphasis added by the Court].

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

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

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

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

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

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

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

In sum, police blotters and incident reports, by their nature, differ in content from one situation or incident to another. To suggest that they may be withheld in their entirety, categorically, in every instance, is in my opinion contrary to both the language of the Freedom of Information Law and its judicial construction by the state's highest court.

When a trooper or police officer is called to a certain location, the presence of that person with his or her vehicle, again, is not secret. It is an event that can be known by any person present or any passerby. That being so, I believe that a record or portion of a record indicating that a state trooper or other police officer visited a certain address must be disclosed. Additional details contained within that record or related records might properly be withheld. For instance, if there is a notation that there was a domestic dispute, but there was no arrest or charge, it has been advised that such a notation may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Nevertheless, a notation that a visit was made to 210 Main Street at a certain time, without more, would, in my view, be accessible, for it would reflect the content of the traditional police blotter entry described by the Appellate Division in Sheehan, supra.

In an effort to encourage reconsideration of your appeal, copies of this response will be forwarded to the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Glenn Valle, General Counsel
William J. Callahan, Administrative Director
Captain Laurie M. Wagner, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 13, 2006

E-MAIL

TO: Peggy L. Mousaw

FROM: Camille S. 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 Ms. Mousaw:

We are in receipt of your request for an advisory opinion pertaining to the following three questions:

> "1) Are capital project daily job reports available via a FOIL request?
> 2) Is pending litigation a valid reason for denying a FOIL request?
> 3) How does a FOIL request have to be worded to obtain gross salary information only as related to a W2 so it is not denied due to social security number confidentiality?"

With respect to your first inquiry, but without any context within which to address your question, we point out that the Freedom of Information Law pertains to 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."

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 [see e.g., Encore College Bookstores, Inc. v. Auxilary Service Corp., 87 NY2d 410 (1995)].

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

Although §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 our view be withheld.

With respect to your second inquiry, we note, 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)]. 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, 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.

With respect to your third inquiry, we note that W-2s pertaining to public employees would constitute "intra-agency materials." However, they would appear to consist solely of statistical or factual information that must be disclosed under §87(2)(g)(i), unless a different ground for denial could properly be asserted.

Although somewhat tangential to the matter, we point out that, with certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, we believe that the payroll record and other related records identifying employees and their wages, including compensation for unused sick, vacation or personal leave, must be disclosed.

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

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

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

Based upon the direction provided by the Freedom of Information Law and the courts, we believe that other records reflective of payments made to public employees are available. For instance, insofar as W-2 forms of public employees indicate gross wages, they must be disclosed. In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, 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. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

Your request, therefore, could be for copies of W-2's for a specific year, with redactions made to protect against an unwarranted invasion of personal privacy.

On behalf of the Committee on Open Government we hope this is helpful to you. Due to the brevity of your request, it is not clear whether we have addressed your particular questions in full. Please feel free to clarify your requests.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 15, 2006

Mr. Gregory L. Jackson
00-B-0720
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. Jackson:

I have received your letter in which you indicated that, as of the date of your letter to this office, you had not received a response to your request submitted to the Tompkins County District Attorney's Office. You requested a videotape and other records pertaining to a statement given by a particular person, and you submitted an affidavit from that person authorizing the release of that statement 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, 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, 2005 (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.

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 you who has obtained a written release authorizing disclosure to the you, could be denied on the basis of §87(2)(b). As stated in §89(2)(c) of the Freedom of Information Law:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision...

ii. when the person to whom a record pertains consents in writing to disclosure..."

To the extent that persons other than the person who authorized permission for you to obtain the records are identified in the records, there may be privacy considerations that arise relative to those individuals. In such situations, perhaps identifying details or certain portions of records might be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy with respect to those third parties.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 15, 2006

Mr. Oscar Pena
03-R-0673
Mt. McGregor Correctional Facility
P.O. Box 2071
Wilton, NY 12831

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

Dear Mr. Pena:

I have received your letter in which you indicated that you requested "the names and position of all the family members" related to a particular person and who are employed by the NYS Division of Parole. You contend that this information must be maintained under the Freedom of Information Law. 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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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, 2005 (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, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request for information. I would conjecture that the Division of Parole does not maintain a record that indicates familial relationship to its employees. If that is so, the request would not involve existing records, and the Freedom of Information Law would not apply.

Lastly, that one employee is related to another particularly when they are civil servants, is in my view irrelevant to their functions or duties. When that is so, it is my view that disclosure of familial relationships on the part of employees would constitute "an unwarranted invasion of personal privacy."

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 15, 2006

Mr. Warren J. Sonne
Pinnacle Protective Services, Inc.
40 Wall Street - Suite 5600
New York, NY 10005

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

Dear Mr. Sonne:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a recent New York State Police policy change. As reported on the New York State police website:

> "As of May 15, 2006, requests for copies of Police Accident Reports of collisions investigated by the State Police that occurred on the New York State Thruway (I-87 South of Albany, I-90 West of Albany & Berkshire Spur) and its subsidiary arterials (I-84, I-190) must be made to Troop T Headquarters.
>
> "All requests for copies of Police Accident Reports of collisions investigated by the State Police that occurred on roads or highways other than the Thruway must be made to the New York State Department of Motor Vehicles (DMV) Certified Documents Section. The form for requesting a copy of an Police Accident Report (MV-198-C) is available on the DMV website, www.nysdmv.com, and linking to "DMV Forms and Publications," then link to "All DMV Forms."
>
> "Note: New York State Police Accident Reports are sent electronically to DMV, and are available within two weeks of the collision. Police Accident Reports submitted to DMV by other departments may not be available as soon. Motorists requesting a copy of a Police Accident Report relative to an collision that was investigated by a department other than the State Police should follow the DMV guidelines on the DMV form MV-198C."

Based on the foregoing, the State Police are now requiring that all requests for reports pertaining to accidents which occurred on the New York State Thruway be directed to one address, and all other requests be directed to the Department of Motor Vehicles ("DMV"). We note that the last sentence of the third paragraph seems to indicate that reports pertaining to accidents which were investigated by local policies agencies should also be directed to DMV.

Insofar as the new provisions direct requests to DMV, it is your contention that this will "result in delays of several months" based on your experience that accident reports are not available from DMV for three months after the accident date. The form utilized by DMV for requesting copies of accident reports, Form MV-198C, and the accompanying instructions, indicate "Copies of all accident reports are not available until 3 months after the accident date; accident reports from the New York State Police may be available sooner."

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.

Second, §89(6) states that if records are available under some other provision of law or by means of judicial interpretation, the grounds for denial appearing in §87(2) cannot be asserted. Accident reports kept or maintained by the State Police or the police department of any county, city, town or village are governed by§66-a of the Public Officers Law, which was enacted in 1941 and 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 or prosecution by such authorities of a crime involved in or connected with the accident."

The Freedom of Information Law is consistent with the language quoted above, for while accident reports are generally available, §87(2)(e)(i) of that statute states in relevant part that records compiled for law enforcement purposes may be withheld to the extent that disclosure would "interfere with law enforcement investigations or judicial proceedings." Therefore, unless disclosure

would interfere with a criminal investigation, an accident report would be available to any person, including one who had no involvement in an accident.

Section 66-a permits the custodian of such accident reports to prescribe reasonable rules and regulations regarding the time and manner of access to the records. Similarly, the Committee on Open Government has been directed by the Legislature to promulgate rules and regulations with respect to access to agency records (Public Officers Law §89[1][b]). Because the Freedom of Information Law requires "each agency" to promulgate conforming rules and regulations (Public Officers Law §87[1][b]), the Committee has created, and makes model regulations available for adoption by local agencies.

We note that §86(3) of the Freedom of Information Law defines the term"agency " to mean:

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

Further, the Legislature consistently directs "each agency" to comply with the Freedom of Information Law, as opposed to permitting one agency to answer requests on behalf of others. "Each agency" is required, "in accordance with its published rules, [to] make available for public inspection and copying all records, except..." (§87[2][g]). "Each agency shall maintain: (a) a record of the final vote of each member in every agency proceeding in which the member votes..." (§87[3]), and §89(3) "[e]ach entity subject to the provisions of this article, within five business days of the receipt of a written request 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 the request...". Accordingly, it is our opinion that all local offices of the State Police and the State Police as a whole cannot shift the burden of compliance with the Freedom of Information Law to another agency. Through the language of Public Officers Law, §66-a, the Legislature has made clear its intent that each agency "may prescribe reasonable rules and regulations" regarding the time and manner of access to records (emphasis added). In this respect, we agree with your observation that shifting the burden of providing access to records from each local office of the State Police to Troop T Headquarters and/or from the State Police to DMV would not be reasonable.

Deferring requests away from local agencies and/or to the DMV and thus imposing a three month waiting period, when records are available elsewhere, in our view, is unreasonable in light of the Legislature's recent amendments to the time limits for responding to requests expressed in the Freedom of Information Law. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

> the approximate date, 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, each 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 and agency to defer its responsibilities to another agency thereby increasing the response time frame. From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and as indicated 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.

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

In sum, because there will be instances in which the State Police can and should respond without undue delay to requests, it is our opinion that delaying disclosure is unreasonable. Similarly, it is our opinion that to defer all requests for records pertaining to accidents occurring off the New York State Thruway to DMV would only serve to unreasonably delay access to those records.

Finally, we note that the Department of Motor Vehicles, like the State Police, is authorized by statute to charge a fee for searching for records. Local police agencies have authority to charge only $.25 per photocopy pursuant to §87(1)(b)(iii). To defer requests made pursuant to the Freedom of Information Law from local police agencies to the DMV would, therefore, in our opinion unreasonably increase the cost of gaining access to records.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Bill Butler
Glenn Valle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16026

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June 15, 2006

Mr. David Carter
05-A-2964
Woodbourne Correctional Facility
P.O. Box 1000
Woodbourne, NY 12783-1000

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. Carter:

I have received your letter in which you complained that you have encountered difficulty in obtaining your medical records from the New York City Department of Health and Mental Hygiene. You submitted several requests,but as of the date of your letter to this office, you received no responses.

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, 2005 (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.

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 staff could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

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

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

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-16027

From: Robert Freeman
To: arubinstein[redacted]
Date: 6/16/2006 10:34:53 AM
Subject: Dear Mr. Rubinstein:

Dear Mr. Rubinstein:

I have received your letter in which you asked whether the return of records by the New York City Department of Buildings to an applicant for an addition to a building, and not retaining those records, is consistent with the Freedom of Information Law.

In this regard, the Freedom of Information Law pertains to rights of access to records maintained by or for government agencies; it does not include direction concerning the retention or disposal of records. Provisions of that nature are found in different provisions of law, and in the case of the City of New York, I believe that they are contained in the City Charter.

It is my understanding that retention schedules requiring the maintenance of records by City agencies are developed by the New York City Department of Records and Information Services (DORIS). To attempt to ascertain whether the Department of Building complied with retention requirements or failed to do so, it is suggested that you contact the Municipal Records Management Division at DORIS. Its Compliance & Statistics Unit can be reached at (212)788-8555.

I hope that I have been of assistance.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4216
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June 16, 2006

Mr. Brian Mandryck
[redacted]

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

Dear Mr. Mandryck:

I have received your letter and the materials relating to it. You have raised a variety of issues concerning the implementation of the Freedom of Information and Open Meetings Laws by the Lee Board of Fire Commissioners. Based on a review of the materials, I offer the following general remarks.

It is noted at the outset that you referred several times to the "United States Freedom of Information Law." There is a federal Freedom of Information Act, which applies only to records of federal agencies, and each state has enacted its own version of a law dealing with public access to records. Applicable in the context of your requests is the New York Freedom of Information Law.

That law pertains to existing records, and ordinarily, it does not require that an entity, such as a board of fire commissioners, to create records [see §89(3)]. Therefore, if requested records do not exist, there is no obligation to prepare new records to satisfy an applicant. For instance, if there are no records identifying firemen who cannot access the fire station through the use of the coded security system, there would be no obligation to create a record containing that information on your behalf.

A possible exception to that general principle relates to issues that you raised concerning minutes of meetings of the Board of Fire Commissioners and the application of the Open Meetings Law. However, before focusing on that issue, by way of background, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of that statute defines the term "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members,

> performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, the Board of Fire Commissioners is clearly a public body required to comply with the Open Meetings Law.

Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assembly syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of the Board, or a convening by means of videoconferencing. An affirmative vote of a majority would be needed for the Board to take action or to carry out its duties.

I note that provisions in the Open Meetings Law concerning videoconferencing are newly enacted (Chapter 289 of the Laws of 2000), and in my view, those amendments clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone, by mail, or by e-mail, would be inconsistent with law.

As indicated earlier, the definition of the phrase "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or

> officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties.

In sum, I do not believe that the Board may validly take action, except at a meeting during which a quorum convened and in which a majority of the Board's total membership voted in favor of the proposed action.

In a related vein, I do not believe that there is any legal distinction between a "workshop" or "work session" and a "meeting." 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 majority 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 held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int.

> Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, when a majority of the Board convenes to discuss Fire District business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, even if it is characterized as a "workshop" or "work session."

The Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

You also referred to minutes, particularly minutes of executive sessions. In this regard, 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.

Finally with respect to the Open Meetings Law, while individuals may have the right to express themselves and to speak, I do not believe that they necessarily have the right to do so at meetings of public bodies. It is noted that there is no constitutional right to attend meetings of public bodies. Those rights are conferred by statute, i.e., by legislative action, in laws enacted in each of the fifty states. In the absence of a statutory grant of authority to attend such meetings, I do not believe that the public would have the right to attend.

In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies, to listen to their deliberations and observe the performance of public officials. However, as you are aware, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. As such, it is reiterated that, in my opinion, there is no constitutional right to attend meetings.

Within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which I am aware provides the public with the right to speak during meetings, I do not believe that a public body is required to permit the public to do so during meetings. Certainly a public body may in my view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally.

Next, now focusing on the Freedom of Information Law, one of the issues relating to your requests for records may involve whether certain of your requests "reasonably describe" the records sought as required by §89(3) of that 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 Board, 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.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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)].

Since you referred specifically to records involving payment to an attorney, 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.

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 Fire Commissioners.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Fire Commissioners

FOIL-AO-16029

From: Robert Freeman
To: randy[redacted]
Date: 6/16/2006 4:19:58 PM
Subject: I have received your letter concerning the fee that may be chargedfor a copy of tax map that is 18 b

I have received your letter concerning the fee that may be chargedfor a copy of tax map that is 18 by 24 inches. You wrote that Nassau County "wants to charge $10.00 per page."

In this regard, §87(b)(b)(iii) of the Freedom of Information Law pertains to fees and provides two standards. The first concerning photocopies of records of up to nine by fourteen inches, and those instances, an agency may charge up to twenty-five cents per photocopy, unless a different fee is prescribed by statute (an act of the State Legislature). In all other instances, as in those involving records maintained electronically, tape recordings or records larger than nine by fourteen inches, the fee must be based on the actual cost of reproduction, again, unless a different fee is prescribed by statute.

If there is no statute that authorizes the County to charge ten dollars per copy for its tax maps, and I know of none, its fee is restricted to the actual cost of reproducing the tax maps.

While I am unaware of the actual cost borne by the County to reproduce the tax maps, I do not believe that the actual cost approaches ten dollars per map.

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-16030

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June 19, 2006

E-MAIL

TO: Brian Powers

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. Powers:

I have received your correspondence in which you asked that I confirm that "all materials publicly submitted by applicants in the planning process are in fact public materials subsequent to their public submission, and as such cannot lawfully be withheld by a municipality in response to inquiries from the public or the press." During our conversation, you referred to a contention that a map submitted to the Town of Shandaken Planning Board by a private entity could be withheld because it is copyrighted.

In this regard, first, the Freedom of Information Law is expansive 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, as soon as documentary materials come into the possession of an agency, such as a town, they constitute "records" that fall within the scope of the Freedom of Information Law.

Second, 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. From my perspective, none of the grounds for denial of access would be applicable with respect to the kinds of records at issue.

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

Lastly, while I am not an expert with respect to the Copyright Act (17 U.S.C §101 *et seq.*), it is clear and has been advised by the United States Department of Justice as well as this office that the Copyright Act is not a statute that exempts records from disclosure. Copyrighted materials are widely accessible to the public (i.e., in libraries and numerous other sources), and issues involving copyright infringement relate not to their to disclosure, but rather to their use.

In short, in the circumstances that you described, I believe that the Town is required to disclose.

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 19, 2006

E-MAIL

TO: Hon. Amy Emerson, Supervisor

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 Supervisor Emerson:

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

You referred initially to an advisory opinion addressed to a resident concerning access to Town financial records in which I cited §29(4) of the Town Law. That provision involves the books of account kept by town supervisors and states that they are "open and available for inspection at all reasonable hours of the day..." In my view, the foregoing does not mean that when the account books are being used, they must be made immediately available on demand. I believe, however, that they must be made available without unreasonable delay. Further, §89(3) of the Freedom of Information Law requires that a response to a request for records be given within five business days of its receipt. Because the records in question are clearly accessible to the public and readily retrievable, in my opinion, there would be no valid basis for delaying disclosure.

You also wrote that you were told that the payroll of highway employees is not subject to the Freedom of Information Law. In short, that is not so. Records or portions of records indicating salaries or other payments made to all public employees are available to the public.

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.

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, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed for the following reasons.

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)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

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

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

It has been contended that W-2 forms and similar records may be withheld because the include social security numbers. However, 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 or similar records 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.

Your remaining questions pertain to the Open Meetings Law, and 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.

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.

The provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the description of the general intent of the grounds for entry into executive session suggested in my remarks in the preceding paragraph, i.e., that they are intended to enable public bodies to avoid some sort of identifiable harm. For instance, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Again, §105(1)(d) would not permit a public body to conduct an executive session due to a possibility or fear of litigation. As the court in Weatherwax suggested, if the possibility or fear of litigation served as a valid basis for entry into executive session, there could be little that remains to be discussed in public, and the intent of the Open Meetings Law would be thwarted.

In my view, only to the extent that the Board discusses its litigation strategy 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].

With respect to discussions with the Town Attorney, relevant is §108(3), which exempts from the Open Meetings Law:

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

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

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

In a judicial determination that described the parameters of the attorney-client relationship and the conditions precedent to its initiation, it was held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his

> subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (I) an opinion on law or (ii) legal services (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

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

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

While it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies. In the case of the latter, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. It is suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to an executive session.

Lastly, you questioned the ability to conduct an executive to discuss the reappointment of an individual to the Board of Assessment Review. In this regard, 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.

In the context of your question, it involved a matter leading to the appointment of a particular person. That being so, I believe that the executive session was validly held.

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)]."

I hope that I have been of assistance.

RJF:tt

FOIL-AO-16032

From: Robert Freeman
To: Randy Bond
Date: 6/21/2006 8:27:10 AM
Subject: RE: I have received your letter concerning the fee that maybechargedfor a copy of tax map that is 18

A local law cannot override a state statute. In fact, §87(1)(b)(iii) of the Freedom of Information Law stated until the early 1980's that an agency could charge up to 25 cents per photocopy up to 9 by 14 inches or the actual cost of reproducing other records, unless a different fee was prescribed by "law". The problem was that the term "law" include local laws, ordinances, etc., and they were valid. FOIL was amended, however, and now refers to charge different fees only when they are prescribed by "statute." The term statute was intended to mean and has been construed by the courts, including the Appellate Division, Second Department, which includes Nassau County, to mean an enactment of the State Legislature [see Gandin, Schotsky & Rappaport v. Suffolk County, 226 AD2d 339 (1996)].

In short, an enactment by the Nassau County Legislature establishing a fee higher than that permissible under the FOIL would be invalid.

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

>>> Randy Bond 6/20/2006 10:18:06 AM >>>
Hi Bob,

Gene Fanelli from the County Map division claims that the fee was established by the Nassau County Legislature. He thinks it was 660 passed in 2001 (August) although he can't be sure of the number. Does the county legislature have the right to override state statute?

Randy M. Bond
Incorporated Village of Sands Point
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16033

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

June 21, 2006

Ms. Jamie L. Mereness
04-G-0088
Bedford Hills Correctional Facility
P.O. Box 1000
Bedford Hills, NY 10507-2499

The staff of the Committee on 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. Mereness:

I have received your letter in which you complained that you submitted a request for records pertaining to your medical intake to the Orange County Jail and, that as of the date of your letter to this office, you had not received a response. You also indicated that you submitted a check for the records.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 compliance with law, a copy of this opinion will be forwarded to the records access officer at the Orange County Jail

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16034

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

June 21, 2006

Mr. Sammy Swift
95-B-1276
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. Swift:

I have received your letter in which you sought assistance in obtaining records from the Cayuga County Office of the District Attorney. Having reviewed the correspondence attached to your letter, it appears that the Office of the District Attorney has denied access to the records because they were provided to your attorney or that it does not possess the records,

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

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

Since your attorney indicated that he does not have possession of the records, he should prepare an affidavit so stating that can be submitted to the office of the district attorney.

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

FOIL-AO-16035

41 State Street, Albany, New York 12231
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June 21, 2006

Mr. Allan J. Jordan
02-A-5282
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. Jordan:

I have received your letter in which you complained that you are being charged $.50 per copy for your medical records by your facility.

In this regard, I offer the following comments.

First, the Freedom of Information Law is a statute that pertains to government records generally. When a different statute pertains to particular records, I believe that it would prevail. As a rule, a specific statute supersedes a general statute. In this instance, §18 of the Public Health Law deals specifically with patients rights of access to medical records pertaining to them.

Moreover, that statute provides the subjects of medical records with rights in excess of those conferred by the Freedom of Information Law. Medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial. Under §18 of the Public Health Law, however, I believe that medical records, even those consisting of diagnostic opinion, for example, would be available to the subjects of those records.

Second, with respect to fees, the Freedom of Information Law authorizes agencies to charge up to twenty-five cents per photocopy, unless a different fee is prescribed by a statute other than the Freedom of Information Law. In the case of medical records, subdivision(2)(e) of §18 of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. 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."

Based on the foregoing, the Department of Correctional Service in my opinion could charge up to seventy-five cents per page for photocopies of medical records, for that fee is authorized by statute. Nevertheless, as a matter of practice and policy, I believe that the Department charges fees for copies of medical records at the rate of $.50 per copy.

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-16036

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

June 22, 2006

E-MAIL

TO: Peggy L. Mousaw

FROM: Camille S. 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 Ms. Mousaw:

We are in receipt of your follow up request for an advisory opinion pertaining to the following two questions:

> "1) May a municipality respond to a FOIL request by stating that they will answer your requests as time allows?
>
> 2) Is the gross salary information on W2's foilable? May this be denied due to confidential information, such as social security numbers and/or HIPPA?"

Because we addressed your second question in our June 13, 2006 correspondence to you, we offer the following comments with regard to your first question.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

On behalf of the Committee on Open Government we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16037

41 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 22, 2006

Mr. William Rivera
00-A-3461
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011

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

Dear Mr. Rivera:

I have received your letter in which you indicated that you are interested in obtaining Family Court records and your visiting records from Riker's Island Detention Center. You asked if there is a specific format that should be used in requesting these records.

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 does not apply to the courts.

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

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

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

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

A potential issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records sought. In considering that standard, the State's highest court has found that to meet the standard, the terms of a request must be adequate to enable 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, enclosed is a copy of "Your Right to Know", a citizen's guide to the Freedom of Information Law. That pamphlet includes a sample letter of request that should be helpful 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16038

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

June 22, 2006

E-Mail

TO: Mr. Daniel J. Hingre

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. Hingre:

I have received your letter in which you questioned the propriety of a "a fee of $53.75 for over 3.5 hours of work" in response to your request for "a copy of [your] tape recorded assessment review which was approximately 5 minutes."

From my perspective, the fee to which you referred is inconsistent with law. In this regard, §87(1)(b)(iii) of the Freedom of Information Law provides that agencies, by rule, may establish fees "which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute." Based on the foregoing, there are two standards for charging fees. One involves photocopies up to nine by fourteen inches, in which case an agency may charge up to twenty-five cents per photocopy, irrespective of its cost; and the second involves "other records", those that cannot be photocopied (i.e., tape recordings, computer disks and tapes, etc.), in which case the fee is based on the actual cost of reproduction. If another statute, an act of the State Legislature, authorizes an agency to charge a different fee, that provision would supersede the Freedom of Information Law.

With respect to clerical or other costs associated with responding to a request for copies of records, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. 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, it has been held that the actual cost of reproducing a tape recording would involve the cost of a cassette (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978). In the alternative, you could place your tape recorder next to the municipality's tape recorder and have your machine record the sound from the other machine. In that instance, since no copy would be made, no fee could be charged.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16039

41 State Street, Albany, New York 12231
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June 22, 2006

E-Mail

TO: Mr. David Warwick

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. Warwick:

I have received your letter concerning the time within which an agency must respond to a request for records.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

RFJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16040

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June 22, 2006

E-Mail

TO: Mr. Bradley D. Schwartz

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. Schwartz:

I have received your letter in which you asked whether you may "obtain a copy of a report directly from a private company that prepared that report for the town government."

In this regard, the Freedom of Information Law 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 includes governmental entities within its scope; private companies are not required to give effect to that statute.

Nevertheless, when records are prepared for an agency, I believe that they constitute agency records, irrespective of where the records are physically kept. Most pertinent is §86(4), which defines the term "record" expansively to include:

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

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

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

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

Insofar as records maintained by a private company are "kept, held, filed, produced or reproduced..,*for* an agency", such as a 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 the 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/she can review the records for the purpose of 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

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June 22, 2006

Ms. Donna Hylton
86-G-0206
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 information presented in your correspondence.

Dear Ms. Hylton:

I have received your letter and the correspondence attached to it. You indicated that you submitted Freedom of Information Law requests to a court, a county clerk and a district attorney's office and each have asked for payment which you cannot afford.

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."

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 (i.e., Judiciary Law, §255). 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 point out that §255 provides that:

> "...[A] clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

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

Lastly, under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy. I point out that there is nothing in that statute pertains to the waiver of fees. Further, in a decision involving a request for a waiver of fees by an inmate who sought records from an office of a district attorney, it was held that an agency may assess a fee in accordance with the Freedom of Information Law, notwithstanding the inmate's status as an indigent person [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)]. Therefore, irrespective of one's status, i.e., as a litigant or a poor person, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with its rules promulgated under §87(1)(b)(iii) of that statute.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 22, 2006

Hon. Rose E. Farr
Town Clerk
Town of Corinth
600 Palmer Avenue
Corinth, NY 12822

The staff of the Committee 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. Farr:

As indicated to you by phone, your letter seeking an advisory opinion was inadvertently misplaced. Please accept my apologies for the delay in response.

You wrote that two members of the Corinth Town Board:

> "...received e-mails from an unidentified person who received the e-mails from someone else. In these e-mails were derogatory statements about the councilmen. At a Town Board meeting the two councilmen read from these e-mails..."

You asked whether the e-mails are "FOIL-able since [you] do not have them in [your] possession." In this regard, I offer the following comments.

First, as you are likely aware, 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 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."

During our telephone conversation, you informed me that the e-mail in question is in the possession of the Town Board members to whom they relate. In my view, the e-mail communications would not have come into the possession of the Board members but for their roles or functions as government officials. That being so, it is my opinion that the e-mail communications maintained by the Board members constitute Town records that fall within the framework of the Freedom of Information Law.

Second, if a request is made for the e-mails, because you are the Town Clerk and the legal custodian of all Town records [see Town Law, §30(1)], and if you are the Town's records access officer, it is suggested that you contact the Board members in possession of the e-mail for the purpose of disclosing their contents to the extent required by 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.

Insofar as the e-mail communications were read to the public, I believe that the ability to deny access would have been waived and that those portions must be disclosed. With respect to the remainder of those communications, those portions that were not read aloud, it is suggested that they be reviewed to determine the extent to which they must be disclosed. It would appear unlikely that any of the grounds for denial would, under the circumstances, apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4218
FOIL-AO-16043

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

June 22, 2006

Mr. Anthony M. Cerreto
Village Attorney
Village of Port Chester
10 Pearl Street
Port Chester, NY 10573

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

Dear Mr. Cerreto:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings and the Freedom of Information Laws to a "communications channel" established by a member of the Village of Port Chester Planning Commission. Your description of the "channel" as "an electronic messaging and discussion group" differs somewhat from the terms and conditions of the system, which is set forth in relevant part as follows:

> "**Purpose And Policy**:
>
> "...to broaden the expertise and support the mission of the Planning Commission members....
>
> "...to promote the ability of the Commission Members to ask technical questions in a controlled open environment prior to noticed meetings of the Village professionals who support the operation of the Commission...
>
> "The system will also serve as an additional method to notice meetings and transmit documents as may be deemed timely or necessary by the Chairman...
>
> "The overall goal of this system is to raise the level of review by Commission Members while avoiding any unnecessary delay in application review.

> "...This is solely a system in which Commission Members and Village Professionals can pose questions and receive answers based on the applicable Codes and Law, not submit issues for the Commission to take action upon.
>
> "Please help ensure that this system is a positive experience for all its members by letting the Commission Chairman know if you find content that violates our rules."

In this regard, we note that there is nothing in the Open Meetings Law that would preclude the Village from electronically forwarding documents and materials to members of the Commission, nor is there anything that would preclude Commission members from individually contacting Village professionals with questions about upcoming applications before the Commission and sharing those responses with other members of the Commission. A series of communications, however, between individual Commission members, or telephone conversations among the members which results in a collective decision, a meeting or vote held by means of an electronic conference or discussion group would, in our opinion, be inconsistent with law.

From our perspective, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference. It is noted that the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Further, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of that definition and others, we 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. We 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 were enacted in 2000, and in our 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 our opinion that a public body may not take action or vote by means of e-mail, or system such as the one you have described.

Conducting a vote or taking action via an electronic discussion group would, in our 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 through a system such as this 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 this system is used as it is intended, only for distribution of materials and dissemination of information provided by Village professionals, with no substantive discussions occurring between members, that circumstance would be equivalent to the transmission of inter-office memoranda. In that kind of situation, in our view, the Open Meetings Law would not be implicated.

With regard to you question about how and the extent to which the Freedom of Information Law would apply to communications sent through this system, we 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, records of communications need not be in the physical possession of an agency, such as the Village, 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, 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)].

In our view, when Commission members communicate with one another or Village employees in writing, in their capacities as Commission members, any such communications constitute agency records that fall within the framework of the Freedom of Information Law.

The definition of the term "record" also makes clear that electronic communications between or among Commission members or Village employees 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, this system is merely a means of transmitting information; communications can be viewed on a screen and printed, and we believe that the 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 communications sent through this system must be disclosed in their entirety. Like other records, the content of the 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..."

We 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 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.

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).

In this case, it would appear that many of the communications transmitted through this system would consist largely of factual information and required to be made available to the public, i.e., notices of meetings, copies of applications, or background information. Those communications which would include opinions, advice and recommendations of Commission members or Village employees, on the other hand, would be subject to partial redaction prior to their release.

Finally, we note that the "Subscriber Usage Obligations And Limitations" section of the description you submitted is geared towards protection of free trade in a corporate environment. In our opinion, it would be appropriate to revise this section to address the Open Meetings Law directly.

On behalf of the Committee on Open Government 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

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June 23, 2006

Assistant Chief LaCorte
Kenmore Police Department
2395 Elmwood Ave.
Kenmore, NY 14217

The staff of the Committee 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 Assistant Chief LaCorte,

This is in response to your request made at a presentation given at the Erie County Central Police Services Training Academy on May 30, 2006, for an advisory opinion concerning the application of the Freedom of Information Law to records available to your police department through shared electronic databases. Apparently there are various types of county-wide shared databases consisting of law enforcement information acquired from all municipalities within a particular county, and at least one statewide database, known as the New York Statewide Police Information Network, or "NYSPIN". It is our understanding that criminal justice information is promptly made available to local police agencies through these databases, and to officers working in their patrol cars.

We have also been informed that there are written agreements between local police agencies, the New York State Police and/or the various County agencies responsible for maintaining the County-wide database, whereby the local police agencies agree not to access information in the databases except pursuant to criminal investigations.

As prescribed by Executive Law §§217-221, NYSPIN is authorized to connect with other similar state, national or international systems, and is required to collect, in addition to other information, records of felony complaints, arrest warrants, complaints of missing children, and actual or attempted abduction or molestation information. The State Police is permitted to make the basic system available for use by "any department or division of the state government and by any municipal, county, town, village, railroad or other special police department lawfully maintained by any corporation in this state..." (Executive Law §219).

Regulations governing local access to NYSPIN, adopted by the Superintendent of the State Police, state in relevant part:

> "(d) Inquiries to NYSPIN may only be made for criminal justice purposes.
>
> (e) No printed material obtained via NYSPIN (or copies thereof) may be delivered to persons or agencies outside criminal justice except as directed by an appropriate court or other proper legal authority. Requests for printed material (or copies thereof) pursuant to the Public Officers Law, article 6 (the Freedom of Information Law) need not be delivered to persons or agencies outside criminal justice if exemptions listed under section 87, subdivision 2 (a-i) of such law apply. If you have any doubt that the Freedom of Information request is valid, assistance is available from the New York State Police, Records Access Officer (Assistant Deputy Superin tendent [sic] –Administration), Building 22, State Campus, Albany, NY 12226.
>
> (f) All requests for information in the NYSPIN computer, the NYSPIN Operating Manual, interim NYSPIN Operating Manual revisions, and NYSPIN operational aids pursuant to the Public Officers Law, article 6 (the Freedom of Information Law) must be referred, in writing, to the Superintendent of State Police. All requests for CHRI under either the Freedom of Information Law or the Public Officers Law, article 6-A (Personal Privacy Protection Law), must be referred to the commissioner of DCJS." (9 NYCRR 486.3)

A careful reading of the regulations quoted above indicates that printed material obtained via NYSPIN is public, unless an exception to rights of access listed in paragraphs (a) through (i) of §87(2) of the Freedom of Information Law may properly be asserted. Stated differently, those materials are treated in the same manner for purposes of the Freedom of Information Law as any other agency records.

Further, according to judicial decisions, an agency's regulations may not render records deniable or confidential, unless there is a basis for so doing pursuant to one or more of the grounds for denial appearing in the Freedom of Information Law. The first ground for denial in the Freedom of Information Law, §87 (2)(a), refers to records that may be characterized as confidential and enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." A statute, based upon judicial interpretations of the Freedom of Information Law, is an act of the State Legislature or Congress [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)], and it has been found that agencies' regulations are not equivalent to statutes for purposes of §87 (2)(a) of the Freedom of Information Law [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. Therefore, insofar as an agency's regulations render records or portions of records deniable in a manner inconsistent with the Freedom of Information Law or some other statute, those regulations would, in our opinion, be invalid. Regulations cannot operate, in our view, in a manner that provides fewer rights of access than those granted by the Freedom of Information Law.

In addition, insofar as there may be contractual provisions which limit rights of access conferred by a statute, such as the Freedom of Information Law, we believe that they are void and unenforceable. In this regard, we 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 Court of Appeals has held that a request for or a guarantee of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available. In Washington Post v. Insurance Department [61 NY2d 557 (1984)], the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court also concluded that "just as promises of confidentiality by the Department do not affect the status of documents as records, neither do they affect the applicability of any exemption" (id., 567).

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

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

In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education' s right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.

> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

In short, notwithstanding any contractual language or regulations to the contrary, we believe that records maintained in the databases must be disclosed to any person seeking them, to the extent required by the Freedom of Information Law.

Turning now to questions of whether particular elements of information maintained on the databases are required to be disclosed, we offer the following comments.

As mentioned above, the Freedom of Information Law is based upon a presumption 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 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 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.).

With respect to the subject databases, we are not suggesting that the contents must necessarily be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

Second, from our perspective, unless an arrest or booking record has been sealed pursuant to §160.50 of the Criminal Procedure Law, it must be disclosed. Under that statute, when criminal charges have been dismissed in favor of an accused, the records relating to the arrest ordinarily are sealed. In those instances, the records would be exempted from disclosure by statute pursuant to the Freedom of Information Law, §87(2)(a).

Although arrest records are not specifically mentioned in the current Freedom of Information Law, the original Law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. In 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 Court of Appeals, several years ago that, unless sealed under §160.50 of the Criminal Procedure Law, records of the arresting agency identifying those arrested must be disclosed [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)].

With respect to the names of witnesses, complainants or victims, rights of access, or conversely, the ability to deny access would in our 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, for example, 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, we are 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 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 our 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)]. Similarly, when a person is arrested, taken into custody and is committed to a county jail, a record must be maintained at the jail that includes numerous details, all of which must be disclosed. Specifically, §500-f of the Correction Law, which pertains to county jails, states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what any by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record, and shall be kept permanently in the office of the keeper."

In sum, we believe that a blanket denial of access to records maintained on the databases would be inconsistent with law and that an agency in receipt of a request must review the records to ascertain the extent to which they may properly be withheld.

As indicated in our discussion, one of the challenges facing a local police agency is the ability to determine the final disposition of a particular arrest. It is our understanding that at least one county-wide database captures disposition information and blocks access to records which have been sealed pursuant to Criminal Procedure Law §160.55. In this regard, we recommend that final disposition information be incorporated into electronic databases as a matter of course, so as not to unduly burden local agency personnel with the responsibility to obtain such information manually.

Another challenge, which was subsequently raised in a related telephone conversation, is how to handle requests for a large volume of electronic records maintained over the course of a year, for example. The concern is that the request would require the review and redaction of many, many pages of records, a hugely labor-intensive project.

In this regard, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. It is also important to note, however, that §86(4) of the Law defines the term "record" to include:

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

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

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, an agency is not required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

Often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat

the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, it would seem that an agency should follow the more reasonable and less costly and labor intensive course of action.

In our view, there is clearly a distinction between extracting information and creating it. If an applicant knows that an agency's database consists of 10 items or "fields", asks for items 1, 3 and 5, but the agency has never produced that combination of data, would it be "creating" a new record? The answer is dependent on the nature of the agency's existing computer programs; if the agency has the ability to retrieve or extract those items by means of its existing programs, it would not be creating a new record; it would merely be retrieving what it has the ability to retrieve in conjunction with its electronic filing system. An apt analogy may be to a filing cabinet in which files are stored alphabetically and an applicant seeks items "A", "L" and "X". Although the agency may never have retrieved that combination of files in the past, it has the ability to do so, because the request was made in a manner applicable to the agency's filing system.

As in the case of incorporating final disposition information, we recommend that the electronic databases are designed to segregate confidential information, so as not to unduly burden local agency personnel with review and redaction of individual records. That recommendation is the subject of legislation that has been approved by the Senate and Assembly and will soon be transmitted to the Governor (see A. 8007/S. 4896).

To that extent, we recommend that disposition information be incorporated into the electronic databases, so that resources need not be expended tracking.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Edmund Fitzgerald
Edward Hempling
June Jonmaire

FOIL-AO-16045

From: Robert Freeman
To: Frank Coccho
Date: 6/26/2006 9:25:46 AM
Subject: Re: FOIL Request

Dear Mayor Coccho:

I have received your inquiry concerning complaints made to government agencies by members of the public.

In this regard, this office has long advised that any portion of a complaint that would, if disclosed, identify the person who made the complaint may be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. In general, the identity of the person making the complaint is irrelevant to the agency in receipt of the complaint; the agency's is merely interested in whether the complaint has merit. Further, if names of complainants are disclosed, it is less likely that complaints will be made or, therefore, that the government will obtain information necessary to carry out its duties on for the public.

I note that there is no obligation to withhold identifying details pertaining to a person who makes a complaint. Rather, a government agency may, based on the exception in the Freedom of Information Law referenced above, choose do so.

I hope that I have been of assistance.
>>> "Frank Coccho" <[redacted]> 6/23/2006 10:13:10 PM >>>
Counselor:

I know Betty spoke to you earlier this week regarding the following question and would appreciate a brief opinion from you:

Is a local police agency required to provide copies of a complaint containing the complainant's name, identity, address, etc, or are they within the Freedom of Information Law to withhold or redact same?

Example: Earlier this week a citizen called the police to complain about a loud party in her neighborhood. The caller was "pressed" to give her name which she was reluctant to do. After the dispatcher insisted, the caller finally conceded and offered her name/address. The police responded and subsequently one of the participants at the party was removed by the police.

Now, the caller is concerned that the police will disclose her name as the complainant and she naturally fears for her safety, well being, being harassed, etc.

Thanks very much for your time and cooperation.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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June 26, 2006

Mr. Brian Burke
[redacted]

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

Dear Mr. Burke:

I have received your letter and the materials attached to it. You have sought assistance in relation to a request made under the Freedom of Information Law to the New York City Police Department. Based on a review of the correspondence, I offer the following comments.

First, since you referred to the federal Freedom of Information Act, I note that that statute is applicable only to federal agencies. The applicable statute in the context of your correspondence is the state's Freedom of Information Law, which pertains to entities of state and local government in New York.

Second, in consideration of the response by the Department, a primary issue appears to involve the extent to which you met the requirement imposed by §89(3) of the Freedom of Information Law that a request must "reasonably describe" the records sought. 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 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 staff can locate the records of your interest with a reasonable effort analogous to that described above, it 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.

From my perspective, it appears that item (1) of your request, which refers to a particular event at a specific time and location would reasonably describe records of your interest. However, with respect to items (2) and (3), I do not believe that the requirement that records sought be reasonably describe was met. In short, the Department indicated that it does not maintain its records in a manner in which it can locate the records falling within those aspects of your request with reasonable effort.

It is suggested that you contact the Department with respect to the records sought in relation to item (1). Although I am unaware of any facts relating to the event to which you referred, I note that the Freedom of Information Law is based upon a presumption of access. Stated differently, all

records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Enclosed is "Your Right to Know", a guide to the Freedom of Information Law that may be useful to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Sgt. James Russo

STATE OF NEW YORK
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June 26, 2006

Mr. James Russell
[redacted]

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

Dear Mr. Russell:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Office of the Westchester County District Attorney. As you indicate, apparently you were denied access to a copy of a videotaped confession which was played at a trial and then again, more recently, at a pre-trial hearing. Although we do not have information as to final disposition of the matter and/or your role in the proceedings, we offer the following comments.

First, even though records might ordinarily be withheld under the Freedom of Information Law, it has been held that there is no basis for denial once the records have been presented in a public judicial proceeding. In Moore v. Santucci, 543, NYS2d 103, 151 AD2d 677 (1989), the Court found that:

> "...while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (*see, Matter of Knight v Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [151 AD2d 677,679 (1989)].

In short, by disclosing the videotape in open court, a public disclosure would have already been made. Once that occurs, unless a record is later sealed, nothing in the Freedom of Information Law would serve to enable an agency to deny access to that record.

That principle appears to have been recognized in a case involving an attempt by a new organization to obtain a videotape from the court, which denied the request "based on the court's concerns that the integrity of the evidence in question would be placed in jeopardy" (see People v. Shulman, Supreme Court, Suffolk County, NYLJ, December 24, 1998). Although the trial judge's

refusal to provide the videotape was based on its fear that the tape, as evidentiary material, might in some way be damaged, he emphasized that:

> "...there are other mechanisms which have already been confirmed by the court in that they could simply file a Foil request with the district attorney's office for a copy of the tape, and based on the appellate law, it's clear that the district attorney's office, if they have a copy, would have to turn it over to News 12...It seems to me that would be the appropriate way to proceed" (Transcript of Order by Hon. Arthur G. Pitts, pp. 5-6, November 6, 1998, County Court, Suffolk County).

In consideration of the foregoing, while the trial judge denied the request for the court's copy of the videotape based on concern for the physical integrity and security of the tape, he essentially recommended that a copy be sought from the District Attorney and recognized that a duplicate must be disclosed by the District Attorney in response to a request made under the Freedom of Information Law.

Lastly, another aspect of Moore may be equally significant, for it was also held that if a record sought was previously made available to the defendant or his or her attorney, there must be a demonstration that neither possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

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

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt
cc: Janet DiFiore

STATE OF NEW YORK
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June 26, 2006

Mr. Thomas Middendorf
[redacted]

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

Dear Mr. Middendorf:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Syosset Fire District, in particular with respect to the amount of time within which the District is required to respond to your requests. In an effort to address some of the questions you raise, 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, 2005 (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.

Second, with respect to your requests for copies of minutes, §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."

With respect to the District's denial of your request for access to Length of Service Awards Program award beneficiaries and amounts paid in August of 2005 on the ground that the "list of participants and beneficiaries and proposal payouts is privileged litigation material", we note that if the records are part of a settlement agreement, and like other contracts between government agencies and persons or entities, they are accessible under the Freedom of Information Law.

The courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the state's highest court, the Court of Appeals, twenty-five years ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have carte blanche to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for in camera inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In another decision, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" [Capital Newspapers v. Burns,67 NY2d 562, 565-566 (1986)].

As the judicial decisions cited above make clear, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Sections 87(2)(b) and 89(2)(b) authorize agencies to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

Although instances have arisen in which agreements or settlements have included provisions requiring confidentiality, those kinds of agreements have uniformly been struck down and found to be inconsistent with the Freedom of Information Law. In short, it has been held that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

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

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

In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining

agreement which bargained away the board of education' s right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).

A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.

The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Louise Intindoli

STATE OF NEW YORK
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June 27, 2006

Mr. Andrew Coe
[redacted]

The staff of the Committee 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. Coe:

I have received your letter concerning a request made pursuant to the Freedom of Information Law for records of the New York City Police Department. The request involves a series of arrests and convictions pertaining to Raymond Marquez, and you specified the nature and dates of arrests and charges, e.g., "07/30/1998 Enterprise Corruption; Promoting Gambling, 1st." In response, you received only fifteen pages of material and were informed that the request is "too broad in nature and does not describe a specific document."

Based on the legislative history of the Freedom of Information Law and its interpretation by the Court of Appeals, the state's highest court, I believe that the response by the Department is inaccurate and inconsistent with law.

In this regard, by way of background, when the Freedom of Information Law as initially enacted in 1974, it required that an applicant must seek "identifiable" records. Since 1978, however, it has merely required that an applicant "reasonably describe" the records sought. Moreover, it was 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.).

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.

Although it appears that your request likely met the requirement of reasonably describing the records sought, it is suggested that you contact the Department's records access officer and offer additional detail known to you in an effort to enhance and ensure the Department's ability to locate and identify the records.

You indicated by phone that Mr. Marquez has been the subject of several trials and convictions. I point out that it has been held that records that might ordinarily be withheld with justification under the Freedom of Information Law become accessible if they have been introduced during a public judicial proceeding [see Moore v. Santucci, 151 AD2d 677 (1989)]. When that is so, the greater the disclosure is through judicial proceedings, less likely is the ability to deny access based on an exception appearing in the Freedom of Information Law. You also referred to the preparation of a variety of reports and paperwork by particular units within the Police Department,

some of which "ended up in the hands of an ex-ADA named Jeremiah McKenna and the information in them was used for a book, *The Mob's Daily Number*, by Don Liddick (University Press of America, 1999)." In consideration of the volume of material prepared that relates to Mr. Marquez, you contend that the Department has failed to comply with law.

In this regard, I point out that the Freedom of Information Law pertains to existing records. Therefore, to the extent that the records of your interest no longer exist or are no longer maintained by or for the Department, that statute would not apply.

Insofar as the records of your interest continue to exist, as a general matter, the Freedom of Information Law is upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is important to note that the Freedom of Information Law is permissive. Although an agency may withhold records in accordance with the exceptions to rights of access, the Court of Appeals has held that it is not required to do so and may choose to disclose [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

While it appears that records extant should be disclosed in great measure, it is likely that portions could be withheld.

Perhaps most significant is a decision rendered by the Court of Appeals concerning "complaint follow up reports" and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

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

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

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

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

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

> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NYS2d 54, 89 NYS2d 267 (1996); emphasis added by the Court].

Based on the foregoing, the Police Department cannot claim that complaint reports or other internal documents can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those kinds of 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, unless that person was identified during a public judicial proceeding.

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), most of which would no longer exist.

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, the Court in Gould confirmed its general view of the intent of the Freedom of Information Law stating that:

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

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jonathan David
Lt. Daniel Gonzalez

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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June 27, 2006

Mr. Brendan Scott
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1170 Route 17M, Suite 4
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The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Mr. Scott:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the County of Orange for reports pertaining to motor vehicle accidents involving County owned vehicles. Additionally, we have received a copy of the County's denial of your appeal to release unredacted copies of the reports. We generally agree with your assessment of the current state of the law, which in our opinion requires the County to disclose the reports. 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, because the County maintains the records which you have requested, we believe that those records must be disclosed by the County to the extent required by law.

Second, 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 or prosecution by such authorities of a crime 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.

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 section 87(2)(a) through (i) of the Law. Accordingly, it is our opinion that both the Freedom of Information Law and §66-a laws would apply to require production of those records.

We note that the County relies on two judicial decisions and various advisory opinions of the Committee on Open Government that appear, at first glance, to support its position that certain elements of information may be redacted from the accident reports. As we understand §66-a and the case law, however, there is nothing in that statute that would authorize an agency, such as a County, to withhold names and addresses of persons involved in accidents, the type and nature of any injuries sustained, or the identities, ages or genders of any other individuals who were injured in the accident.

Unlike the factual situation here, the first case upon which the County relies, Goyer v. Dept of Environmental Conservation, (Supreme Court, Albany County, November 29, 2005), involved a request for registration information for all licensed hunters issued deer management permits during the preceding year. Because there was and is no statutory requirement that the permit applications discussed in Goyer be disclosed, the analysis does not directly apply.

The analysis set forth in the second case, Scott, Sardano & Pomeranz, *supra*, is pertinent because it permits the agency to withhold names and address of individuals from accident reports when they are sought for commercial or fundraising purposes, based on the exception set forth in §87(2)(b), which permits an agency to withhold information which if released would constitute an unwarranted invasion of personal privacy. Accordingly, the court directed the City to delete names and addresses of the victims before making the reports available (see §§ 87[2][b] and 89[2][b]).

Based on the ruling in Scott, Sardano & Pomeranz, *supra*, however, it is our opinion that the Court did not give permission for an agency to redact the names of any persons involved in an accident prior to disclosure, unless those names and addresses are to be used for commercial or fundraising purposes. We reiterate, there is nothing in the Court's decision or in the statute that would authorize an agency to withhold the names and addresses of any persons involved in an accident based on their employment with the County or any other government agency. We do not believe that the law would permit redaction of signatures on the reports, and/or the ages or genders of individuals injured in the accident, nor do we believe that the names and home addresses of individuals involved in accidents may be redacted, except when disclosure is for a commercial or fundraising purpose.

Finally, to the extent that the County has redacted information pertaining to injuries sustained in the course of an accident, we note the court's ruling in Beyah v. Goord (309 AD2D 1049, 766 NYS2d 222, 225 [3rd Dept, 2003]). In Beyah, the court held that there is no unwarranted invasion of personal privacy with respect to the release of an incident report that includes notations "which describe the general nature of the .... injuries sustained in the incident" because such disclosure does not reveal details of any existing medical condition, and therefore, cannot reasonably be considered a material part of an individual's medical history.

In sum, it is our view, based on the language of the law and its judicial construction, that motor vehicle accident reports must be disclosed in their entirety, except in two circumstances: the first would involve a situation in which portions may be withheld because disclosure would "interfere with the investigation or prosecution...of a crime involved in or connected with the accident; and the second with a situation in which accident victims' names and addresses are sought for a commercial purpose.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: David L. Darwin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16057

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June 28, 2006

Mr. Joseph P. Calnan
Therapeutic Service Systems
P.O. Box 2547
Galveston, TX 77553

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

Dear Mr. Calnan:

I have received your letter and the materials relating to it. You have sought my views concerning a denial of your request made to the State Education Department for the names and mailing addresses of physical therapists licensed in New York.

Although a list containing equivalent and additional information was made available to you by the Department in 2001, your request was denied based on the following statement:

> "In order to carry out its statutory responsibilities, the Department currently collects and maintains one address record for each licensed professional in New York State. Because many licensees do not have a business address, our computers necessarily contain the home addresses of virtually thousands of licensees. As our computerized files are currently configured, we are unable to distinguish a licensee's business address from a residential address. For this reason we do not provide licensee addresses to the public as it would be an invasion of the licensee's privacy."

From my perspective, the denial of your request is inconsistent with law. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. One of the exceptions authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy" [§§87(2)(b), 89(2)(b)]. However, based

on the language of the Freedom of Information Law, as well as other statutes and their judicial construction, I believe that the provisions dealing with the protection of personal privacy are intended to deal with natural persons, rather than entities, such as corporations, or individuals in relation to their business or professional capacities. The Personal Privacy Protection Law, which is applicable to state agencies, when read in conjunction with the Freedom of Information Law makes clear that the protection of privacy as envisioned by those statutes is intended to pertain to *personal* information about natural persons [see Public Officers Law, §§92(3), 92(7), 96(1) and 89(2-a). In a decision rendered by the Court of Appeals, the state's highest court, that focused upon the privacy provisions, the Court referred to the authority to withhold "certain personal information about private citizens" [see Federation of New York State Rifle and Pistol Clubs, Inc., 73 NY2d 92 (1989)]. In another decision rendered by the Court of Appeals and a discussion of "the essence of the exemption" concerning privacy, the Court referred to information "that would ordinarily and reasonably regarded as intimate, private information" [Hanig v. State Dept. of Motor Vehicles, 79 NY 2d 106, 112 (1992)]. In view of the direction given by the state's highest court, again, I believe that the authority to withhold the information based upon considerations of privacy is restricted to those situations in which records contain *personal* information about natural persons, as opposed to information identifiable to those in their business or professional capacities.

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

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

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

Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

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

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

In Cohen, 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.." (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 indicated in the decisions cited above, the exception concerning privacy does not apply to a record identifying entities or individuals in relation to their business or professional capacities. That being so, I do not believe that there is a basis for withholding the names and addresses relating to professional licensees.

Second, on the basis of the response to your request, the Department apparently does not know and cannot ascertain whether addresses that it maintains pertaining to licensees are business or home addresses. When an agency maintains both business and home addresses, it has been advised that the home addresses may be withheld as an unwarranted invasion of personal privacy. The business address indicates where the licensed activity is carried out, and the home address is irrelevant to one's activities as a licensee. However, if an agency has only one address relating to a licensee, it has been advised that the address is accessible.

I note that when an agency's denial of access to records is challenged in a judicial proceeding, §89(4)(b) of the Freedom of Information Law states that the agency has the burden of proving that the records were properly withheld in accordance one or more of the exceptions to rights of access. If the agency does not know whether it maintains a home address or a business address, I do not believe that it could justify a denial of access based on its contention that some, but not all of the addresses, are home addresses.

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

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

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to

> determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joan Kasper
Nellie Perez

FOIL-AO-1605

From: Robert Freeman
To: Ann Leber
Date: 6/28/2006 11:58:48 AM
Subject: Re: FOIL

We have consistently advised that an agency is not required to honor a request that is prospective. The basis for the advice is that the Freedom of Information Law pertains to existing records. That being so, in a technical sense, it can neither grant nor deny access to records that do not yet exist.

In short, I agree with your belief that you need not agree to make records available on a "continuing" basis and that you may suggest that the applicant make periodic requests for existing records.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
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>>> "Ann Leber" <aleber@northcastleny.com> 6/28/2006 11:42:13 AM >>>
Bob,
A resident foiled some certioraris and tax settlements which we will provide. He also wrote "I would like my request to be treated as a continuing FOIL request if possible" as he would like to receive copies of any certioraris we receive going forward. Can I tell him that is not possible and that I will need periodic FOIL requests from him in order to supply documents received in the future?

As always, thanks for your on-going help.
Ann

Ann Leber
Town Clerk
Town of North Castle
15 Bedford Road
Armonk, NY 10504
Phone: (914) 273-3321

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16053

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June 28, 2006

E-MAIL

TO: Julie Grow Denton

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. Denton:

I have received your correspondence in which you indicated that you represent a client, a private entity, seeking to develop "an active adult community in Rome" for tenants of at least 55 years of age.

To guarantee that to be so, the City of Rome has asked that a variety of information be reported and filed with its code enforcement office. The information would include the names, ages, dates of birth and addresses of each resident, the same items pertaining to any non-resident who visits the property for at least 24 hours, the source of any subsidy received by a tenant, and any other information "as necessary" to verify the age of a tenant. City officials have provided assurances that the information in question would be withheld under the Freedom of Information Law, §87(2)(b).

You have sought confirmation of the "the accuracy of the City's representations." In this regard, I offer the following comments.

First, although the City might promise confidentiality or claim that the information in question would be protected, 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, records 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).

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 in general agreement that the items sought to be maintained by the City could be withheld pursuant to the provision to which it referred. Specifically, §87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In my view, those items, names of tenants in a private facility, coupled with their ages, dates of birth, the identities of their visitors, the visitors' dates of birth, and in some instances the fact that tenants are eligible for subsidies based on their income, would, if disclosed result in an unwarranted invasion of their privacy. However, it is important to note that even though an agency *may* withhold records or portions thereof in accordance with the exceptions, it is not required to do so. As stated by the Court of Appeals:

> "...while an agency is permitted to restrict access to those records falling 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)].

Therefore, despite what may be the City's intention to withhold the items it seeks, it is not obliged to do so.

Lastly, while the City may have the ability to withhold the items it seeks when they are requested under the Freedom of Information Law, the City may have no authority to do so if they are subject to a subpoena or discovery. In those instances, the exceptions to rights of access in the Freedom of Information Law would not apply.

I hope that I have been of assistance.

RJF:tt

cc: Corporation Counsel, City of Rome

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4221
FOIL-AO-16054

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June 29, 2006

Ms. Sandra Small
[redacted]

The staff of the Committee on 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. Small:

I have received your letter and the materials attached to it. You indicated that you are a member of the Enfield Town Board and appointed as liaison to the Enfield Volunteer Fire Company. You have sought "clarification on whether or not advance notice of Board member's attendance at the Fire Company's Board of Directors meeting is necessary", and whether residents must provide advance notice. You also raised questions concerning the status of a fire protection district and a fire district, and you sought guidance concerning the terms of the contract between the Town and the Company.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information and Open Meetings Laws, and my comments will be limited to matters that you raised that relate to those statutes. It is suggested that questions that involve volunteer fire companies or fire districts be made to an attorney for the Department of State who has expertise on those subjects, Elisha Tomko. Ms. Tomko can be contacted at the Department by mail or by phone at (518)474-6740.

Insofar as I can address your questions, it is my understanding that a fire protection district is merely a geographical area that has no governing body or employees. A fire district is a governmental entity, and the meetings of a board of fire commissioners fall within the coverage of the Open Meetings Law.

That statute pertains to meetings of public bodies, and §102(2) of the 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."

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 board of commissioners of a fire district in my view is clearly a public body subject to the Open Meetings Law.

The Freedom of Information Law, the companion of the Open Meetings 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."

Again, a fire district is a public corporation. Consequently, I believe that it is an "agency" required to comply with the Freedom of Information Law.

With respect to a volunteer fire company, by reviewing the components in the definition of "public body", I believe that each is present with respect to the board of such a company. The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law.

I point out that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was questionable whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions if the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland, I believe that the board of a volunteer fire company falls within the definition of "public body" and would be required to comply with the Open Meetings Law.

In Westchester-Rockland, the case involved access to records relating to a lottery conducted by a volunteer fire company, and it was determined that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

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

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

While I know of no judicial decision that focuses on the status of meetings of the boards of volunteer fire companies under the Open Meetings Law, I believe that the decision by the state's

highest court that those companies constitute "agencies" that fall within the coverage of the Freedom of Information Law indicates that the same conclusion would be reached regarding their status as "public bodies" required to comply with the Open Meetings Law.

Lastly, and in response to your specific question, §103 of the Open Meetings Law states that meetings of public bodies "shall be open to the general public." That being so, anyone may attend their meetings, and no advance notice can be required as a condition precedent to attending.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Enfield Volunteer Fire Company

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16055

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July 10, 2006

Mr. Alan M. Valente
[redacted]

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

Dear Mr. Valente:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the City of Troy. Based on the information you submitted with your request, it appears that the City has not yet responded to your requests for the following records pertaining to The Hudson Duster, 40 - Third Street, Troy:

Arrest records/incident reports
Notices issued by the Commissioner of Public Works
Rules and Regulations promulgated in conjunction with §205-14A of the Troy General Code
Affidavits of Service
Documentation regarding criteria for maximum capacity/occupation for restaurants and/or taverns

In addition, you have requested copies of all notices to restaurants and/or taverns issued to date with respect to maximum capacity/occupation criteria requested above.

In this regard, we offer the following comments:

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

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

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In 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, reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

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

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

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to

> determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

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

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

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

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

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

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

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

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

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

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

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

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

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

The ability to withhold records under §87(2)(e) is limited to those situation in which the harmful effects described in subparagraphs (i) through (iv) would arise by means of disclosure. It is difficult, in my view, to envision how disclosure of the records would result in any of those harmful effects. Moreover, the provision that is likely of greatest significance, §87(2)(e)(i), does not refer to disclosures that might, at some point, interfere with an investigation; it refers to disclosure that "would" interfere. The language of the denial, as I interpret it, does not suggest that.

In your correspondence with the city, you referenced sections of the Troy City Code relating to the matter. Absent specific information concerning the incidents and the notices of violation, which are contained in the records you have requested, it may be all but impossible to take steps to abate any nuisance as required by §205-14(b) and (c) of the City Code. Moreover, although the records at issue were different, the Court of Appeals suggested that disclosure of the kinds of records you seek may be beneficial rather than damaging. Fink v. Lefkowitz involved access to a manual prepared by a special prosecutor who investigated nursing homes, in which the Court of focused on §87(2)(e)(iv) and 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" [47 NY 2d 568, 572 (1979)].

Under the circumstances, disclosure of the records sought might result in the correction rather than the continuation of alleged violations, if indeed violations have occurred.

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

In sum, incident reports, by their nature, differ in content from one situation or incident to another. To suggest that they may be withheld in their entirety, categorically, in every instance, is in our opinion contrary to both the language of the Freedom of Information Law and its judicial construction by the state's highest court. We are not suggesting that incident reports or similar records must in every instance be disclosed; however, as indicated in the preceding commentary, the extent to which those records may be withheld is dependent upon their content and the effects of disclosure.

With respect to your request for all documentation regarding all documentation regarding maximum capacity/occupation for restaurants and/or taverns and rules and regulations promulgated in conjunction with specific provisions of the City Code and affidavits of service, again, the Freedom of Information Law is based upon a presumption of access, and there are no exceptions which would apply to permit the City from withholding access to such information from you.

Further, and with respect to your request for all notices issued against all restaurants and/or taverns, we note that 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 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 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 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.).

It is unlikely that the City could identify "all documentation" regarding occupation limits for restaurants, as this request requires a determination as to which records pertain to occupational limits and could be construed so broadly as to require a search of every historical record maintained by the City's code enforcement office. Similarly, a request for "all notices" without a date restriction, could result in an unnecessary search through every archived file. On the other hand, if City 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 not reasonably describe the records, the City should so inform you.

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, 2005 (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.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Flora O'Malley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 10, 2006

Ms. Ann M. Perron
[redacted]

The staff of the Committee on 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. Perron:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Village of Ossining. Based on the information which you provided, it appears the Village has not yet provided fund balance information from 2005 or 2006, or records reflecting the information you requested pertaining to bonds issued since January of 2005.

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

While one of the grounds for denial is relevant to an analysis of rights of access, due to its structure, we believe that it requires disclosure of the kinds of records in which you are interested. Section 87(2)(g) permits an agency to withhold records that:

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

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

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

The records that you are seeking would constitute "inter-agency or intra-agency" materials. However, they would appear to consist of "statistical or factual tabulations or data" available under §87(2)(g)(i).

Notwithstanding the foregoing, we note that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information *per se*; rather it is a statute that may require agencies to disclose existing records. Similarly, §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request. Here, it seems that copies of the records from which the Clerk has collected the information provided to you may be more responsive to your request than the excerpts that she provided.

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, 2005 (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.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Mary Ann Roberts

STATE OF NEW YORK
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July 10, 2006

E-MAIL

TO: Greg Bagonyi

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. Bagonyi:

We are in receipt of your request for an advisory opinion concerning the Freedom of Information Law and whether it would require a municipality to provide access to records of complaints made against neighbors for failure to maintain their property. In this regard, we offer the following comments.

By way of background, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. We note that the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that there may be instances in which a single record includes both accessible and deniable information, and that an agency is required to review a record that has been requested to determine which portions, if any, may properly be withheld.

The exception to rights of access of primary significance, in our view, pertains to the protection of privacy, and §87(2)(b) permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." It has consistently been advised that those portions of a complaint or other record which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. We 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 our 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, we believe that identifying details may be deleted.

If the identity of the complainant is known, the complaint might properly be withheld in its entirety if indeed, due to its contents, disclosure would constitute an unwarranted invasion of personal privacy. In that situation, for obvious reasons, the deletion of a name or other identifying details would not serve to protect privacy.

We hope this helps to clarify your understanding of the Freedom of Information Law.

CSJ:tt

FOIL-AO-16058

From: Robert Freeman
To: [redacted]
Date: 7/11/2006 9:30:26 AM
Subject: Dear Anthony:

Dear Anthony:

I have received your inquiry concerning fee waivers. In this regard, while the federal Freedom of Information Act (applicable only to federal agencies) includes provisions concerning fee waivers, there are no similar provisions in the New York Freedom of Information Law. Therefore, although agencies in some instances waive fees, usually when a request involves a minimal amount of copying, there is no obligation to do so. Further, it has been held that an agency may charge its established fees even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

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-16059

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

July 11, 2006

Mr. Shan Carter
#0486636
Central Prison
1300 Western Boulevard
Raleigh, NC 27606

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

Dear Mr. Carter:

I have received your letter in which you asked how you can obtain criminal history records of the person to whom you have been convicted of murdering.

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

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

It is noted that in a decision rendered by the Appellate Division, Second Department, the Court reconfirmed its position that criminal history records are, in general, exempt from disclosure [Woods v. Kings County District Attorney's Office, 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."

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 point out that the Office of Court Administration makes criminal conviction histories available upon payment of a fee of fifty-two dollars.

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-16060

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

July 11, 2006

Mr. Blake Wingate
05-A-4578
Attica Correctional Facility
Exchange Street
Attica, NY 14011-0149

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

Dear Mr. Wingate:

I have received your letter in which you complained that the New York City Police Department acknowledged receipt of your request for records but indicated that it would take four months to make a determination on 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, 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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16061

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

July 11, 2006

Mr. Narciussus Dellamore
88-A-8001
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. Dellamore:

I have received your letters in which you indicated that you have encountered difficulty in obtaining your medical and mental health records from the Coney Island Hospital and Coney Island Mental Health Psychiatric Center.

In this regard, since the facilities in question are part of the New York City Health and Hospitals Corporation, I believe that they are governmental agencies subject to the Freedom of Information Law. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

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

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

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

With respect to mental health records, §33.16 of the Mental Hygiene Law, deals specifically with those records.

As I understand §33.16 of the Mental Hygiene Law, it provides rights of access to clinical mental health records, with certain exceptions, to "qualified persons," and paragraph 7 of subdivision (a) of that section defines that phrase to include "any properly identified patient or client." It appears that you are a "qualified person" and that you may assert rights of access under that statute.

I note that §33.16(b) states in relevant part that a facility must respond to a request within ten days, and subdivision (d) of §33.13 pertains to the right to appeal a denial of access and states that:

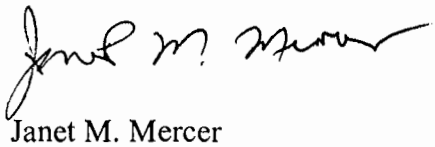
> "(d) Clinical records access review committees. The commissioner of mental health the commissioner of mental retardation and developmental disabilities and the commissioner of alcoholism and substance abuse services shall appoint clinical record access review committees to hear appeals of the denial of access to patient or client records as provided in paragraph four of subdivision (c) of this section. Members of such committee shall be appointed by the respective commissioners. Such clinical record access review committees shall consist of no less than three nor more than five persons. The commissioners shall promulgate rules and regulations necessary to effectuate the provisions of this subdivision."

Again, it is suggested that you resubmit you request citing §33.16 of the Mental Health 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-16062

41 State Street, Albany, New York 12231
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July 11, 2006

Mr. Elvis Castillo
01-A-4084
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. Castillo:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records from the Queens County Office of the District Attorney since 2002. Having reviewed the correspondence attached to your letter, it appears that that office, after nearly three years, has indicated that 488 pages would be made available to you upon payment of the appropriate fees. You sent a money order but, as of the date of your letter to this office, you still had 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..."

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, 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 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, Records Access Officer.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Tina LoSchiavo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16063

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

July 12, 2006

Mr. Baxter Thomas
JAF Station
P.O. Box 7176
New York, NY 10116

The staff of the Committee on Open 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:

We have received your correspondence concerning your efforts in obtaining records from the Department of Correctional Services and the Division of Parole. Based on a review of the materials, I offer the following comments.

First, I note that the federal Freedom of Information Act applies only to federal agencies and has no application when requests are made to the state agencies to which you referred. Those agencies are subject to the New York Freedom of Information Law.

Second, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the information that you requested does not exist in the form of a record, the Freedom of Information Law would not be applicable.

Lastly, since you referred to a request for your pre-sentence report, I believe that access to it is governed by a statute other than the Freedom of Information Law. Although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

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

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency

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

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

Most recently, it was confirmed that "Criminal Procedure Law Sec. 390.50 is the exclusive procedure concerning access to such reports, as they are confidential and specifically exempted from disclosure pursuant to State and Federal Freedom of Information Laws. Petitioner...must make a proper application to the Court which sentenced him" (Matter of Roper v. Carway, Supreme Court, New York County, NYLJ, August 17, 2004).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16064

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

July 12, 2006

E-MAIL

TO: Charles Hearon

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. Hearon:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to blueprints received by an agency. According to your letter, it has been suggested to you that access would not be permitted until the blueprints were made public at a meeting. We disagree with that position and offer the following comments.

The Freedom of Information Law pertains to all agency records, and as you point out, the key provision in an analysis of the matter is §86(4), which defines the term "record" expansively to mean:

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

Based upon the language quoted above, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)].

Moreover, more than twenty-five years ago, the state's highest court, the Court of Appeals, found that the nature, the function or the origin of records are irrelevant in considering whether the records fall within the framework of the Freedom of Information Law. So long as information in some physical form is kept by or for an agency, it is a "record" subject to rights of access. In Westchester-Rockland Newspapers v. Kimball, the materials sought involved a lottery conducted by a volunteer fire company, which was found to be an "agency", and although that agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the documents constituted "records" subject to rights of access granted by the Law. The Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (50 NY2d 585, 581 [1980]).

Further, the Court emphasized that the Freedom of Information Law must be construed broadly in order to achieve the goal of government accountability, for the court found that:

> "Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In short, based on the considerations referenced in the preceding commentary, we believe that the blueprints in question, as well as similar documentation, would constitute "records" that fall within the scope of the Freedom of Information Law. If they are to be disclosed at an open meeting, there would appear to be no basis for denying access to them until the meeting.

We 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, we are 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.

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

FOIL-AO-16065

41 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, 2006

Mr. Kenneth Feinstein
[redacted]

Dear Mr. Feinstein:

I have received your undated letter in which you referred to an alleged failure of the Office of the Nassau County District Attorney to engage in "full disclosure" relative to a matter in which you are involved. Because you did not describe the nature of the records of your interest, I cannot offer specific guidance. However, I offer the following comments.

First, state and local government agencies, such as the Office of the District Attorney, are not subject to the federal Freedom of Information Act. That statute is applicable to federal agencies. The provision that generally governs access to records of state and local government is the New York Freedom of Information Law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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, 2005 (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.

Enclosed for your review is "Your Right to Know", a general guide to the Freedom of Information Law that includes a sample letter of request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16066

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July 12, 2006

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, unless otherwise indicated.

Dear Mr. Berman:

We are in receipt of your correspondence requesting an advisory opinion concerning application of the Freedom of Information Law to requests you have made to the Valley Stream Central High School District, as well as copies of various letters which you have attached. To clarify our comments and in response to your questions, we offer the following comments.

First, as you may know, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

When records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the

> person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), in our opinion, the name of an applicant or intended use of the records is irrelevant.

In sum, insofar as the District maintains records which are required to be made accessible to the public, we believe that they must do so, irrespective of your interest or motivation.

Second, as you indicate, we had a discussion about your attempt to step into the shoes of your wife who is, for the time being, unable to review records at the District office that you had previously inspected. In this regard, there is nothing in the Freedom of Information Law that pertains specifically to repeated requests made by an applicant for records that have already been disclosed for inspection and we know of no provision or decision that deals with the number of times that a record may be inspected. From our perspective, reasonableness should govern. We do not believe that an agency must make the same records available repeatedly if such disclosure would unnecessarily interfere with its capacity to carry out its duties.

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, 2005 (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.

We hope this helps to clarify your understanding of the Freedom of Information Law. At your request, a copy of this opinion will be forwarded to the Valley Stream Central High School District.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Albert Chase

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-4122(
FOIL-AO-16060

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July 13, 2006

E-Mail

TO: Ms. Susan Burgess

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. Burgess:

As you are aware, I have received your letter concerning the application of §105(1)(f) of the Open Meetings Law.

In this regard, first, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may

be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f), 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.

The terms of §105(1)(f) are not limited to employees of a government agency, and there may be instances in which that provision could justifiably be cited in relation to other persons or, for example, corporate entities. Assuming that a matter relates to the governmental functions, powers or duties of a public body, I believe that a public body may enter into executive session to discuss one or more of the topics indicated in that provision, so long as the topic or topics relate to a particular person or corporation.

In situations in which §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "personnel" or "a particular personnel matter" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division has confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305).

> Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

You also referred to "a right to access to any documents produced in executive session wherein a 'particular person' has been discussed." The Open Meetings Law provides 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)].

The foregoing is not intended to suggest that records other than minutes that relate to an executive session may not be accessible. The Freedom of Information Law pertains to all government agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16068

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July 13, 2006

Mr. Patrick Jeanty
98-A-1874
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jeanty:

I have received your letter in which you sought assistance in obtaining various 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 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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 13, 2006

Mr. Michael Finnegan
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Finnegan:

I have received your letter in which you sought guidance concerning a request for certain records made to the East Meadow Fire District. In brief, although more than five months had passed from the submission of your request to the date of your letter to this office, you had received no response. The records sought involve catering bills relating to a meeting held by the Board of Fire Commissioners in December and records of payments made by the District to a certain company and to electrical inspectors "for the past 10 years."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Since the second portion of your request deals with records that might have been prepared as long as ten ago, it is possible that some might legally have been discarded. To the extent that records sought no longer exist, the Freedom of Information Law would not apply.

Second, also with respect to the second portion of request, a possible issue involves the requirement that an applicant "reasonably describe" the records sought. It has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the

> identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the District, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

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, 2005 (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: Board of Fire Commissioners
Diane Bartone

FOIL-AO- 16070

From: Robert Freeman
To: April Mitzman
Date: 7/14/2006 12:48:16 PM
Subject: RE: Good morning

Congratulations! It seems that things are going well for you and yours.

As for the "final determination" issue, it arises in relation to the provision dealing with internal governmental communications, so-called "inter-agency and intra-agency materials", §87(2)(g) of FOIL. It says that those materials may be withheld, except to the extent that they consist or contain any among four categories of information: 1)statistical or factual information; 2) instructions to staff that affect the public; 3) final agency policies or determinations; or 4) are external audits. Most significant in many instances is the first category, for statistical or factual information is independently accessible, irrespective of whether it may relate to anything that is final, unless some separate exception can be invoked. What remains to be withheld typically involve portions of the internal communications that consist of advice, opinion, suggestion, recommendation, conjecture and the like. The notion is that government officers and employees should have the ability to express their recommendations and opinions without an obligation to disclose.

I hope that this helps.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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With respect to your question, that a document does not represent a final determination is not the issue. The issue, very simply, involves where a record falls within the retention schedule developed by the State Archives. In some instances, records that seem to be relatively insignificant have to be retained for substantial periods. I suggest that you or the District's records manager take a peek at the schedule.

Talk to you soon.
Bob

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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 14, 2006

Mr. Ron Foster
Peter J. Cayan Library
SUNY Inst. of Tech.
P.O. Box 3051
Utica, NY 13504

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Foster:

I have received your letter and the materials attached to it. You indicated that you serve as chair of a committee of a non-profit organization of SUNY librarians and affiliated members, and that the committee periodically conducts a survey in an effort to prepare for renegotiation of your contract. Although you apparently encountered little difficulty in obtaining the survey data in previous years, one of the SUNY library directors this year refused to participate, and he wrote that:

> "...these questions cannot be answered without consulting individual personnel records and there is concern that it may prove illegal for us to extract personnel data from these files and 'publish' it. There would be no problem if the request was for salary ranges by rank accompanied by aggregated gender and ethnicity numbers. However, spelling out by individual name one's gender, ethnicity, experience, rank and title, salary, degrees, etc. appears to be quite inappropriate and open to legal challenge by the individual."

You listed the items sought in the survey and asked initially whether your organization is "allowed to ask" for them. Certainly there is no law that precludes your organization or any person or entity from "asking" for information or records. The second critical question involves the extent to which those items sought must be disclosed under the Freedom of Information Law. The response to that and your intervening questions is somewhat complex, for it might involve a separate statute, the Personal Privacy Protection Law, Article 6-A of the Public Officers Law, §§91-99. That law applies only to state agencies, and it specifically excludes units of local government from its coverage [see definition of "agency" for purposes of the Personal Privacy Protection Law, §92(1)]. Therefore, Personal Privacy Protection Law applies to the State University, but in my view, it does not apply to community colleges, which are generally entities of county government.

The Personal Privacy Protection Law focuses on personal information pertaining to 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 the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

To the extent that the records identify data subjects, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions, §96(1)(c), involves a situation in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Consequently, when a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law; alternatively, if disclosure of a record would not constitute an unwarranted invasion of personal privacy and if the record is available under the Freedom of Information Law, it may be disclosed under §96(1)(c).

Again, the Personal Privacy Protection Law is not applicable to records maintained by local government agencies. Access to records of those agencies is generally governed 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. One of the exceptions, §87(2)(b), authorizes an agency to 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..."

Unless there is a statute that prohibits disclosure, the Freedom of Information Law is permissive, for an agency may choose to disclose records or portions of records in accordance with the exceptions to rights of access, but it is not required to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. Therefore, while community colleges, local government agencies, are permitted to disclose items that they could choose to withhold on the ground that disclosure would result in an unwarranted invasion of personal privacy, state agencies, such as SUNY, that are subject to the Personal Privacy Protection Law, cannot disclose items when so doing would constitute an unwarranted invasion of personal privacy, unless a data subject consents to disclosure.

In consideration of the foregoing, I believe that the key issue involves whether the items that you identified must be disclosed in response a request made pursuant to the Freedom of Information Law. They are as follows:

" a) sex
b) ethnicity
c) previous full-time experience
d) previous part-time experience
e) year appointed
f) starting rank
g) current rank
h) appointment status
i) bargaining unit
j) full time equivalency
k) contract year
l) vacation leave."

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, supra. 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)]."

That decision was unanimously affirmed by the Appellate Division [262 AD2d 171 (1999)].

As the foregoing analysis and judicial precedent relate to the items to which you referred, with few exceptions, I believe that they must be disclosed. In my opinion, one's gender ordinarily has little relation to one's duties. However, an employee's gender in most instances can be ascertained through that person's name, and I do not believe that a court would find that the gender of public employees would be considered an item so intimate that disclosure would constitute an unwarranted invasion of personal privacy. I believe, however, that disclosure of one's race or ethnicity may be withheld by local government agencies and must be withheld by state agencies. An item of that nature clearly would be irrelevant to one's duties. As suggested above, one's prior public sector employment experience has been found to be accessible; portions of records indicating employment in the private sector could be withheld by local government agencies, but must be withheld by state agencies. Lastly, I note that records involving leave time used or accrued by public employees, including the days and dates of leave time claimed, have been found by the Court of Appeals to be accessible to the public (see Capital Newspapers, supra).

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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July 17, 2006

Bernard Fryshman, 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 Mr. Fryshman:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the New York City Department of Mental Health and Hygiene. 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..."

It is noted that new language was added to that provision on May 3, 2005 (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.

Because the Department provided you with access to certain records and denied access to others, while simultaneously reserving its ability to identify and review the accessibility of further records at a later unknown date, it is not clear when the statute of limitations begins to run regarding your ability to bring a judicial challenge to its determinations. In March, you were denied access to certain records and informed of your ability to request an administrative appeal. In April, your administrative appeal was denied and you were informed of your ability to pursue an action pursuant to Article 78 of the Civil Procedure Law and Rules. Then, on May 1, 2006, you were provided with the ability to inspect an additional 101 pages of records which were "now identified." Although we do not advise that you pursue the matter in court, should you chose to do so, because you were not informed of any ability to appeal the May 1, 2006 determination, we would advise that you commence any Article 78 proceeding within four months from April 17, 2006, when you were informed that you had exhausted your administrative remedies.

Second, and with respect to the requests which have been denied, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 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, for §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 memorializing conversations in meetings, which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. We 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 our 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 most circumstances, we 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 our view, be withheld.

Because some of the complaints may have been made 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. We do not believe that they would apply to records identifiable to entities, such as interest organizations. In those instances, the identities of those entities could not, in our opinion, justifiably be deleted. Similarly, the identity of a media representative could not be redacted, in our opinion, from any memorialization of a conversation with such person, for he or she would be acting in a professional and not a personal capacity.

With respect to the denial of access to redacted copies of medical records, we agree with the Department's position that Public Health Law §18 would prohibit the release of medical records to you. Based on a decision rendered by the Court of Appeals, the state's highest court, we believe that when a class of records or data is specifically exempted for disclosure by statute, an agency is not required to delete portions of records, to protect privacy, for example; rather, the records are considered to be exempt from disclosure in their entirety [see Short v. Board of Managers of Nassau County Medical Center, 57 NY2d 399 (1982)]. In situations in which one statute deals with a subject generally and another statute deals with a particular area within the general subject, the particular prevails over the general. In this instance, the Freedom of Information Law deals with access to government records generally; §18 of the Public Health Law deals specifically with access to medical records, some of which are maintained by governmental entities. From our perspective, it

is likely that a court would determine that rights of access to the requested medical records are governed by the Public Health Law rather than the Freedom of Information Law.

Finally, with respect to your request for names of individuals involved in attorney/client communications, and dates of documents which are protected from disclosure, we point out that §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request. Additionally, 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, we are unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index.

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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July 17, 2006

Mr. Lawrence M. Karam
Alliance for Bovina, Inc.
P.O. Box 98
Bovina Center, NY 13740

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Karam:

We are in receipt of your request for an advisory opinion and materials pertaining to it concerning a request you made pursuant the Freedom of Information Law to the Delaware County Board of Supervisors. According to your materials, you were denied access to 13 categories of records on the ground that your request is "too vague and indefinite." You were denied further review on appeal to the Chairman with no additional explanation. When you contacted the County's attorney by telephone, he was not willing to discuss any specific items in the request. In this regard, we offer the following comments.

First, it is questionable, if not doubtful, in our view, that every one of the 13 requests you submitted for records is "too vague and indefinite" to identify any records maintained by the County.

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 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 County, 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 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 County staff can locate the records of your interest with a reasonable effort analogous to that described above, it would be obliged to do so. As indicated in Konigsberg, only if it can be established that the County 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.

For example, your request for "copies of all resolutions that have been passed or adopted by the County Board since January 1, 1995 pertaining to the development of wind energy in the County, including but not limited to siting, planning and/or financing of wind energy facilities" would require, perhaps, the review of a large volume of documents. In this regard, subdivision (1) of §106 of the Open Meetings Law pertains to minutes of open meetings, and at a minimum, directs that minutes consist of a record of summary of motions, proposals, resolutions, action taken and the votes of the members. Your request may require the review of all minutes produced since 1995. It may be that they are organized by topic, in which case your request would not be unreasonable. If

they can reviewed electronically, and searched within a short period of time, it is our opinion that the volume of documents alone may not be grounds for denial of this request.

While the requests that you have submitted appear broad and identify a large volume of records, according to the case law described above, it is our opinion that it would be unreasonable to reject each of your requests. Additionally, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state that an agency's designated records access officer has the duty of assuring that agency personnel "assist persons seeking record to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records" and further, "to contact persons seeking records when a request is voluminous or when locating the records sought involves substantial effort, so that agency personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested" (21 NYCRR 1401.2[b][2] and [3]). This was the basis for our suggestion to you that you contact the County in an effort to ascertain which records could be obtained more easily.

We note that some of your requests, for example the first, for "all records pertaining to wind energy development" are too broad, and in our opinion would not reasonably describe records sought as it could require a search of every record ever prepared by the County, an effort of which is clearly not contemplated by the Law.

To the extent that the request does reasonably describe the records, the remaining issues involve rights of access.

With respect to your questions about enforcement mechanisms available under the law, and the role of the Committee on Open Government, we direct your attention to §89(4) of the Freedom of Information Law, which provides for review pursuant to Article 78 of the Civil Procedure Law and Rules and attorney's fees and other litigation costs reasonably incurred in certain instances. 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.

Finally, with respect to your question about the timeliness of the County's responses, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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, 2005 (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.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: James E. Eisel, Chairman
Board of Supervisor
Richard Spinney, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16074

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July 18, 2006

Ms. Larraina Carpenter
District Clerk
Greater Johnstown School District
2 Wright Drive, Suite 101
Johnstown, NY 12095

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Carpenter:

Thank you for forwarding a copy of the Greater Johnstown School District's response to an appeal of the District's denial of a request for access to records of the District from a resident of the District, as required pursuant to the Freedom of Information Law. While it is not our practice to comment on every appeal response received, we are doing so here, in an effort to enhance understanding of and compliance with the Freedom of Information Law

We note that the District's response of May 2, 2006 included a denial of the request for copies of two licenses of certification issued by the New York State Education Department, pertaining to one former employee and one current employee, and a denial of the request for a copy of a record indicating the basis for the former employee's termination. Because it is our opinion that these records should be made available upon request, 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.

Perhaps of greatest significance is the provision on which the District relied, §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].

As we understand it, the issuance of a certification, which we 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, we believe that it is clearly relevant to the performance of an individual's duties.

Further, we note that it was 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)].

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.

In terms of the judicial interpretation of the Freedom of Information Law, we point out that in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefitted by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "...the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent.'
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access" (at p. 531).

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

Another decision also required the disclosure of a settlement agreement between a teacher and a school district following the initiation of disciplinary proceedings under §3020-a of the Education Law, which pertains to charges against tenured persons, (Buffalo Evening News v. Board of Education of the Hamburg School District and Marilyn Will, Supreme Court, Erie County, June 12, 1987). Further, that decision relied heavily upon an opinion rendered by this office.

It has been held in variety of circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "...long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In another decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

> "...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

The court also referred to contentions involving privacy as follows:

> "Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his

> privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

> "This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (*Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

In LaRocca v. Board of Education of Jericho Union Free School District [220 AD 2d 424, 632 NYS 2d 576 (1995)], charges were initiated under §3020-a of the Education Law, but were later "disposed of by negotiation and settled by an Agreement" (id., 577) and withdrawn. The court rejected claims that the record could be characterized as an employment history that could be withheld as an unwarranted invasion of privacy, and found that a confidentiality agreement was invalid. Specifically, it was stated that:

> "Having examined the settlement agreement, we find that the entire document does not constitute an 'employment history' as defined by

> FOIL (*see, Matter of Hanig v. State of New York Dept. of Motor Vehicles, supra*) and it is therefore presumptively available for public inspection (*see,* Public Officers Law § 87[2]; *Matter of Farbman & Sons v. New York City Health and Hosps. Corp., supra,* 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437). Moreover, as a matter of public policy, the Board of Education cannot bargain away the public's right of access to public records (*see, Board of Educ., Great Neck Union Free School Dist. v. Areman,* 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943)" (id., 578, 579).

In sum, there may be details within the documentation that has been requested that may be of an intimate nature or which are largely irrelevant to the performance of the former employee's official duties. We believe that those aspects of the records could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. Similarly, charges that were not sustained or that were withdrawn could, in our view, also be withheld for the same reason. For reasons previously discussed, however, any determination reflective of a finding or admission of misconduct or agreement concerning termination between the former employee and the District should, in our opinion, be disclosed.

On behalf of the Committee on Open Government we hope this helps to enhance your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Janene E. Bouck

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16075

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July 18, 2006

E-Mail

TO: James Calantjis

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. Calantjis:

I have received your letter in which you requested an advisory opinion concerning a request for records of the State Education Department and the response by its records access officer, Ms. Nellie Perez. In brief, Ms. Perez indicated that a diligent search for the records was conducted but that none could 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." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of assistance.

RJF:jm

cc: Nellie Perez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 18, 2006

Mr. Donald Cook, 199310
P.O. Box 300
Marcy, NY 13403-0300

Dear Mr. Cook:

I have received your letter in which you wrote that a request made under the Freedom of Information Law to the Buffalo City School District had not been answered.

In this regard, first, whether you are a minor or an adult is not relevant when requesting records under the Freedom of Information Law. When records are accessible to the public under that law, it has been held by the courts that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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, 2005 (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
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July 18, 2006

E-MAIL

TO: Bruce Golding

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. Golding:

I have received your letter and the materials relating to it. You asked that I review a transcript of a conversation involving yourself, Robert McLaughlin, General Counsel to the New York Lottery, and Michelle Mattiske, the Lottery's records access officer, and that I comment with respect to their "stated and implied positions on providing access to records that are not 'final records' and on providing access to records in the format specified by the requester, as well as....an agency's obligation under the Freedom of Information Law to provide access to records that an agency deems to be part of a 'fishing trip.'" The transcript indicates that you are attempting to obtain detailed breakdowns of financial records maintained by the Lottery, as well as figures reflecting "the annual sales generated by each of the New York Lottery's sales agents, by game and in total, for each fiscal year since 1995-96, or as far back in time as available."

In this regard, I offer the following comments.

First, although the Lottery's employees appear to have attempted to assist you and to understand the nature of the records of your interest, I point out that the regulations promulgated by the Committee on Open Government, which have the force and effect of law, describe the duties of a records access officer and provide in relevant part that:

> "The records access officer is responsible for assuring that agency personnel....
>
> (2) Assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the

> records are filed, retrieved or generated to assist persons in reasonably describing records...." [21 NYCRR §1401.2(b)].

Based on our conversations and the transcript, there appears to have been reluctance on the part of Lottery staff to provide information concerning the manner in which its records are maintained or can be generated.

As a general matter, I do not believe that there is any language in the Freedom of Information Law or its judicial construction that precludes a person seeking records from engaging in a "fishing trip." 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)].

Related and significant, however, is whether or the extent to which a request "reasonably describes" the records as required by §89(3) of the Freedom of Information Law. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The decision cited above involved thousands of records, and although it was found that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise,

> potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my opinion, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. I am unaware of the nature of the filing or recordkeeping systems employed by the Lottery. However, from my perspective, insofar as records can be located with reasonable effort, a request meets the requirement of reasonably describing the records, even if an applicant is "fishing." On the other hand, insofar as records cannot be located except by means of a review of what may be hundreds or thousands of records individually, a request in my opinion would not reasonably describe the records.

Second, the transcript includes statements indicating that the Freedom of Information Law pertains to existing records, and that an agency is not required to create a record in response to a request. While I believe that those statements are generally accurate, judicial decisions offer clarification concerning their meaning in relation to information maintained electronically.

By way of background, the Freedom of Information Law pertains 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."

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 it is required to do so.

Illustrative is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

In another decision which cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

Perhaps most pertinent is a decision concerning a request for records, data and reports maintained by the New York City Department of Health regarding "childhood blood-level screening levels" [New York Public Interest Research Group v. Cohen and the New York City Department of Health, 729 NYS2d 379 (2001); hereafter "NYPIRG"]. The agency maintained much of the information in its "LeadQuest" database.

In NYPIRG, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:

> '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'
>
> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500" (id., 380).

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction" (id., 381).

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy" (id., 382).

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or

> maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions" (id., 381-382).

As I interpret the foregoing, insofar as the Lottery has the ability to extract or generate the data of your interest with reasonable effort, it is obliged to do so to comply with the Freedom of Information Law.

Third, there is a suggestion the transcript that you may enjoy rights of access to a "final" product, but not the data that might have been used in preparation of that final document. In an exchange between you (BG) and Mr. McLaughlin (RM), involving your request for records used by KPMG, the Lottery's auditor, the conversation was as follows:

> BG: "You don't keep these in a spreadsheet?
> RM: This is how they're provided to us by our auditor, KPMG.
> BG: How do you provide the figures to KPMG?
> RM: Well, it, I don't know if that, that questions is relevant. The question is what's our record? This is our record. The record we provide to KPMG becomes their working papers, they then provide us with this records and that's what we're providing you.
> BG: But the record before you provide it to KPMG is your record.
> RM: This is the final record.
> BG: Are you telling me that you don't maintain those records after you give them to KPMG?
> RM: I'm not saying anything other than this is the final record. This is, this is the record..."

Based on a decision rendered by the Court of Appeals, the figures provided by the Lottery to KPMG must be disclosed, even though they are not "final." Relevant in this context 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 Gould v. New York City Police Department [87 NY2d 267 (1996)], 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 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)].

Based on the direction provided by the state's highest court, that records do not relate to final action or determination would not represent an end of an analysis of rights of access or an agency's obligation to disclose its records.

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).

As I understand your request, you are seeking the data given by the Lottery to KPMG in the latter's preparation of "the final record." If that is so, and if the Lottery has the ability to locate the data with reasonable effort, the data would appear to be available pursuant to subparagraph (i) of §87(2)(g).

Lastly, the Lottery denied your request for records indicating sales generated by sales agents by game and in total for "as far back in time" as possible. The request was denied based on three exceptions to rights of access. In my view, none would justify a denial of access.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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).

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.).

The first exception upon which the Lottery relied, §87(2)(b), authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Here I point out that several judicial decisions, both New York and federal, that pertain to records about individuals in their business or professional capacities conclude 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 my opinion and as suggested in the decisions cited above, the exception concerning privacy, does not apply to the Lottery's sales agents, for its records relate to persons in their business capacities.

The exception concerning privacy and another, §87(2)(d), were cited in the denial of access as grounds for withholding figures regarding sales by agents. The latter provision authorizes an agency withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;"

The rationale for the assertion of §87(2)(d) is based on a finding that "release of the requested information would provide an unfair competitive advantage to a retailer's competitor." I cannot envision how the Lottery could demonstrate that to be so to a court. That a particular retailer sells lottery tickets is not a secret; on the contrary, many have signs advertising the sale of lottery tickets or that their sales led to winnings of certain amounts.

Most importantly in my view, sales of lottery tickets involve only one aspect of a retailer's sales or income. By means of example, I buy lottery tickets occasionally from any one of several retailers, including Stewart's convenience stores, a Hess gas station, and Price Chopper and Hannaford supermarkets. I simply cannot envision how the disclosure of lottery sales figures would "cause substantial injury" to the competitive position of retailers whose gross sales are in the millions of dollars, and whose sales of lottery tickets represent a small fraction of their gross revenues.

In short, I do not believe that the figures you seek are "personal", that they reflect amounts that approach the gross revenues or income of individuals or corporate entities, or that the Lottery

could meet its burden of proving that disclosure would cause substantial injury to the competitive position of its agents.

The remaining exception to rights of access cited by the Lottery, §87(2)(f), authorizes an agency to withhold records insofar as disclosure "could endanger the life or safety of any person." Specifically, it was contended that release of sales figures would expose "the nature of their business and the amount of cash on hand to the public and potential criminal elements." Again, in consideration of what is known to the public, I do not believe that the Lottery could justify the assertion of the exception [see American Broadcasting Companies, Inc. v. Siebert, 442 NYS2d 855 (1981) concerning check cashing businesses whose locations are known to the public]. The nature of the businesses of lottery sales agents is known; the Lottery promotes sales, particularly when there are large jackpots, which may create lines of potential purchasers in full view of any person or passerby. Even in that circumstance, no member of the public can know the amount of cash on hand in a given establishment. Ordinarily, a large supermarket would likely have more cash on hand than a convenience store. If both sell lottery tickets, could it be proven to a court's satisfaction that disclosure of the records sought is likely to create greater attraction to "criminal elements" to the supermarket than the convenience store? I doubt that would be so.

In sum, it is my view that the records sought involving sales figures relating to lotto retail sales agents must be disclosed, for the exceptions to rights of access asserted by the Lottery cannot be justified.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Robert McLaughlin
Michelle Mattiske

FOIL-AO-16078

From: Robert Freeman
To: lmsnewyork@yahoo.com
Date: 7/20/2006 1:01:22 PM
Subject: I have received your inquiry concerning rights of access to "50(H) hearing transcripts."

I have received your inquiry concerning rights of access to "50(H) hearing transcripts."

In this regard, subdivision (3) of §50-h of the General Municipal Law states in part that: "The transcript of the record of an examination shall not be subject to or available for public inspection, except upon court order upon good cause shown, but shall be furnished to the claimant or his attorney upon request."

Based on the foregoing, the records of your interest are "specifically exempted from disclosure by...statute" [see Freedom of Information Law, §87(2)(a)] and, therefore, beyond the scope of rights of access conferred by the Freedom of Information Law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16079

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 20, 2006

Mr. Kenneth Warren
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Warren:

We are in receipt of your request for an advisory opinion with respect to requests you have made to the New York State Education Department. It is reiterated that the Department has contended that you are making repeated requests for records which have already been provided to you. In this regard, there is nothing in the Freedom of Information Law that pertains specifically to repeated requests made by an applicant for records that have already been disclosed. From our perspective, reasonableness should govern. We do not believe that an agency must make the same records available repeatedly particularly if such disclosure would unnecessarily interfere with its capacity to carry out its duties. In conjunction with the foregoing, we have advised that an agency may inform an applicant that the records sought have already been made available, and that ensuing requests for the same items will be considered moot and need not be answered.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Nellie Perez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16080

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 20, 2006

Mr. John J. Sheehan
Adjusters, Inc.
213 Green Street
Dunmore, PA 18512

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sheehan:

I have received your letter and the form attached to it. You asked whether the Department of Motor Vehicles may "charge a search fee of $10.00 when none was previously charged."

In this regard, as you are aware, §87(1)(b)(iii) of the Freedom of Information Law states that an agency cannot charge in excess of twenty-five cents per photocopy up to nine by fourteen inches or the actual cost of reproducing any other record, "except when a different fee is otherwise prescribed by statute." Stated differently, only when an enactment of the State Legislature authorizes a fee higher than that permitted by the Freedom of Information Law would that higher fee be valid.

Section 202 of the Vehicle and Traffic Law, which became effective in 2003, is entitled "Fees for searches and copies of documents" and pertains solely to the Department of Motor Vehicles. Subdivision (2)(a) states that "The fee for a search which is made manually by the department shall be ten dollars." Because that fee is authorized by statute, I believe that it clearly is valid.

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-1605

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July 20, 2006

Mr. Richard Hoffmann
Office of the Town Attorney
Town of Islip
Town Hall
Islip, NY 11751

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hoffmann:

Thank you for forwarding a copy of the Town of Islip's response to an appeal of the Town's denial of a request for records of the Town of Islip Police Department. The request involved a copy of Islip Harbor Police Violation No. 6127 and Islip Harbor Police Summons No. A648961005 and was denied "based on the fact that the records requested are Law Enforcement records." You further wrote that: "During the pendency of any law enforcement proceeding, all records are exempt from FOIL." While it is not our practice to comment on every appeal response received, we are doing so here, in an effort to enhance understanding of and compliance with the Freedom of Information Law. In this regard, we offer the following comments.

There is a distinction in terms of rights of access between those situations in which a person has been charged or 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 the Town Code, the records would be available from the court in which the proceeding occurred, such as the Town Justice Court (see Uniform Justice Court Act, §2019-a). Further, the Court of Appeals determined in 1984 that traffic tickets issued and lists of violations of the Vehicle and Traffic Law compiled by the State Police during a certain period in a county must be disclosed, unless charges were dismissed and the records sealed pursuant to provisions of the Criminal Procedure Law (see Johnson Newspaper Corp. v. Stainkamp, 61 NY2d 958, 475 NYS2d 272 [1984]).

Although that decision did not pertain to the kind of violations here, we believe that the principle would be applicable in this instance. In short, unless it has been sealed pursuant to statute, a notice of violation or summons would in our opinion be accessible from either the Town Justice Court or other Town offices that maintain the record.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Mr. and Mrs. Paul C. Mulford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16082

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July 26, 2006

Mr. Donald Lucarello
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lucarello:

We are in receipt of your request for an advisory opinion and materials pertaining to it regarding a request made to the New York State Department of Transportation pursuant to the Freedom of Information Law. Specifically, you requested documents related to the Department's investigation of a guard rail condition contributing to your son's motor vehicle accident, including the claims engineer's report, records of conversations between the claims engineer and the New York State trooper who investigated the accident, and a copy of the letter that the Department sent to a subcontractor at the conclusion of the claims engineer's investigation. The Department has denied access to the first two of those records on the ground that they are protected from disclosure as attorney-client communications, and has not yet provided a copy of the third. We disagree with the characterization of these records as attorney-client communications. In this regard, we offer the following comments.

First, 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)].

Second, as you may be aware, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Two of the grounds for denial are pertinent to an analysis of rights of access.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, we believe that a municipal attorney may engage in a privileged relationship with his/her client and that records prepared in conjunction with an attorney-client relationship 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 and 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 our 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, it is unlikely that an investigator's report, records of conversations between an engineer and a police officer, or a letter to from the Department to the subcontractor contain legal advice or opinion provided or sought by Department counsel to Department staff. Based on the foregoing, it is our opinion that the records you have requested would not be confidential pursuant to §4503 of the Civil Practice Law and Rules.

Perhaps more relevant would be §3101(d) of the Civil Practice Law and Rules, which exempts material prepared for litigation from disclosure. It is emphasized, however, that it has been determined judicially that if records are prepared for multiple purposes, one of which might include 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)]. While some of the records falling within the scope of your request might possibly have been prepared solely for

litigation, based upon the description of the records, it appears unlikely that all were prepared solely for litigation. To the extent that they were not prepared solely for litigation, we believe that the records would be subject to rights conferred by the Freedom of Information Law.
This does not mean, necessarily, that the records should be disclosed in full.

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 our view be withheld.

Third, it may be that one of the records you have requested is the accident report prepared by the state trooper. Section 66-a of the Public Officers Law has required the disclosure of accident reports, except to the extent that their release would interfere with a criminal investigation, since its enactment in 1941.

Subdivision (1) of §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 or prosecution by such authorities of a crime involved in or connected with the accident." (emphasis mine)

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."

Moreover, if the records you have requested are part of the accident report, we believe that they, too, would be available under §66-a. Aside from the broad definition of the term "record" appearing in the Freedom of Information Law, we point out that it has been held that photographs made during the course of an investigation of an accident and other records comprising a police department's investigation of an accident are part of the accident report and are therefore available under §66-a of the Public Officers Law [see Fox v. New York, 28 AD 2d (1967); Romanchuk v. County of Westchester, 42 AD 2d 783, aff'd 34 NY 2d 906 (1973)]. Again, except to the extent that disclosure would "interfere with the investigation involved in or connected with the accident", the documentation comprising the accident report must, in our view, be disclosed.

Fourth, 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 confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports

contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the Department has engaged in a blanket denial of access in a manner which, in 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 that agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In short, we believe that the blanket denial of the request was inconsistent with law.

Finally, we note that although the Department denied access to the requested records, it did not inform you of your right to administratively appeal the denial. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (21 NYCRR 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In sum, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal, as well as the name and address of the person or body to whom an appeal may be directed.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Thomas Perreault

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 26, 2006

Hon. Kathleen 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 facts presented in your correspondence, unless otherwise indicated.

Dear Ms. Vendel:

I have received your letter and the documentation accompanying it. You serve as Clerk/Treasurer for the Village of Webster, and you learned that the Mayor and a trustee had removed certain personnel files without the knowledge or consent of yourself or the Board of Trustees. You requested their return, and the Mayor did so, but upon your inspection, you determined that certain records pertaining to you were missing. You have learned that the Mayor and the trustee have spoken to one of your previous employers "without your knowledge or consent", and you are seeking the information given to the Mayor and trustee by your previous employer and which was discussed during an executive session. Although the Board assured you that an attorney retained by the Village would provide that information to you, that had not occurred as of the time we spoke on July 20.

That attorney, according to your letter, concluded that the Mayor, in your words, "had every right to take our personnel files with original documents home at anytime without board approval." You have asked whether that is so and raised a variety of related questions. Insofar as your questions relate to access to records, I offer the following comments.

First and perhaps most importantly, I do not believe that a mayor of a village owns village records or generally has legal custody or control over village records. Section 4-402 of the Village Law states in part that the clerk of each village "shall....have custody of the corporate seal, books, records, and papers of the village and all the official reports and communications of the board of trustees..." Consistent with that provision in the Village Law is §57.19 of the Arts and Cultural Affairs Law, entitled "Local government records management program." Section 57.19 states in relevant part that:

> "The governing body, and the chief executive official where one exists, shall promote and support a program for the orderly and efficient management of records, including the identification and appropriate administration of records with enduring value for historical or other research. Each local government shall have one officer who is designated as records management officer. This officer shall coordinate the development of and oversee such program and shall coordinate legal disposition, including destruction of obsolete records. In Villages, the village clerk shall be the records management officer...."

A mayor is one among five members of a village board of trustees, and although a mayor has certain powers and duties, in many instances he or she does not have the authority to act unilaterally. As stated in §4-412(2) of the Village Law, "A majority of the board shall constitute a quorum for the transaction of business..." Section 41 of the General Construction Law entitled "Quorum and majority" has long provided that a public body, such as a village board of trustees, may do what it is empowered to do only by means of an affirmative vote of a majority of its total membership. Consistent with those statutes is §4-400 of the Village Law entitled "Mayor", which in subdivision (1) states that a mayor "may have a vote upon all matters and questions coming before the board and he shall vote in case of a tie, however on all matters and questions, he shall vote only in his capacity as mayor of the village and his vote shall be considered as one vote..."

Again, unless otherwise authorized by law, I do not believe that a mayor may act or take action unilaterally, without the consent or direction of a board of trustees. In the context of your question, I do not believe that the Mayor had the right to remove records from Village offices on his own and without proper authorization and take them to his home. That conclusion was confirmed in Bracco v. Mastroeni (Supreme Court, Rockland County, November 23 1994) in which the court determined that a mayor "is entitled to inspect the books, records and papers at the Village Clerk's office during office hours as prescribed by the board of trustees", but that §4-402 of the Village Law "does not, however, permit the Mayor to remove original records from the custody of the Clerk, who is charged with holding Village records subject to the direction and control of the board of trustees."

Second, related is the implementation of the Freedom of Information Law. Under §89 (1) of that statute, the Committee on Open Government is required to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87 (1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access officers

> shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public form continuing from doing so."

As such, the Village Board of Trustees 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...
>
> (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..."

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. As part of that coordination, I believe that other village officials and employees are required to cooperate with the records access officer in an effort to enable him or her to carry out his or her official duties. Because village clerks are both the custodians of village records under §4-402 of the Village Law and the records management officer, they are in most circumstances also designated as records access officer. Assuming that you have been designated as records access officer, absent the ability to gain access to or review records requested under the Freedom of Information Law, you would be effectively precluded from carrying out your duties or "coordinating" the Village's response to requests.

In sum, I believe that you, as Clerk, have overall custody of Village records, and that the Mayor lacks that power or authority.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

From: Robert Freeman
To: [redacted]
Date: 7/27/2006 9:26:26 AM
Subject: Dear Mr. Stemmler:

Dear Mr. Stemmler:

I have received your letter in which you asked whether local sanitation discticts are subject to the Freedom of Information Law.

That statute applies to agency records, and §86(3) defines the "term" agency to include any public corporation. According to §66(1) of the General Construction Law, a "public corporation" includes a district corporation, and §66(3) states that a "district corporation" includes "any territorial division of the state, other than a municipal corporation, hertofore or hereafter established by law which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments, whether or not such territorial division is expressly declared to be a boy corporate and politic by the state creating or authorizing the creation of such territorial division."

Based on the foregoing, I believe that a sanitation district is a district corporation, that it is a kind of public corporation, and that, therefore, it constitutes an "agency" required to give effect to the Freedom of Information Law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
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July 27, 2006

Mr. David Brooks
89-A-4087
P.O. Box 4000
Stormville, NY 12582-0010

Dear Mr. Brooks:

I have received your request for "a copy of the Official Compilation of Codes, Rules & Regulations of the State of New York and D.O.C.S. Codes Rules & if they are not included." You indicated that you are indigent and asked that fees for copying be waived.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. This office does not maintain records generally, and we do not possess a copy of the Official Compilation of Codes, Rules & Regulations.

Second, the Official Compilation consists of dozens of volumes, each of which includes hundreds of pages. The volume pertaining to the Department of Correctional Services alone likely consists of hundreds of pages. Rather than requesting all such rules and regulations, it is suggested that you request the regulations pertaining to a particular matter. It is also suggested that you confer with your facility librarian, for that person may either possess or have the ability to obtain the Department's regulations or an index to the regulations that would enable you to request particular regulations.

Lastly, there is nothing in the New York Freedom of Information Law that refers to the waiver of fees, and it has been held that an agency may charge its established fee, even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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July 27, 2006

E-MAIL

TO: Jim Harberson

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. Harberson:

I have received your inquiry in which you questioned whether "New York State universities", as well as Cornell University, are subject to the Freedom of Information Law.

In this regard, that statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, it is clear that the State University and its component institutions, as well as community colleges, constitute agencies that fall within the coverage of the Freedom of Information Law.

With respect to Cornell University, in 1999, the Court of Appeals, the state's highest court, found that the records at issue in that case maintained by Cornell were not subject to the Freedom of Information Law (Stoll v. New York State College of Veterinary Medicine at Cornell University, 94 NY2d 162). However, the Court of Appeals did not determine that all records maintained by or for Cornell fall beyond the coverage of the Freedom of Information Law.

In considering the scope of the term "agency" in relation to Cornell, the Court of Appeals in Stoll indicated that the State University of New York is an agency, but that "[w]hether Cornell's statutory colleges also qualify as agencies of the State for FOIL purposes is an open question" (id.,

166). Although the Court stated that "the law is settled that, for a number of purposes, the statutory colleges are *not* state agencies"(id.), it was also found that "[t]he statutory colleges are, however, subject to certain oversight by the SUNY Board of Trustees" (id., 167). The Court referred to the "hybrid statutory character of the colleges", stating that "[a]t issue is the threshold question whether the statutory colleges are subject to FOIL in the first place" and that "[t]his question cannot be answered by reference to broad classifications, but rather turns on the particular statutory character of these *sui generis* institutions" (id.).

The request in Stoll involved a disciplinary record relating to a member of the faculty of one of the statutory colleges, and the Court found that discipline of employees is a university wide function, not a function special or unique to the statutory colleges. Specifically, it was found that:

> "The principle that resolves the particular quandary here is that the Legislature has chosen to vest Cornell–the private institution–with discretion over the 'maintenance of discipline' at the four statutory colleges (*see*, Education Law § 5711[2]; § 5712[2]; § 5714[3]; § 5715[6]). In this respect, there is no statutory provision for oversight by the SUNY Trustees, or for any appeal to the SUNY Board. Consistent with that statutory mandate, Cornell has implemented a single system for administering discipline in the statutory colleges and in its private colleges. Indeed, as is manifest from petitioner's own FOIL request, there is a University-wide Campus Code of Conduct and a Judicial Administrator to whom all such complaints are directed. Thus, the disciplinary records of the statutory colleges and private colleges are all held by the same private office of the University" (id., 167-168).

It was advised in an opinion rendered in 2000 that disciplinary records maintained by Cornell are not subject to the Freedom of Information Law does not necessarily lead to the conclusion that all records of or pertaining to the statutory colleges fall beyond the scope of that statute. On the contrary, at the conclusion of its discussion, the majority wrote that:

> "...we underscore that, by this decision and analysis, we do not 'rule that the entire administration of the statutory colleges is not subject to FOIL' (dissenting opn., at 169, – N.Y.S.2d at –, 723 N.E.2d at 70). We hold only that, given the unique statutory scheme applicable here, Cornell's disciplinary records are not subject to FOIL disclosure. Other, more public aspects of the statutory colleges may well be subject to FOIL, but we need not and do not reach such issues today" (id., 168).

In so stating, I believe that the Court of Appeals left the door open to a finding that some records of or pertaining to the statutory colleges are subject to rights of access conferred by the Freedom of Information Law, particularly in those situations in which records relate to or involve "State direction or oversight" (id.,167).

"State direction and oversight" are described in §5712 of the Education Law concerning the College of Agriculture and Life Sciences. Subdivision (1) states in part that the College "shall continue to be under the supervision of the state university trustees." Additionally, subdivision (3) provides that "[t]he state university trustees shall maintain general supervision over the requests for appropriations, budgets, estimates and expenditures of such college."

"Supervision", in my view, is the equivalent of "oversight", and based on Stoll, it appears that the Court of Appeals inferred that the functions, and therefore the records reflective of those functions, carried out by the statutory colleges under the supervision of the SUNY trustees, may be agency records subject to the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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July 27, 2006

Mr. David Cole
643 Cedar Rock Road
Arlington, VT 05250

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cole:

I have received your letter and the materials attached to it. Based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. I am unaware of whether the Village of Horseheads maintains records that include each of the items that you requested. If it does not, the Village would not be required to prepare new records on your behalf that would include those items.

Second, insofar as the records of your interest exist and are 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 or purchase new programs in an effort to generate the data of your interest.

Third, it is likely that some of the records of your interest, primarily traffic tickets, may be withheld in their entirety. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent 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." In my view, 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 a statute, §160.50, and perhaps other provisions of the Criminal Procedure Law. However, if it is determined that a person has engaged in a violation, the records would be available from the courts in which the proceedings occurred. Further, the Court of Appeals determined in 1984 that traffic tickets issued and lists of violations of the Vehicle and Traffic Law compiled by the State Police during a certain period in a county must be disclosed, unless charges were dismissed and the records sealed pursuant to provisions of the Criminal Procedure Law [see Johnson Newspaper Corp. v. Stainkamp, 61 NY2d 958). In short, records pertaining to persons whose charges were dismissed likely would not be accessible.

Next, records relating to the discipline of particular police officers are confidential by statute. Section 50-a of the Civil Rights Law 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.

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)].

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, 2005 (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: Sharron Cunningham

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16088

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 28, 2006

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 facts presented in your correspondence.

Dear Mr. Elentuck:

I have received your letter in which you raised several issues concerning the implementation of the Freedom of Information Law by the New York City Department of Education.

You referred first to a determination of your appeal by a person other than the individual designated by the head of the agency to determine appeals. In this regard, as you are aware, §89(4)(a) of the Freedom of Information Law states in relevant part that "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body..." Further, the regulations promulgated by the Committee on Open Government, 21 NYCRR §1401.7(a), similarly state that "The governing body of a public corporation or the head, chief executive or governing body of other agencies shall determine appeals or shall designate a person or body to hear appeals regarding denial of access to records..." Based on the foregoing, if a particular individual has been designated to determine appeals, I agree with your contention that he/she should sign any such determinations.

Second, you objected to a determination following an appeal which referenced an exception to rights of access different from that cited in the initial denial by the records access officer. In short, there is nothing in the law that binds the person designated to determine appeals to an exception or exceptions upon which a records access officer relied. In my view, therefore, there is nothing that precludes an appeals officer from relying upon provisions different from those cited by a records access officer.

Lastly, you objected to my opinion concerning the disclosure of public employees' email addresses. My opinion remains the same, and I note that the Freedom of Information Law is permissive. While an agency may have the authority to deny access to records, it is not obliged to do so, and may choose to disclose. It is my understanding that some, but not all, email addresses of

Department employees are accessible to the public. It does not follow that all such addresses must be disclosed. Further, the Department may have different levels of security associated with its employees and their electronic information systems.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-16089

From: Robert Freeman
To: anthony.iuzzolino@brooklaw.edu
Date: 7/31/2006 10:19:45 AM
Subject: http://www.dos.state.ny.us/coog/explanation05.htm

http://www.dos.state.ny.us/coog/explanation05.htm

Dear Mr. Iuzzolino:

I have received your letter and attached an explanation of the amendments to the FOIL enacted last year dealing with time within which agencies must respond to requests.

There is no provision indicating that an agency may reject a request due to its volume. On the contrary, one aspect of the amendments includes reference to what may be an unusually voluminous or complex request. In that event, assuming that an agency needs more than twenty business days to grant the request in whole or in part, it must so indicate, with an explanation for the delay and a date certain within which it will respond by granting access in whole or in part.

I note that §89(3) has long required that an applicant must "reasonably describe" the records sought. In construing that standard, the Court of Appeals has indicated that the volume of a request is not critical in determining whether a request reasonably describes the records; rather, the issue involves the means by which an agency maintains, files or retrieves it records, and the extent to which agency staff can locate records with reasonable effort [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. In Konigsberg, the agency was able to locate 2,300 pages of material based on the terms of the request and it was held, therefore, that the request met the standard; only if the agency was unable to locate the records with reasonable effort due to the nature of its filing or recordkeeping system could it reject a request due to its breadth.

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-16090

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July 31, 2006

Hon. Edward P. Romaine
Suffolk County Legislature
423 Griffing Ave., Suite 102
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 Legislator Romaine:

I have received a copy of a letter addressed to you by the Commissioner of the Suffolk County Department of Fire, Rescue and Emergency Services. The Commissioner wrote that the County Attorney "determined...that all county emergency plans are not subject to the Freedom of Information Law."

While there may some aspects of the County's emergency plans that might justifiably be withheld, I do not believe that all such plans may be withheld in their entirety.

In this regard, first and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency

> to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the County appears to have established a policy of engaging in a blanket denial of access in a manner which, in my view, is inappropriate. Again, I am not suggesting that the records in question must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed when requested for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

Second, from my perspective, three of the exceptions to rights of access are pertinent to an analysis of the County's ability to deny access to emergency plans.

Section 87(2)(g) potentially serves as a means of denying access to records. However, due to its structure, it often requires substantial disclosure. That provision authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Insofar as emergency plans consist of statistical or factual information, including factual information presented in narrative form (see Gould at 276-277), or reflect the County's policy or determinations, those plans must be disclosed unless a different exception might justifiably be asserted.

One such exception might be subparagraph (iv) of §87(2)(e), which authorizes an agency to withhold records "compiled for law enforcement purposes and which, if disclosed, would....reveal criminal investigative techniques or procedures, except routine techniques and procedures." The Court in Gould referred to the leading decision concerning that exception, Fink v. Lefkowitz [47 NY2d 567 (1979)]. That decision involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body

> charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of criminal investigative techniques or procedures which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others, a denial of access would be appropriate.

Lastly, when safety and security are of primary concern, often most pertinent is §87(2)(f), which was amended in 2003. By way of background, that provision had since 1978 authorized an agency to withhold records or portions thereof which if disclosed "would endanger the life or safety of any person." Although an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more of the grounds for denial [see §89(4)(b)], in the case of the assertion of that provision, the standard developed by the courts was somewhat less stringent. In citing §87(2)(f), it was found that:

> "This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner's assertion that respondents are required to prove that a danger to a person's life or safety will occur if the information is made public (see, *Matter of Nalo v. Sullivan*, 125 AD2d 311, 312, *lv* denied 69 NY2d 612). Rather, there need only be a *possibility* that such information would endanger the lives or safety of individuals...."[emphasis mine; Stronza v. Hoke, 148 AD2d 900,901 (1989)].

The principle enunciated in Stronza appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Division of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991), Fournier v. Fisk, 83 AD2d 979 (1981) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994], and it was determined in American Broadcasting Companies, Inc. v. Siebert that when disclosure would "expose applicants and their families to danger to life or safety", §87(2)(f) may properly be asserted [442 NYS2d 855, 859 (1981)]. Also notable is the holding by the Appellate Division in Flowers v. Sullivan [149 AD2d 287, 545 NYS2d 289 (1989)] in which it was held that "the information sought to be disclosed, namely, specifications and other data relating to the electrical and security transmission systems of Sing Sing Correctional Facility, falls within one of the exceptions" (id., 295). In citing §87(2)(f), the Court stated that:

> "It seems clear that disclosure of details regarding the electrical, security and transmission systems of Sing Sing Correctional Facility might impair the effectiveness of these systems and compromise the safe and successful operation of the prison. These risks are magnified when we consider the fact that disclosure is sought by inmates. Suppression of the documentation sought by the petitioners, to the extent that it exists, was, therefore, consonant with the statutory exemption which shelters from disclosure information which could endanger the life or safety of another" (id.).

In sum, although §87(2)(f) referred to disclosure that *would* endanger life or safety, the courts clearly indicated that *"would"* meant *"could."*

The Legislature acted to change the word "would" to "could" (Ch. 403, Laws of 2003). Therefore, when there is a reasonable likelihood that disclosure could endanger life or safety, I

believe that the County may deny access, whether the records are kept by a law enforcement agency or any other unit within County government.

Having discussed the contents of emergency and disaster preparedness plans with many over the course of years, it clear that disclosure of significant elements of those plans would if disclosed be beneficial to the public and enhance public safety. Often those kinds of documents include direction regarding safety and security not only in the event of terrorism, but also in consideration of natural disasters. They might include guidance, for example, concerning boiling water or staying in a basement that enhance rather than endanger life and safety. Following Hurricane Katrina, many have recognized that broad disclosure of information concerning evacuation in the event of a disaster is critical to protect life and safety, and that denying access to information identifying evacuation routes could result in widespread suffering and even death. Similarly, although disclosure of the location of hazardous chemicals might be used by terrorists to inflict damage, it may be beneficial to disclose some information of that nature to the public in order to promote public safety.

In sum, for the reasons discussed in the preceding commentary, we believe that the County is required to required to review any emergency plans that may be requested to determine which portions, if any, may justifiably be withheld, and that it is likely that portions of the records at issue must be disclosed to comply with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John F. Williams, Commissioner
Christine Malafi, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16091

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July 31, 2006

Dennis V. Tobolski, Esq.
County Attorney
Cattaraugus County
303 Court Street
Little Valley, NY 14755

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tobolski:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request made to the County of Cattaraugus for an unredacted copy of a motor vehicle accident report. We note that in response to the initial request, you provided a copy of the accident report after having first blacked out the driver's license identification number and the dates of birth. In this regard, we offer the following comments.

First, 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 or prosecution by such authorities of a crime 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.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Accordingly, it is our opinion that both the Freedom of Information Law and §66-a laws would apply to require production of those records.

The court's analysis of the matter in the above case, Scott, Sardano & Pomeranz, *supra*, is relevant here, because it permits the agency to withhold names and address of individuals from accident reports when they are sought for commercial or fundraising purposes, based on the exception set forth in §87(2)(b), which permits an agency to withhold information which if released would constitute an unwarranted invasion of personal privacy. Accordingly, the court directed the City to delete names and addresses of the victims before making the reports available (see §§ 87[2][b] and 89[2][b]).

Based on the narrowness of the ruling in Scott, Sardano & Pomeranz, *supra*, however, it is our opinion that the Court did not give permission for an agency to redact anything from accident reports other than names and addresses when they are to be used for commercial or fundraising purposes; there is nothing in the Court's decision or in the statute that would authorize an agency to withhold the drivers' license identification number and/or dates of birth.

We note that the Legislature recently amended §3-220 of the Election Law which requires complete disclosure of registration records, permitting an agency to withhold a voter's driver's license number and social security number. Without any corresponding amendment to §66-a of the Public Officers Law, it is our opinion that there is no such exception for such information to be redacted from accident reports.

In sum, it is our view, based on the language of the law and its judicial construction, that motor vehicle accident reports must be disclosed in their entirety, except in two circumstances: the first would involve a situation in which portions may be withheld because disclosure would "interfere with the investigation or prosecution...of a crime involved in or connected with the accident"; and the second, with a situation in which accident victims' names and addresses are sought for a commercial or fundraising purpose.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 1, 2006

E-Mail

TO: Mr. Dan McLane

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. McLane:

As you are aware, I have received your inquiry. Please accept my apologies for the delay in response. You have asked whether "retainer statements filed with the Office of Court Administration (OCA) in personal injury matters" are accessible under the Freedom of Information Law.

In this regard, in an effort to learn more of the issue, I contacted OCA and was directed to 22 NYCRR §6307. That is a rule promulgated by the Appellate Division, First Department, but I was informed that each Department has adopted analogous provisions. The cited provision deals specifically with "Claims or actions for personal injuries", and subdivision (a)(2) states in part that "A statement of retainer must be filed in connection with each action, claim or proceeding for which the attorney has been retained." That provision also contains the form of the retainer statement indicating that is to be filed with OCA and must include a variety of information.

With respect to your specific question, §6307(c) entitled "*Confidential nature of statements*" provides in paragraph (1) that:

> "All statements of retainers or closing statements filed shall be deemed to be confidential and the information therein contained shall not be divulged or made available for inspection or examination to any person other than the client of the attorney filing said statements except upon written order of the presiding justice of the Appellate Division."

Based on the foregoing, the retainer agreements of your interest are deemed confidential by the Appellate Division.

Even in the absence of the provision quoted above, I believe that elements of the retainer agreements could be withheld pursuant to §87(2)(b) of the Freedom of Information Law. That provision authorizes an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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August 1, 2006

Mr. John Bly
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bly:

I have received your letter concerning requirements relative to the disclosure of "(1) official death inquest material, (2) toxicological and latent fingerprint data, and (3) ballistic reports" pertaining to a "fifty-four year old unsolved homicide case that occurred in Westchester County."

In this regard, as you may recall, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 many of the grounds for denial of access are based on the likelihood that some sort of harm would occur through disclosure. From my perspective, and as suggested to you in 2003, because the records at issue relate to an event that occurred more than fifty years ago, it may be difficult in some instances for an agency in possession of the records to justify a denial of access.

There are, however, statutes that may remove records from the coverage of the Freedom of Information Law, and I believe that to be so in connection with "official death inquest material." In an early New York case, a "coroner's inquest" was described as an examination by a coroner or medical examiner into the causes and circumstances relating to a death that occurred by violence or suspicious circumstances [Ehlers v. Blood, 22 NYS2d 1001 (1940)]. Section 677(1) of the County Law refers to "The writing made by the coroner, or by the coroner and the coroner's physician, or by the medical examiner, at the place where he takes charge of the body", and subdivision (2) to "The report of any autopsy or other examination [which] shall state every fact and circumstance tending to show the condition of the body and cause and means or manner of death." Most significant in consideration of the first aspect of your request is §677(3)(b), which states that:

> "Such records shall be open to inspection by the district attorney of the county. Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner,

> a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Based upon the foregoing, the Freedom of Information Law in my opinion is inapplicable as a basis for seeking or obtaining an autopsy report or other records described in §677, for the right to obtain such records is based solely on §677(3)(b). In my view, only a district attorney and the next of kin of the deceased have a right of access to records subject to §677; any others would be required to obtain a court order based on demonstration of substantial interest in the records to gain a right of access.

Nevertheless, a careful reading of the provision quoted above indicates that nothing in its terms *prohibits* a coroner, a medical examiner, a district attorney or others from disclosing the records falling within its coverage. In my experience, there have been numerous situations in which coroners and medical examiners, as well as district attorneys and police departments, have asserted their discretionary authority to disclose records falling within the scope of §677(3)(b), even though there was no obligation to do so.

In short, while the public may have no right to obtain autopsy reports and related records, there is nothing in the law which in my view precludes a government official or agency from disclosing those records.

With respect to the remaining records involving toxicological and latent fingerprint data, as well as ballistics reports, two of the grounds for denial in the Freedom of Information Law appear to be relevant in considering rights of access.

Assuming that those records were prepared by a government agency, such as a police department or office of a district attorney, I believe that they would fall within the coverage of §87(2)(g). As you may recall, although that provision potentially serves as a basis for a denial of access, due to its structure, it may require substantial disclosure. Specifically, that provision authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It is likely that the contents of the records at issue would consist largely of statistical or factual information that must be disclosed, again, unless a separate exception to rights of access may properly be asserted.

The remaining exception of likely 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 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;"

As suggested in my 2003 response to you, in view of the fact that more than fifty years have passed since the murder, it is inconceivable that significant aspects of thee records relating to the murder would, if disclosed, interfere with an investigation. That is particularly so if indeed no investigative activity has recently occurred or is in any way ongoing. The less such activity has recently occurred, the less is the ability, in my view, to contend that disclosure would interfere with an investigation. If the case has effectively been closed, it might be contended that disclosure at this juncture would neither have an effect on nor interfere with the investigation.

With specific respect to toxicological and fingerprint data and ballistics reports, the key provision in my opinion is subparagraph (iv.) of §87(2)(e). That provision pertains to the authority to withhold records compiled for law enforcement purposes which, if disclosed, would reveal non-routine criminal investigative techniques and procedures.

In Fink v. Lefkowitz [47 NY2d 567 (1979)], the Court of Appeals, the state's highest court, held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to

> significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques or procedures which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate.

I would conjecture that the techniques and procedures used now may substantially differ from those employed more than fifty years ago. If that is so, the ability to assert §87(2)(e)(iv) would likely be minimal. I note, too, that although it was held based on the facts in a particular case that although "laboratory examinations of certain items of evidence seized from both the crime scene and elsewhere" may be withheld, "ballistic and fingerprint tests" were found to be accessible, for disclosure of those tests would not enable future violators of law to tailor their conduct to evade detection [Spencer v. New York State Police, 187 AD2d 919 (1992)]

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 4, 2006

Mr. Daren Antonio Payne
05-B-0297
P.O. Box 2000
Pine City, NY 14871-2000

Dear Mr. Payne:

I have received your letter in which you appealed a decision rendered at the Southport Correctional Facility concerning your Freedom of Information Law request.

In this regard, the Committee on Open Government is authorized to provide advice and opinions relating to the Freedom of Information Law. The Committee is not empowered to determine appeals or compel agencies to comply with law. 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."

For your information, the person designated at the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

As I understand the response to your request, the facility does not maintain the records of your interest. If no such record exists, the Freedom of Information Law would not apply. In addition, I note that §89(3) states in part that an agency is not required to create a record or prepare a record in response to a request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Robert Freeman
To: ecooper@utica.gannett.com
Date: 8/7/2006 9:01:10 AM
Subject: Dear Elizabeth - -

Dear Elizabeth - -

I must apologize for offering an opinion that was supplanted by a decision providing a different outcome.

The decision that I related to you involving the incidents of assault holding that certain statutes only applied to medical review functions was reversed. The Court of Claims (the lower court) determined that the reports did not relate to a quality of care or medical review function, but rather to a security function and, therefore, were subject to disclosure. The Appellate Division reversed, holding that Education Law §6527(3) and Mental Hygiene Law §29.29, when read in tandem, barred disclosure of the psychiatric hospital's incident reports. The Court of Appeals, the state's highest court, affirmed in Katherine F. v. State of New York [94 NY2d 200 (1999)].

I hope that the foregoing will serve to clarify your understanding and that you will accept my apologies.

Robert J. Freeman
Executive Director
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August 7, 2006

Mr. Reynell C. Andrews
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Andrews:

I have received your letter in which you asked whether "the Freedom of Information Law requires that an 'Application for Public access to Records' be submitted in order to view a 'legal notice'...as advertised in the local authorized newspaper."

In this regard, the Freedom of Information Law pertains to all government agency records, and §89(3) provides that an agency may require that any request be made in writing. That is so, even when a record is clearly accessible to the public. However, agencies may choose to waive the requirement that requests be made in writing, and many do so, particularly when records are clearly accessible and easy to locate.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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August 7, 2006

Mr. Arthur W. Fuhst, 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. Fuhst:

Your letter addressed to the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit within the Department, is authorized to provide advice and opinions concerning the Freedom of Information Law.

That law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, in brief, the Freedom of Information Law applies to entities of state and local government in New York. It does not apply to private organizations or corporations.

Since you referred specifically to meaning of the phrase "public corporation", it is defined in §66 of the General Construction Law, which provides in relevant part as follows:

> "1. A 'public corporation' includes a municipal corporation, a district corporation, or a public benefit corporation.
>
> 2. A 'municipal corporation' includes a county, city, town, village and school district.
>
> 3. A 'district corporation' includes any territorial division of the state, other than a municipal corporation, heretofore or hereafter

established by law which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments, whether or not such territorial division is expressly declared to be a body corporate and politic by the statute creating or authorizing the creation of such territorial division.

4. A 'public benefit corporation' is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof."

A public corporation is most often a unit of local government or a public authority. To be distinguished is a private corporation whose shares are publicly traded. Those latter entities, private corporations, fall beyond the coverage of the Freedom of Information Law.

As a general matter, a request made under the Freedom of Information Law should be directed to an agency's "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records. Enclosed is "Your Right to Know", which describes both the Freedom of Information and Open Meetings Laws and includes a sample letter of request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Enc.

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August 7, 2006

E-Mail

TO: Mr. Stephen B. Hanse

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. Hanse:

I have received your letter in which you asked whether the "comptroller's actions seem to constitute a denial" of your request made under the Freedom of Information Law for a certain record.

You wrote that on March 8, you requested a copy of an "emergency contract provided to Empire Blue Cross Blue Shield for providing prescription drug coverage for governmental employees until 12/31/07." On April 17, you received a letter from the State Comptroller's records access officer indicating that "due to the volume of records involved and the nature of the review process, it may take up to 60 business days before we make a determination...." She added that you would be contacted "no later than 7/12/06 to inform you of any cost associated with producing or photocopying the records." You sought to clarify your request on April 21 by specifying that you are seeking only one document, the executed contract, and no others. Because you received no further response, you contacted the records access officer on July 24, who informed you, in your words, that "the document contained trade secrets and the company had yet to deal with them and that seemed to be the reason for the delay."

From my perspective, the foregoing reflects a failure to comply with law. In this regard, several provisions in the Freedom of Information Law are relevant, and I offer the following comments.

First, §89(5) pertains to situations in which commercial enterprises submit records to state agencies and provides that, at the time of submission, they may request that the records or portions

thereof be excepted from disclosure based on §87(2)(d). In brief, that provision authorizes an agency to withhold trade secrets and other records when disclosure would cause substantial injury to the competitive position of a commercial enterprise. Paragraph (b) of §89(5) deals with requests for records that commercial enterprises have asked to be kept confidential and requires that an agency must:

> "(1) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued;
> (2) permit the person who requested the exception, within ten business days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception;
> (3) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; copies of such determination shall be served upon the person, if any, requesting the record, the person who requested the exception, and the committee on open government."

It is unclear whether the entity that is a party to the contract requested that the contract or portions thereof be excepted from disclosure. If no such request was made, §89(5) would not apply. In that event, the general provisions concerning the time for responding to requests described in §89(3) would be applicable. If such a request was made, it is clear, in consideration of the date of your initial request, that the agency's time for granting or denying access in whole or in part has expired. If that is so, I believe that you may consider you request to have been denied and that you may appeal the denial in accordance with §89(4)(a).

If §89(3) applies, again, I believe that your request has, at this juncture, been constructively denied. That provision states that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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, including, where appropriate a statement that access to the record will be determined in accordance with subdivision five of this section."

It is noted that new language was added to that provision on May 3, 2005 (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.

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 the Freedom of Information Law, a copy of this opinion will be forwarded to the records access officer.

I hope that I have been of assistance.

RJF:jm

cc: Shelly Brown

STATE OF NEW YORK
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August 8, 2006

Mr. Thomas J. Marcinek
[redacted]

The staff of the Committee 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. Marcinek:

I have received your letter and the materials attached to it. The matter focuses on your request under the Freedom of Information Law made to the Department of Taxation and Finance for records relating to an audit pertaining to you performed by the Department. You have sought an advisory opinion relating to a series of questions that you raised, and in this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law pertains to existing records, and §89(3) states in relevant part that an agency, such as the Department, is not required to create a record in response to a request. Having discussed the matter with a representative of the Department, it is clear that the Department does not function as you envision. It is not an agency that issues "delegation orders" to its staff reflective, as you suggest, of "the unbroken chain of command" or that requires signatures on documents in carrying out its duties. Similarly, because the law deals with existing records, it does not require agency staff to provide "information" in response to questions. Rather, it requires that staff grant or deny access to existing records in whole or in part in accordance with the exceptions to rights of access appearing in §87(2). In short, insofar as the information that you requested does not exist in the form of a record or records, the Department, in my opinion, is not required to prepare new records on your behalf that contain the information of your interest.

Second, §89(3) refers to two kinds of certification. One involves an assertion that copies of records disclosed by an agency in response to a request are true copies. The other involves a situation in which an agency indicates that it does not possess or cannot locate requested records. In that instance, the law states that, on request, the agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." Having discussed the matter with Christina Seifert of the Department's records access office, it was

suggested that a certification be prepared indicating that the Department does not possess records falling within the scope of your request that include signatures of its employees.

Lastly, with respect to employee ID numbers, I believe that §87(2)(i) of the Freedom of Information Law authorizes the Department to deny access. That provision enables 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."

As you are likely aware, the Department maintains numerous records relating to taxpayers that contain intimate personal information and are exempted from disclosure by statute (see e.g., Tax Law, §697). It is my understanding that employee ID numbers are used, in essence, as passwords that enable staff to review records in the performance of their official duties. As suggested by the Department's Records Access Appeals Officer, a member of the public who obtains the ID numbers might "use them to gain unauthorized access to a variety of records..." Because ID numbers are used in the era of electronic information systems to access confidential records, again, I believe that the Department's denial of your request was appropriate and consistent with law.

I hope that the foregoing serves to enhance your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Deborah Liebman
Christina Seifert

STATE OF NEW YORK
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August 8, 2006

E-MAIL

TO: Trudy Bloomquist

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. Bloomquist:

As you are aware, I have received your correspondence. You have asked whether "zoning board minutes", including minutes of executive sessions, are accessible under the Freedom of Information Law. You also inquired with respect to access to tape recordings of meetings.

In this regard, two statutes are pertinent in considering your questions. First, the Open Meetings Law is applicable to "public bodies", entities that consist of two or more members that perform a governmental function and conduct public business. A zoning board of appeals clearly constitutes a public body required to comply with the Open Meetings Law. Second, the Freedom of Information Law pertains to agency records. A unit of local government is an agency, and §86(4) of that 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, such as a zoning board of appeals, maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In

my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, case law indicates that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

A tape recording ordinarily will capture every word expressed during a meeting. Minutes of meetings need not be so detailed. 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)].

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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August 8, 2006

E-MAIL

TO: Supervisor Paul Feiner

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 Supervisor Feiner:

As you are aware, I have received your letter in which you referred to an opinion provided by the Greenburgh Town Attorney to the Town Board concerning the implications of the acceptance of a certain HUD grant. It is your view that the opinion should be made public, for you believe that disclosure would not "compromise the town in any way." You also indicated the memo includes an admonition indicating that its dissemination or disclosure by persons other than Board members is "strictly prohibited and any violation or breach of this confidentiality will subject the violator to criminal and civil sanctions and penalties."

In this regard, as you are aware, the Freedom of Information Law pertains to all government 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.

It is noted that the Freedom of Information Law is permissive; even when records *may* be withheld in accordance with one or more of the grounds for denial of access, there is no obligation to withhold the records [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. The only instances in which that is not so involves those cases in which a statute, either an act of Congress or the State Legislature, specifies that records are confidential.

The first ground for denial, §87(2)(a), pertains to those records, those that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App.

Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101(c) of the Civil Practice Law and Rules. In my view, there need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (I) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that records consist of legal advice or opinion provided by counsel to the client, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

The client, in the context of your inquiry, in my view is the Town Board. Since you are but one of five members, I do not believe that you, or any other Board member, acting unilaterally, would have the authority to waive the privilege. On the other hand, if a majority of the Board determines to waive the privilege, the attorney's opinion could be disclosed.

Lastly, with respect to admonition by the Town Attorney, once the privilege is knowingly and intelligently waived, I know of no provision that generally prohibits further dissemination. Further, if, for example, a copy of a record that is exempted from disclosure by statute is obtained by a member of the public, but not by means of any illegality, I believe that person may do with the record as he or she chooses.

I hope that I have been of assistance.

RJF:tt

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August 8, 2006

Mr. James S. Buswell
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Buswell:

I have received your letter concerning meetings of the Utica Urban Renewal Agency, particularly the location of its meetings, its entry into executive session to discuss "sensitive items", and a refusal to provide access to minutes and other records. In this regard, I offer the following comments.

First, §553 of the General Municipal Law states in subdivision (2) that an urban renewal agency "shall be a corporate governmental agency, constituting a public benefit corporation." A public benefit corporation is a kind of public corporation (see General Construction Law, §66). Therefore, an urban renewal agency is an "agency" that falls within the coverage of the Freedom of Information Law [Public Officers Law, §86(3)], and a "public body" subject to the Open Meetings Law [Public Officers Law, §102(2)]. Subdivision (3) of §553 states that "A majority of the members of an [urban renewal] agency shall constitute a quorum. As you are aware, §616 of the General Municipal established the Utica Urban Renewal Agency (hereafter "the Agency").

Second,although the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the

> governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend meetings of public bodies and to observe the performance of public officials who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

The preceding paragraph appeared in an advisory opinion rendered in 1993 and was relied upon in Crain v. Reynolds (Supreme Court, New York County, NYLJ, August 12, 1998). In that decision, the Board of Trustees of the City University of New York conducted a meeting in a room that could not accommodate those interested in attending, even though other facilities were available that would have accommodated those persons. The court in Crain granted the petitioners' motion for an order precluding the Board of Trustees from implementing a resolution adopted at the meeting at issue until certain conditions were met to comply with the Open Meetings Law.

It is also noted that §103(b) of the Open Meetings Law states that:

> "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty or the public buildings law."

Based upon the foregoing, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Agency has the capacity to hold its meetings in a room that is accessible to handicapped persons, I believe that the meetings should be held in the room that is most likely to accommodate the needs of those people.

Third, it is emphasized that every meeting of a public body, such as the Agency, must be convened as an open meeting, for §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. That being so, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Based on the foregoing, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Next, 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)].

In a somewhat related vein, I point out that §87(3)(a) of the Freedom of Information Law provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3), a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually concerning particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

> "it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)].

Lastly, the Freedom of Information Law pertains to all records kept by or for a government agency and is based on a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Utica Urban Renewal Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16103

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August 9, 2006

Mr. Steve Dombert
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Dombert:

I have received your letter and the materials attached to it. In brief, you requested a variety of records from the Town of Hartsville relating to the development of a windfarm. Although some records were made available, others, particularly certain email communications and documentation concerning a public opinion survey about the development, were not disclosed. Although the Supervisor indicated that no email communications prior to August of 2005 exist, you wrote that the project had been in development since early 2004 or perhaps earlier. You also wrote that you asked that the Supervisor certify that the records no longer exist, but that as of the date of your letter, there had been no response.

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 town, 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 may be especially relevant, for there may be "considerable crossover" in the activities of Town officials. In my view, when those persons communicate with one another in writing in their capacities as Town officials or with others, such as a developer, any such communications constitute agency records that fall within the framework of the Freedom of Information Law, even though they may be kept at locations other than Town offices.

Second, the definition of the term "record" also makes clear that email communications made or received by government officers and employees 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, insofar as records exist, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, communications between Town officials and a developer, for example, whether they were made by means of email or more traditional methods, would be accessible, for none of the grounds for denial could properly be asserted. Further, for reasons discussed earlier, those communications would be subject to rights granted by the Freedom of Information Law even if they are stored in a Town official's home computer.

With respect to documentation relating to the public opinion survey, if, as you suggest, "tallies and compilation" exist, I believe that they would be accessible. Relevant would be §87(2)(g)(i), which requires that statistical or factual information contained within internal government records must be disclosed.

Lastly, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 9, 2006

Mr. Jeffrey Monsour
[redacted]

The staff of the Committee 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. Monsour:

I have received your letter in which you requested an advisory opinion concerning your efforts in gaining access to records you believe to be maintained by the Racing and Wagering Board.

As I understand the matter, you requested "documentation of all Notices of Discipline" pertaining to several named individuals. In response to the request, you were informed that the Board does not maintain any such records. However, in a conversation with Ms. Jobin-Davis of this office, you apparently suggested that one of those individuals was demoted following an investigation.

In this regard, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if no documentation falling within the scope of your request exists, the Freedom of Information Law would not apply.

It appears that you requested a certification concerning the absence of records, but that the Board's records access officer might have misinterpreted or misunderstood your request. Here I point out that §89(3) refers to two types of certification. One involves an assertion that copies of records made available to an applicant are true copies. The other pertains to a situation similar to that to which you referred in which an agency indicates that requested records do not exist. Specifically, §89(3) states in relevant part that, upon request, the agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." In my opinion, the records access officer must, upon your request, ensure that a certification of that nature must be prepared.

In an effort to assist you in your efforts, a copy of this opinion will be forwarded to the Board's records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gail Pronti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 9, 2006

Capt. Robert Zimmerman
Orangetown Police Department
26 Orangeburg Road
Orangeburg, NY 10962-1706

The staff of the Committee on 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 Zimmerman:

I have received your letter and the materials attached to it. You have sought an advisory opinion concerning certain requests made pursuant to the Freedom of Information Law. The first involves:

> "1. monthly activity logs for police officers summons issuance and arrest activity, for the period 1998 through present (inspection only, not copies, unless under $25).
>
> 2. copies of the monthly activity logs of summons issuance and arrest activity logs involving Police Officer Tyronne McNeill (shield 166), for the periods 1998, 1999, 2000 and 2005"

In the second, the applicant requested:

> "1. Police Office [sic] McNeill 'memo book' (including daily activity report) and 'incident report' records for the afternoon and evening of 17 December 1999;
>
> 2. Police Office [sic] McNeill 'memo book' and 'incident report' records for December 1999, and any other time, pertaining to Doris Latta;
>
> 3. Police Office [sic] McNeill 'memo book' and 'incident report' records during the year 1999, reflecting his presence, in connection with police duties, at Nyack Hospital."

You wrote that the Town's legal counsel preliminarily advised that "because the records that may be responsive" to the requests "are unduly voluminous, both in number and in years covered, the requests do not reasonably describe the records sought" and, therefore, may be denied.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Many of those sought pertain to incidents that occurred several years ago, and it is possible that some might properly have been discarded. To the extent that the records no longer exist, the Freedom of Information Law would not apply.

Second, from my perspective, and based on a decision rendered by the state's highest court, the volume of a request is not necessarily determinative of its validity. Rather, in my view, critical is the extent to which Department staff have the ability to locate the records sought with reasonable effort. It has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v. Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a)(3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']) (id. At 250)."

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a 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 Department, to the extent that the records sought can be located with reasonable effort, I believe that the requests would have met the requirement of reasonably describing the records. On the other hand, insofar as the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even

thousands of records individually in an effort to locate those falling within the scope of the request, the requests would not in my opinion meet the standard reasonably describing the records.

Third, the kinds of records that have been requested may include a variety of information, some which might properly be withheld. That being so, even if the request meets the requirement of reasonably describing the records, the process of reviewing records to determine the extent to which redactions should be made may be lengthy and time consuming. I note that when records include information that may properly be withheld (i.e., portions of reports that contain names of informants or others the disclosure of which would result in an unwarranted invasion of personal privacy), it has been held that the applicant has no right inspect the records at no charge. Rather in that situation, the agency would make a photocopy from which appropriate deletions would be made, and it could charge up to twenty-five cents per photocopy. Further, the agency could charge the fee in advance of making photocopies (VanNess v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999).

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. There is no specific reference in that statute to police activity logs, memo books or incident reports, and the contents of those records and the effects of disclosure, which differ from one another, serve as the key factors in determining rights of access or, conversely, the authority to deny access. In considering the kinds of records at issue, several of the grounds for denial of access may pertinent and enable a law enforcement agency to withhold records or portions of records.

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, §160.50 of the Criminal Procedure Law, deals with situations in which charges against an accused are dismissed in his or her favor. In those instances, the records most often are sealed. Police records involving the arrests of juveniles are confidential under §784 of the Family Court Act, and a court may seal records concerning persons adjudicated as youthful offenders pursuant to §720.35 of the Criminal Procedure Law.

In addition to §87(2)(a), other grounds for denial in the Freedom of Information Law are likely relevant in relation to the records at issue. For instance, incident reports and memo books might include the opinions or impressions of police officers. Those records would fall within the scope 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.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness, or perhaps a victim.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

In sum, to the extent that existing records cannot be found with reasonable effort due to the manner in which they are maintained or filed, a request, in my opinion, would not meet the requirement that records be reasonably described. To the extent that a request meets that

requirement, the records in question may be accessible or deniable, in whole or in part, depending on their content or perhaps actions taken by courts.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 10, 2006

Mr. Richard A. Binner
Assistant Superintendent for Business
Frontier Central School District
5120 Orchard Avenue
Hamburg, NY 14075-5657

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Binner:

I have received your letter and the materials attached to it. In your capacity as Assistant Superintendent and Records Access Officer for the Frontier Central School District, you have sought an advisory opinion concerning rights of access to certain records requested pursuant to the Freedom of Information Law. The records sought include:

> "1. Cover letter, signed contract, John Montesanti's email and Dave Farmelo's Proposal for Services to be rendered pertaining to the contract and any and all amendments regarding the contract between FCSD and Bernard P. Donegan, Inc, authorized by Janet Plarr, President of the FSCD Board of Education, dtd 2/7/06.
>
> "2. Analysis and written report to the FCSD Board of Education regarding the above-mentioned contract which was presented to the Board of Education during their executive session on Monday, July 24, 2006.
>
> "3. Any and all written correspondence between Mr. Donegan and/or Bernard P. Donegan, Inc and Robert Guiffreda and any and all Board of Education members regarding the above mentioned services."

The materials indicate that Mr. Guiffreda is the Superintendent, and that Mr. Montesani is the BOCES Finance and Legislation Coordinator.

You wrote and the minutes of a meeting of the Board of Education indicate that the "analysis and written report" were presented and considered an executive session held to discuss "contractual matters." Executive sessions were also conducted, citing "contractual matters" as the reason, to discuss approval of the terms and conditions of the Superintendent's separation agreement.

You have raised a series of question in relation to the foregoing, and in this regard, I offer the following comments.

First, because some of the records at issue were apparently discussed during executive sessions, I point out that the rationale for conducting executive sessions as reflected in the minutes is questionable. As you are likely aware, §105(1) of the Open Meetings Law specifies and limits the subjects that may properly be discussed during an executive session. Nowhere does the phrase "contractual matters" appear in that statute. The provision most closely related, §105(1)(e), authorizes a public body, such as a board of education, to conduct an executive session concerning "collective negotiations pursuant to article fourteen of the civil service law." Article 14 is commonly known as the Taylor Law, and it deals with the relationship between public employers and public employee unions. That being so, it is clear that §105(1)(e) would not have served as a proper basis for entry into executive session in relation to the matters to which the minutes refer.

While I am unfamiliar with the content of the "analysis and written report", if there was no basis for consideration of the report in executive session, and if it had been discussed in public, it is likely that public discussion would have resulted in the effective disclosure of portions of the report. In my view, to the extent that public discussion results or should have resulted in disclosure of the content of the report, there would effectively be or have been a waiver of the District's ability to deny access to those portions of the report.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The contracts to which reference is made in your questions and the minutes, those involving the terms and conditions of the Superintendent's separation from service, and the contract between the District and Bernard P. Donegan, Inc. (hereafter "Donegan"), including amendments thereto, in my opinion, are clearly public. In short, none of the grounds for denial of access could be asserted to withhold a contract between the District and either its employee or an outside entity, such as Donegan.

With respect to the agreement with the Superintendent, the provision in the Freedom of Information Law of greatest significance, §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, 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.

In a discussion of the intent of the Freedom of Information Law by the state's highest court, 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 562 (1986)].

In short, I believe that any agreement involving compensation, benefits and the like between an agency and an individual, or a collective bargaining agreement between a public employer and a public employee union, must be disclosed. Those documents reflect the manner in which public monies are being allocated and spent and relate directly to the functioning and accountability of government.

In the case of a contract with an entity, such as Donegan, because it involves a corporation, the provision pertaining to the protection of personal privacy is irrelevant, and again, I do not believe that any of the grounds for denying access could properly be asserted to withhold a record of that nature.

With regard to access to the report, Donegan's proposal was expressed in a letter addressed to the Superintendent on January 13 and describes its services in summary as follows:

> "To examine the current policies, procedures and practices of the Frontier Central School District in order to assist the Board of Education, along with administration, in assuring that proper systems are in place to provide both appropriate internal controls and on-going oversight of the finances and financial operations of the School District."

The proposal further states that the analysis would include of a review of past and current policies, practices and procedures relating to the operation of the District business office, and that Donegan would report its findings, prepare an analysis and offer recommendations to the Board.

The report, in my view, would constitute "intra-agency material" that falls within the scope of §87(2)(g). While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. 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 documentation refers to Donegan as a financial consultant, and the same provision 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 added that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][I], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

The Court of Appeals has 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)" [Gould v. New York City Police Department, 89 NY2d 267, 276-277 (1996)].

Based on the foregoing, it would appear that portions of the analysis and written report that consist of statistical or factual information must be disclosed, while opinions, advice and recommendations may be withheld. However, that outcome would likely be different if the Board had discussed the report in public, rather than during an executive session. Again, in consideration of the subject matter, I do not believe that an executive session could properly have been held to discuss the report. Therefore, insofar as compliance with the Open Meetings Law would have resulted in disclosure of portions of the report, it would be appropriate in my opinion to disclose those portions of the report that might otherwise be withheld.

One of your questions involves access to correspondence between Donegan and the Superintendent or Board members. From my perspective, if the correspondence involves communications involving Donegan in its capacity as consultant, the records would constitute intra-agency materials that would be accessible or deniable in whole or in part in accordance with the preceding commentary concerning §87(2)(g). If, however, the communications preceded Donegan being retained or do not involve its duties as consultant, I believe that they would be accessible, for none of the grounds for denial would apply.

Correspondence between an employee of the BOCES and the Superintendent would constitute inter-agency materials also falling with §87(2)(g) that would be accessible or deniable depending on their content.

Lastly, you referred to a communication from the District's attorney to the Board that you assume to be a legal opinion. If your assumption is accurate, §87(2)(a), concerning records that are "specifically exempted from disclosure by state or federal statute", would be pertinent. 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-16107

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August 11, 2006

Mr. Richard L. Kinney
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kinney:

I have received your letter in which you complained that the Ballston Town Planning Board adopted a series of recommendations at its May 4 meeting and forwarded them to the Town Board. Having requested the minutes of that meeting, you were informed by the Chair of the Planning Board that a letter containing the recommendations served as the minutes. Further, the letter apparently states that the Planning Board unanimously voted to adopt the recommendations included in the letter. However, according to correspondence sent to the Town Supervisor by an attorney representing a citizens' group, "at least two members of the Planning Board were opposed to the recommendations and have stated so publicly..."

In this regard, I offer the following comments.

First, because the Planning Board constitutes a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)], it is required to prepare minutes in accordance with that statute. Section 106 pertains to minutes of meetings and directs that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

As the situation has been described, the adoption of recommendations that were transmitted to the Town Board in my view represent action taken by the Planning Board that must be memorialized in minutes. While the letter containing the recommendations might reflect the essence of the Board's action, I do not believe that the letter may be characterized or serve as a substitute for minutes. Often issues arise years after action is taken and there is a need to review minutes, the official record of action taken by a public body. Without minutes, there may be no way of learning of the nature of governmental actions or even if actions were indeed taken. In addition, as you suggested, §106 requires that minutes be prepared and made available within two weeks of meetings.

Second, in a related vein, §87(3)(a) of the Freedom of Information Law requires that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3), a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually concerning particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

> "it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

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)]. Most recently, the Court of Appeals confirmed that the law requires that a record of votes of the members must be prepared when action is taken by a public body and precludes secret ballot voting by its members [Perez v. City University of New York, 5 NY3d 522 (2005)].

In an effort to enhance compliance with and understanding of the matter, copies of this opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board

OML-AO-4242
FOIL-AO-16108

From: Robert Freeman
To: [redacted]
Date: 8/14/2006 8:29:24 AM
Subject: Dear Ms. Rockwell:

Dear Ms. Rockwell:

I have received your letter in which you raised several questions.

In the first, you asked whether there is "a time constraint in offering an opinion on a violation of foil." In this regard, there is no time limitation concerning an individual's capacity to complain or seek an advisory opinion under the Freedom of Information Law.

Second, you asked what you might do when a school indicates that it is not in possession of records of your interest. By "school" is it assumed that you are referring to records that may be maintained by a public school district; if you are referring to a private school, the Freedom of Information Law would not apply.

Assuming that you are referring to a public school district, I point out that the Freedom of Information Law includes within its coverage records kept for an agency, as well as those in its physical possession. Therefore, if, for example, records are kept for the district at the offices of its consultant or attorney, they are district records falling within the scope of the Freedom of Information Law. In that event, the district's records access officer must either direct the person in possession of the records to disclose them in a manner consistent with law or obtain them so that he/she can review them to determine rights of access. The records access officer has the duty of coordinating the agency's response to requests for records.

If it is contended that records are neither kept by nor for an agency, you may seek a certification in writing in which such an assertion is made. Section 89(3) states in relevant part that an agency, on request, "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Lastly, you asked whether "schools have their own set of rules iinvolving Board Meetings..." In this regard, boards of education constitute "public bodies" subject to the Open Meetings Law. That being so, they are generally required to comply with the same provisions as other public bodies, such as town boards, city councils, etc. In short, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry in to a closed or "executive" session. Section 105(1) of the Open Meetings Law specifies and limits the subjects that may properly be considered during an executive session.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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OML-AO-4243
FOIL-AO-16109

From: Robert Freeman
To: [redacted]
Date: 8/14/2006 10:56:08 AM
Subject: Dear Ms. Johnston:

Dear Ms. Johnston:

I have received your letter and appreciate your kind words. It is gratifying to know that you find our website to be useful.

You have asked whether tape recordings of open meetings "are within the domain of FOIL." In this regard, first, a tape recording maintained by or for an agency, such as the governing body of a municipality, constitutes a "record" as that term is defined in §86(4) of the Freedom of Information Law. Second, since the comments captured on tape were made during a public proceeding, there would be no basis for denying a request to listen or copy a recording of an open meeting. Attached is an advisory opinion that deals with the question more expansively.

Your second question relates to minutes of an executive session conducted by a committee. Here I point out that minutes of executive session must be prepared only when action is taken during an executive session. If a matter is merely discussed but no action is taken, there is no obligation to prepare minutes of the executive session. It is also noted that minutes of executive session need not include material that may be withheld pursuant to the Freedom of Information Law.

Lastly, the Open Meetings Law is applicable to public bodies. A governing body of a municipality clearly constitutes a public body, and the definition of "public body" [see Open Meetings Law, §102(2)] includes any committee, subcommittee or similar body of such body that consists of two or more members. Therefore, for example, a county legislature with 11 members is a public body that would have a quorum of 6; if it designates a committee consisting of 3 of its members, the committee would be a public body with a quorum of 2.

With respect to your question, a committee that is a public body must abide by the same requirements imposed by the Open Meetings Law, such as those involving notice, openness, procedure for entry into executive session and the taking of minutes, as the governing body.

I hope that I have been of assistance.

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STATE OF NEW YORK
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August 14, 2006

E-MAIL

TO: Claire A. McKeon

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. McKeon:

I have received your letter concerning the propriety of a denial of your request for "emails....that were sent between board members." The basis for the denial was §87(2)(g).

In this regard, first, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of*

> *Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). 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 school district has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by that agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In short, I believe that the blanket denial of the request was inconsistent with law.

Second, as inferred above, although §87(2)(g) serves as a potential basis for a denial of access, due to its structure, it often requires disclosure of records in whole or in part. Specifically, the cited provision authorizes an agency, such as a school district, to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Since you asked what recourse you might have, it is suggested that you share this opinion with District officials. You also have the right to seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 14, 2006

E-MAIL

TO: Edward V. Kachaloff

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. Kachaloff:

I have received your letter concerning the denial of your request for records of the Department of State. In addition, as required by §89(4)(a) of the Freedom of Information Law, a copy of the determination of your appeal following the initial denial of access was sent to this office.

As I understand the matter, the records sought relate to an ongoing investigation, and the Department determined that disclosure would, at this time, interfere with the investigation. In this regard, §87(2)(e) permits an agency to withhold records that "are compiled for law enforcement purposes and which, if disclosed, would: interfere with law enforcement investigations or judicial proceedings..." Assuming that disclosure would indeed interfere with an investigation, the denial of your request would be consistent with law. I note that the determination of your appeal specified that you will be given "an opportunity" during your upcoming hearing "to challenge the Department's proposed denial of your license application and to present evidence in support of your qualifications to hold an associate broker license."

The determination also indicates that you contend that the records sought "are needed for litigation." While that may be so, it is irrelevant with respect to rights of access conferred by the Freedom of Information Law. From my perspective, there is a clear distinction between rights of access conferred upon the public under the Freedom of Information Law and rights conferred upon a litigant via the use of discovery, and the courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings and in criminal proceedings under the Criminal Procedure Law (CPL). The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the discovery provisions of the CPLR or the CPL are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

As stated by the state's highest court, the Court of Appeals, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)].

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a litigant, and the nature of the records or their materiality to a proceeding. The materials made available in discovery to a litigant through discovery may not be available to the public under the Freedom of Information Law. Conversely, there may be instances in which records are beyond the scope of discovery, but which may be available under the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16112

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August 14, 2006

Mr. Robert Reninger
Broadview Civic Association
250 Knollwood Road
White Plains, NY 10607-1823

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Reninger:

I have received your letter in which you sought clarification concerning "how a NYS agency can claim in 2006 that some selected documents from 1978-1979 are currently exempt from disclosure." The records at issue are maintained by the Department of Transportation, which denied portions of your request on the basis of §87(2)(g) of the Freedom of Information Law.

In this regard, the cited provision authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

There is nothing in the law that requires that portions of records deniable under §87(2)(g), such as advice, opinions, recommendations and the like, ever be disclosed. It has been held by the state's highest court that an agency *may* disclose records or portions thereof that may be withheld in accordance with law [see Capital Newspapers v. Burns, 67 NY2d 562 (1986)], but there is no obligation to do so.

I note that in other situations, the ability of an agency to assert exceptions to rights of access may essentially disappear due to the occurrence of events or the passage of time. For instance, §87(2)(c) permits an agency to withhold records when disclosure would "impair present or imminent contract awards..." While records might properly be withheld under that provision before a contract is awarded, the ability to deny access under that provision generally ends when an award is made. In the case of §87(2)(g), there is nothing that requires that an opinion or recommendation offered twenty-five years ago or more from one agency employee to another be disclosed today, despite the passage of time. Again, the Department may choose to disclose, but it is not required to do so.

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

cc: Thomas D. Perreault

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 14, 2006

E-MAIL

TO: Katherine Delain

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. Delain:

As you are aware, I have received your letter concerning delays by the City of Schenectady in responding to requests for records.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 compliance with and understanding of the Freedom of Information Law, a copy of this response will be sent to the City Clerk.

I hope that I have been of assistance.

cc: Carolyn Friello, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1611 4

41 State Street, Albany, New York 12231
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August 14, 2006

Mr. Jammar Jones
03-B-0895
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

Dear Mr. Jones:

I have received your letter in which you appealed a denial of a request for records made to the Green Haven Correctional Facility.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records.

The provision dealing with the right to appeal a denial of access, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department, Anthony J. Annucci.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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August 15, 2006

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:

I have received your correspondence concerning your request to the Town of Mamakating for a copy of an "actual" signed and dated affidavit sent to the court in connection with a suit against the Town Planning Board. Although a copy of the amended affidavit was made available, it was neither signed nor dated.

In this regard, if the Town maintains the record of your interest, I believe that it must be disclosed. In short, none of the exceptions to rights of access appearing in §87(2) of the Freedom of Information Law could be asserted to deny access. However, it is noted that the Freedom of Information Law pertains to existing records; the public has the right to gain access to records maintained by or for an agency. If, for example, the Town does not possess a copy of a signed and dated amended affidavit, it would not be required to acquire such record on your behalf.

I note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Lastly, if indeed the Town does not possess the record of your interest, it is suggested that you request the record from the clerk of the court in which the litigation is pending, citing an applicable provision of law as the basis for the request. Although the courts are not subject to the Freedom of Information Law, court records are generally available pursuant to other provisions of law (see e.g., Judiciary Law, §255).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Jean Dougherty

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 16, 2006

Mr. Joseph F. Monaghan
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Monahan:

I have received your letter in which you asked whether an incident report pertaining to a fall suffered by a resident of the Eddy-Ford Nursing Home falls within the coverage of the Freedom of Information Law.

In this regard, that statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law applies to entities of state and local government. The Eddy-Ford Nursing Home is part of the Eddy Network, which is not a governmental entity. That being so, I do not believe that the record in question would fall within the coverage of the Freedom of Information Law. Further, even if the facility was within the scope of that law, the record of your interest would appear to be exempted from disclosure pursuant to §2805-m of the Public Health Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

There is not

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7011-A0-L6117

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1018

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August 16, 2006

E-MAIL

TO: Bret L. Matthews

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. Matthews:

As you are aware, I have received your letter concerning a situation in which your daughter was involved in an automobile accident, and her version of the event is different from that appearing in police reports. You referred to an attempt to obtain police officers' "writing at the accident" and a desire to obtain "a written answer to [y]our daughter's statement." In addition, certain information that you seek to obtain does not appear in records that you have obtained, and you have sought guidance in obtaining that information.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) provides in relevant part that a government agency is not required to create or prepare a record in response to a request for information. In short, insofar as the information of your interest is not maintained in a record or records, the Freedom of Information Law would not apply.

Second, the Freedom of Information Law includes within its coverage all records maintained by or for an agency [see definition of "record", §86(4)], and it has been held by the Court of Appeals, the state's highest court, that police officer's memo books constitute "records" that fall within the scope of that law [see Gould v. New York City Police Department, 89 NY2d 267 (1996)]. In that case, the Police Department contended that memo books, also known as "police activity logs", were not "records" that fell within the coverage of the Freedom of Information Law, but rather were the personal property of police officers. In rejecting the Department's position, the Court found that:

> "Activity logs are the leather-bound books in which officers record all their work-related activities, including assignments received, tasks performed, and information relating to suspected violations of law.

> Significantly, the Police Department issues activity logs to all its officers, who are required to maintain these memo books in the course of their regular duties and to store the completed books in their lockers; the officers are obligated to surrender the activity logs to superiors for inspection upon request; and the contents of the logs are meticulously prescribed by departmental regulation (*accord, Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 N.Y.2d 557, 564-565. 475 N.Y.S.2d 263, 463 N.E.2d 604 [minutes of meetings of private insurance companies, required by regulation to be turned over to Insurance Department for inspection, are 'records' under FOIL]). Thus, although the officers generally maintain physical possession of the activity logs, they are nevertheless 'kept [or] held' by the officers for the Police Department, which places these documents squarely within the statutory definition of 'records' (*see, Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 417, 639, N.Y.S.2d 990, 663 N.E.2d 302). Subject to any applicable exemption and upon payment of the appropriate fee (*see*, Public Officers Law, § 87[1][b][iii]), the activity logs are agency records available under provisions of FOIL" (id., 278-279).

It appears that the "writing at the accident" might have been made in memo books analogous to those described by the Court of Appeals in Gould. If that is so, their contents would be subject to rights of access.

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 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).

It would appear that most pertinent under the circumstances as you presented them would be §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, the cited provision authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The Court in Gould 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.

RJF:tt

From: Robert Freeman
To: [redacted]
Date: 8/21/2006 12:46:45 PM
Subject: http://www.dos.state.ny.us/coog/explaination05.htm

http://www.dos.state.ny.us/coog/explaination05.htm

Dear Ms. Hilow:

I have received your inquiry and a copy of your request for information directed to a school district.

Attached is an explanation of agencies' responsibilities concerning the time for responding to requests. However, based on a review of your request, I offer the following brief comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency, such as a school district, is not required to create a record in response to a request. Therefore, if, for example, there is no record indicating a "total" paid to a certain law firm, the agency would not be required to create a record containing a total on your behalf. Similarly, if there is no list of board members who have served from 1989 to the present, the district would not be required to prepare a list for you. I would conjecture that board members could be identified through a review of minutes of board meetings.

Second, in a related vein, some aspects of your request involve records likely prepared as long as 18 years ago. Due to the passage of time, it is possible if not likely that some of the records sought no longer exist. If that is so, the Freedom of Information Law would not apply.

Lastly, §89(3) of the Freedom of Information Law also states that an applicant must "reasonably describe" the records sought. It is likely that minutes of meetings from 1988 to 1996 are maintained chronologically and can be located easily. If that is so, I believe that aspect of the request would meet the standard of reasonably describing the records, despite their volume. On the other hand, I am unaware of the manner in which records paid to law firms are kept or retrievable. If they can be located with reasonable effort, again, I believe that the requirement that records be reasonably described would be met. On the other hand, if locating the record involves the equivalent of searching through the haystack in an attempt to find relatively few needles, the request would not meet the requirements of the law. It is suggest that you might contact the Assistant Superintendent in an effort to ascertain how the records of your interest are kept.

I hope that I have been of assistance.

cc: William J. Thomas

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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August 21, 2006

Mr. Graham A. Kerby
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kerby:

I have received your letter and the materials relating to it, which pertain to your efforts in acquiring a variety of information from the State University at Stony Brook. The issues focus on the utility of information technology as a means of acquiring information, and the following comments will focus on principles and judicial precedent that appear to applicable to the situations to which you referred.

First, with certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, one of the records that you request embodies one of them. A payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed.

Of relevance is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available. Items that have no relevance to the performance of one's official duties, such as social security numbers, the deductions and the like may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Second, the Freedom of Information Law includes within its coverage 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."

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than twenty years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of

existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disc. On the other hand, if information sought can be generated only through the use of new programs, so doing would in my opinion represent the equivalent of creating a new record.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, I believe that that an agency must follow the more reasonable and less costly and labor intensive course of action.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

In another decision which cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

Perhaps most pertinent is a decision concerning a request for records, data and reports maintained by the New York City Department of Health regarding "childhood blood-level screening levels" (New York Public Interest Research Group v. Cohen and the New York City Department of Health, Supreme Court, New York County, July 16, 2001; hereafter "NYPIRG"). The agency maintained much of the information in its "LeadQuest" database. In that case, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'
>
> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

When requests involve similar considerations, in my opinion, responses to them based on the precedent offered in NYPIRG must involve the disclosure of data stored electronically for which there is no basis for a denial of access.

I note that the preceding commentary deals with an agency's ability to extract data from an existing record. There is no judicial decision, however, that requires an agency to compute or create data that does not now exist. For instance, it has been held that a request for data that could not be extracted except by developing new programs need not be honored, for doing so would involve creating a new record, an effort that an agency is not required to carry out to comply with the Freedom of Information Law [Guerrier v. Hernandez-Cuebas, 165 AD2d 218 (1991)]. I would conjecture that your request for data relating to graduates of public schools in Suffolk County involves an inability on the part of the University to extract the data of your interest and would require the creation of new records.

Lastly, you referred to your ability to use your laptop computer when on an agency's premises when reviewing records. As you are aware, it has been held that the use of one's personal photocopier may be prohibited if its use would be disruptive or perhaps obtrusive [Murtha v. Leonard, 210 AD2d 411 (1994)]. Stated differently, the agency's rule was found to be reasonable in consideration of the facts of that situation. Many laptops are characterized as "notebooks", and if the laptop that you seek to use is similar or equivalent in size to a notebook, I do not believe that an agency may preclude you from using the laptop while you are inspecting records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karol K. Gray
Stacey Hengsterman

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

August 21, 2006

Jack Campisi, 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 Mr. Campisi:

We are in receipt of your request for an advisory opinion concerning the timeliness of the response to your request to inspect financial records of the Town of Milan pursuant to the Freedom of Information Law. You indicated that the Town recently provided access to the requested records 15 business days after receipt of your request, explaining that the Supervisor had been on vacation and that the records were in the custody of the bookkeeper.

As you know, we recently wrote to you, clarifying our opinion that a town is required to make readily available financial records accessible to the public as soon as practicable and in fewer than five business days. In addition to the advice previously rendered, we note that 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).

While a vacation of the Supervisor and coordination with a bookkeeper in a small town with limited resources may serve as a reasonable basis for delaying access on one occasion, in our opinion, it seems unlikely that the Town could rely on these grounds to delay access to records on an ongoing basis.

You also submitted a copy of Local Law No. 9 which the Town adopted in an effort to "ensure that all individuals seeking records are treated equally and to update the law in accordance with the current statutory and regulatory treatment of access to public records," as set forth in its statement of intent. We note that while Local Law No. 9 sets forth regulations similar to model regulations prepared by the Committee on Open Government and available on our website, it also repeats most of the language contained in §87(2) of the Freedom of Information Law. That provision reflects the statute's presumption of access and specifies the exclusive grounds for denying access.

It is our opinion that the Town's regulations should not reiterate the statutory language of that aspect of the Freedom of Information Law for the following three reasons.

First, an agency's ability to withhold records or portions of records from the public is based on statute. It has been held by several courts, including the Court of Appeals, the state's highest court, that an agency's regulations or the provisions of 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, and the Town's local law cannot be inconsistent with the Freedom of Information Law, a statute.

Second, periodically the New York State Legislature amends the Freedom of Information Law. Should the law change, the Town would be required to update its local law or regulations to conform with that statute.

Finally, the Town's procedures must, according to §87(1) of the Freedom of Information Law, be consistent with the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401). The Committee's regulations are and can be procedural in nature only; the Committee cannot promulgate regulations that govern rights of access. Similarly, we do not believe that the Town may do so by local law or regulation.

On behalf of the Committee on Open Government we hope this is helpful to you. A copy of this opinion will be sent to the Town of Milan.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Van Talmage, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1612

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August 21, 2006

Ms. Nancy Holliday
[redacted]

Dear Ms. Holliday:

I have received copies of your correspondence. In brief, your request to the Wyandanch Union Free School District to inspect "All Grants: Title I, Title D, Title III, Title IV, Title V – 2004-2006" was denied on the ground that it is "overly vague and overly broad."

In this regard, 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, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Betty Jo Joynes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-4247
FOIL-AO-16123

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August 22, 2006

Mr. Clarence J. Williams
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Williams:

We are in receipt of your request for an advisory opinion concerning records maintained by the Lee Center Fire District and the Lee Center Fire Department. Before addressing issues raised with respect to access to records, in an effort to clarify the differences between fire districts and fire departments, we offer the following comments.

Based on General Construction Law §66 and Town Law §174(7), a fire district is a public corporation. The board of fire commissioners, the governing body of a fire district, is a publicly elected body, with all the rights and responsibilities inherent in governing the fire district as set forth in §176 of the Town Law, including the authority to audit and pay all claims against the fire district based on itemized vouchers. Pursuant to §176(11), fire departments and fire companies within the district may be subject to rules and regulations of a board of fire commissioners.

Records of fire districts are subject to the Freedom of Information Law, based on the statutory definition of "agency" (§86[3]), which includes public corporations. Unlike the records of a fire district, the records of a fire department or volunteer fire company are subject to the Freedom of Information Law based on a decision rendered by the state's highest court. In Westchester-Rockland Newspapers v Kimball (50 NYS2D 575 [1980]), the Court of Appeals, found that despite their status as not-for-profit corporations, volunteer fire companies are "agencies" subject to the Freedom of Information Law. Accordingly, records of both the Fire District and the Fire Department are subject to the Freedom of Information Law.

Town Law governs the nomination and appointment of fire department members to the offices of chief and assistant chief(s) of the fire department. It is our understanding, based on the statutory law, that officers of the governing body of a fire department or fire company, after having been nominated by the members of the fire department by ballot, are appointed to office by the board of fire commissioners pursuant to Town Law §176(11-a, 11-b and 11-c).

It appears that the records you requested, therefore may be maintained by either the Fire District or the Fire Department, or perhaps both. Specifically, you have requested the following records for the years 2003, 2004 and 2005:

> 1. A list of names of persons serving on the Board of Directors (Executive Board) of the Fire Department;
> 2. Copies of minutes of each Board of Directors (Executive Board) meeting of the Fire Department;
> 3. Copies of minutes of each meeting of the general membership of the Fire Department during which the membership voted to spend "2% insurance monies" received from the Board of Fire Commissioners;
> 4. Records reflecting how much "2% insurance money" was received by the Fire Department from the Board of Fire Commissioners, and to whom it was paid, including a copy of the disbursement check(s);
> 5. A copy of the record which reflects the total amount of money received through the Fire Department's annual fund drive;
> 6. A copy of the record which reflects the total amount of money raised by Bingo;
> 7. A copy of the record which reflects the total amount of money raised by Bell-Jar;
> 8. A copy of the record which reflects the total amount of money raised by 50-50 sales, how such money was disbursed and "proof of approval to conduct 50-50 activity."

From our perspective, insofar as the records requested exist, they must be disclosed. If both the District and the Department maintain any of the requested records, each is required to disclose them. Further, in consideration of the representations by the Department's attorney, Mr. Bradley Pinsky, that the Department does not maintain minutes of meetings of its Board of Directors, pursuant to §107 of the Open Meetings Law, we believe that a court could determine that any and/or all actions taken at such meetings are void. In this regard, we offer the following comments.

First, the Freedom of Information Law is expansive in its coverage, for it pertains to all agency records. Section 86(4) defines the term "record" to mean"

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, the kinds of materials that you requested that are maintained by or for the Fire Department or the Fire District, irrespective of their origin or function, in our view, clearly constitute "records" that fall within the coverage of the Freedom of Information Law.

Second, and with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While one of the grounds for denial is relevant to an analysis of rights of access, due to its structure, we believe that it requires disclosure of the kinds of records in which you are interested. Section 87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld.

The records that you are seeking would constitute "inter-agency or intra-agency" materials. However, we believe that they must be disclosed, for they would appear to consist of "statistical or factual tabulations or data" available under §87(2)(g)(i).

With respect to your request for a list of the names of those persons serving on the Board of Directors or the governing body of the Fire Department, we believe the record must be disclosed for the following reasons.

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 list of every officer and their office addresses is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Further, even if those persons of your interest are not paid, such as the members of governing bodies, it is difficult to imagine that there is no record including their identities, or the identities of the members of a volunteer fire company. 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.

Although by failing to respond to your request for records, the Fire District engaged in a constructive denial of access, the Fire Department denied access to a list of names of those holding office in the Fire Department "as they may not be solicited". This appears to be based on §89(2)(b)(iii) of the Freedom of Information Law, which permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes," on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

By way of background, in general, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the

Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, is ordinarily irrelevant.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

This provision represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. 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 Federation of NYS Rifle and Pistol Clubs, Inc., v. New York City Police Department, 73 NY 2d 92 (1989); Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose of which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought.

In your case, however, you have only sought a list of the names of officers of the Fire Department. Based on your familiarity with the members and officers of the Fire Department and the Fire District and the issues you are raising with respect to the election of officers within the Fire Department, it appears clear that your request is not made for either a commercial or fund-raising purpose.

Further, from our perspective, the provision dealing with lists of names and addresses is intended to enable agencies to withhold lists that would be used to solicit individuals at their residences. In the case of this record, however, the residence address would not be included; rather the record would include the "public office address", the location where public employees or members of a fire company carry out their governmental duties. In our view, there is nothing "personal" or intimate about their work location and that kind of information should be made available on request.

With respect to the Fire Department's denial of your request for copies of minutes reflecting certain actions taken by the Board of Directors of the Fire Department, we note that §106 of the Open Meetings Law requires the production of minutes and provides direction concerning the contents of minutes and the time within which they must be prepared and disclosed. Specifically, that provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, minutes must be prepared and made available within two weeks of meetings.

Since its enactment in 1974, the Freedom of Information Law has included an "open vote" requirement. Section 87(3)(a) states that "[e]ach agency shall maintain a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, in each instance in which a public body, such as the governing body of the Fire Department or the Board of Commissioners of the Fire District, takes action, a record must be prepared specifying the manner in which each member cast his or her vote. Typically, the record of votes appears in minutes of meetings.

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."

In short, despite Mr. Pinky's assertion, to comply with law, minutes of meetings must be prepared and made available.

On behalf of the Committee on Open Government, we hope this is helpful to you. We have issued at least one other advisory opinion with respect to the Lee Center Fire Department, a copy of which is enclosed for your information.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

Enc.

cc: Mr. Pinsky
Hon. Eliot Spitzer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16124

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August 23, 2006

Mr. John Ferro
Projects Editor
Poughkeepsie Journal
85 Civic Center Plaza
Poughkeepsie, NY 12602

The staff of the Committee 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. Ferro:

As you are aware, I have received your letter in which you seek an advisory opinion concerning the propriety of a denial of your request for the data maintained by the State Education Department in its Impartial Hearing Reporting System. Based on printouts from screens displaying the data contained in the system, they include the name of a school district, a case identifier that appears to relate to a particular student, a district code, case type, student classification, the name and contact information pertaining to a district representative, and dates and other notations relating to the progress or status of a hearing. The names of students are not included.

The Department denied both your initial request and your appeal, citing three of the exceptions to rights of access appearing in the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The three exceptions upon which the Department relied are §87(2)(a), (b), and (i).

Paragraphs (a) and (b) of §87(2) respectively authorize an agency to withhold records that are "specifically exempted from disclosure by state or federal statute" and when disclosure would constitute "an unwarranted invasion of personal privacy." The statute cited by the Department as a basis for denying access is the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). The focus of FERPA is the protection of privacy of students and 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.

Even if FERPA had not been enacted, I believe that personally identifiable information relating to students, particularly those with disabilities, could be withheld under §87(2)(b) on the ground that disclosure would result in an unwarranted invasion of students' privacy.

The Department has contended that "a release of documents containing the information requested by petitioner (school district names, dates, case types, issues the hearing dealt with, recusal information, etc.) would contain information that could make a student's identity easily traceable." Based on a review of copies of printouts of forms that I believe are used by school districts and the Department, it would appear that only one item, one field in the database, might make a student's identity "easily traceable", and even with the inclusion of that item, the likelihood of identifying a student would in most instances appear to be remote.

The printouts include the name of the school district, but not a specific school within the district. There is a "case identifier", which appears to relate to a particular student. However, the two printouts made available to me from a single district identify cases as 4183 and 19110. Disclosure of those numbers alone clearly would not, in my opinion, make a student's identity easily traceable. Other items involve the progression of a hearing, such "pendency order date", "pendency placement", "pendency appealed", "transcript sent out date", "decision received by SED date", "case closed type" (i.e., "settlement/withdrawn"), and entries regarding a school district's "rep.". From my perspective, disclosure of those and other items would not, if disclosed, render a student's identity easily traceable.

In a case involving similar considerations, New York Times Company v. New York State Department of Health, 674 NYS2d 826, 243 AD2d 157 (1998), the issue involved a request for health care data and the ability to withhold certain items on the ground that disclosure would constitute an unwarranted invasion of personal privacy. To the extent that the data would be personally identifiable to patients, the Department of Health would have the ability to deny access.

Pursuant to its regulations, the Department granted access to a variety of items, but withheld data pertaining to treating physicians, hospitals and insurers. Following the initiation of a proceeding challenging the denial of access to those items, the Department agreed to release the names of hospitals and insurers. Nevertheless, it continued to withhold the names of physicians. The Supreme Court in its review of the denial "expressly rejected [the Department's] argument that the disclosure of:

> "...physician identifiers, even when such information was used in combination with other disclosable data, would lead to the identification of patients and, hence, would constitute an unwarranted invasion of personal privacy" (id., 828).

The Appellate Division later unanimously affirmed the applicant's right to the physician identifiers. Referring to the Freedom of Information Law's presumption of access, the Court determined that:

> "It is well settled that all records of a public agency are presumptively available for public inspection and copying, unless the documents in question fall within one of the enumerated exemptions set forth in Public Officers Law § 87(2) (*see, Matter of Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 496 N.E.2d 665). To that end, 'FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government' (*Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen,* 69 N.Y.2d 246, 252, 513 N.Y.S.2d 367, 505 N.E.2d 932). In this regard, the agency seeking to prevent disclosure bears the burden of demonstrating that the requested material falls squarely within the particular exemption claimed 'by articulating a particularized and specific justification for denying access' (*Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, supra,* at 566, 505 N.Y.S.2d 576, 496 N.E.2d 665; *see, Matter of Ruberti, Girvin & Ferlazzo v. New York State Div. of State Police*, 218 A.D.2d 494, 496-497, 641 N.Y.S.2d 411; *Matter of Legal Aid Socy. of Northeastern N.Y. v. New York State Dept. of Social Servs.,* 195 A.D.2d 150, 153, 605 N.Y.S.2d 785). This respondent has failed to do."

In finding that the Department could not demonstrate that disclosure would enable the public to identify patients, the Court stated that the Department:

> "...would have the court believe...that...providing the identity of the patient's physician is the one additional factor that 'could readily permit a third party to deduce logically the identity of a given patient, resulting in a breach of medical confidentiality'. In our view, such

> speculation falls far short of 'articulating a particularized and specific justification for denying access'" (id.).

The Court emphasized that other data is routinely disclosed including:

> "...the patient's gender, race and ethnicity; the month and year of the patient's admission, the month and year of the patient's discharge; the patient's length of stay; the patient's number of preoperative days; the patient's number of postoperative days; the class of payor; the census tract location of the patient; the age of the patient or one-year intervals for patients one year old or older; the age of the patient at one-week intervals for patients less than one year old; the physician specialty; the number of attending physicians; the presence or absence of an accident; and the facility reimbursement peer group..." (id.).

The one item that might render a student's identity easily traceable would be the "Student Classification", and the Department has forwarded a list of student classifications. Several are quite broad, such as "autism", "emotional disturbance", and "learning disability". In those instances, because there are hundreds or perhaps thousands of students who attend a particular school district, I do not believe that disclosure would make a student's identity easily traceable. However, other classifications indicate somewhat unique characteristics, such as "deaf-blindness", "deafness" and "traumatic brain injury." I would conjecture that in some circumstances, the characterization of a student as deaf or blind on a record could make the student's identity easily traceable.

If the classifications cannot be segregated electronically, due to the possibility that some could, if disclosed, enable a student's identity to be easily traceable, I believe that Department would have the authority to delete the "student classifications" field from the database. The remainder, however, would in my opinion be accessible. Absent that field, it does not appear that disclosure of the other items would, if disclosed, make a student's identity easily traceable or, therefore, result in an unwarranted invasion of personal privacy. I note that there is judicial precedent indicating that when an agency has the ability to electronically delete certain data from a record, or conversely, extract data from a record containing both accessible and deniable items, it is required to do so [New York Public Interest Research Group v. Cohen, 729 NYS2d 379 (2001)].

The remaining exception to rights of access cited by the Department, §87(2)(i) authorizes an agency to withhold records which:

> "if disclosed, would jeopardize an agency's capacity to guarantee the security of information technology assets, such assets encompassing both electronic information systems and infrastructures."

It is my understanding that you are not seeking a means of gaining entry into a database by obtaining a password or similar mechanism that would enable you to gain remote access to or alter its content. Rather, I believe that you have requested a copy of the content of a database at a particular moment in time, a snapshot or duplicate of the data that you can analyze independently, but that you cannot

change. If my understanding is accurate, I do not believe that §87(2)(i) would serve as a basis for denying access.

In sum, I believe that a duplicate of the Impartial Hearing System data that you have requested must be disclosed, and that the only element or field within the database that might justifiably be withheld is the field involving "Student Classification." Again, that would be so only if it can be demonstrated that the information within that field would render a student's identity easily traceable.

In an effort to resolve the matter, copies of this opinion will be sent to officials at the State Education Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Kathy Ahearn
Robert P. Waxman
Erlinda Rejino
Nellie Perez

From: Robert Freeman
To: Betsy; SHoltzm@schools.nyc.gov
Date: 8/24/2006 7:55:29 AM
Subject: Re: Press FOIL Request from The E-Accountability Foundation

Thank you for sending a copy of your latest request to the New York City Department of Education.

Having reviewed it, I do not believe that a court would find that a request for "all files, records (including electronic or magnetic), books, and papers located" in a person's office or "in any rooms or hallways..." under her supervision would "reasonably describe" the records as required by §89(3) of the Freedom of Information Law.

It is suggested that you reconsider your request and provide greater focus concerning the nature of the records of your interest.
>>> "Betsy" <betsy@parentadvocates.org> 8/23/2006 7:20:19 PM >>>
The E-Accountability Foundation
Parentadvocates.org
We Speak Up!
Wespeakup.org
315 East 65th Street
New York, NY 10021
212-794-8902

Betsy Combier, President and Campaign Sponsor
betsy@parentadvocates.org

VIA E-MAIL

August 23, 2006

Ms. Susan W. Holtzman
Central Records Access Officer
Office of Legal Services
New York City Department of Education
52 Chambers Street
New York, NY 10007

SHoltzm@schools.nyc.gov

Dear Ms. Holtzman:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request to inspect records or portions thereof pertaining to:

1) all files, records (including electronic or magnetic), books, and papers located in Virginia Caputo's inner office

2) all files, records (including electronic or magnetic), books, and papers located in Virginia Caputo's outer office(s), or in any rooms or hallways of the Office of Appeals and Reviews under her general supervision

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 24, 2006

Mr. Monte P. Schapiro
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schapiro:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the New York City Department of Buildings for records pertaining to the building in which you reside.

Specifically, when you verbally asked to inspect the contents of the Department of Buildings job folder for your building at the Department's office, you were informed that it is the Department's policy to deny access to a job folder when it is under audit. Later, you were informed that the Department had released the contents of the folder to a representative of the owner of the building and that it had not been returned. By written submission dated May 26, 2006, you again requested a copy of the contents of the job folder, and accurately cited §300(8) of the Multiple Dwelling Law which requires as follows:

> "All specifications, plans, permits and statements filed in the department shall be public records and shall not be removed from the department."

After receiving no written response to your request, on June 8, 2006 you made a second written request for:

> "...all records, plans, drawings, site surveys, and other accompanying documents including roll plans, audit objections, 10 day notices and 10 day extensions, correspondence concerning cures of these objections, etc. pertaining to Application/Job # 104368845 and any other applications for jobs/work permits associated with Block 401, Lot No. 56 since December 2005."

To date you have not received a response from the Department of Buildings.

From our perspective, the Department's policy of denying access and its failure to respond to your requests in a timely fashion are inconsistent with the law. In this regard, we offer the following comments.

First, in general, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (I) of the Law.

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. With respect to any documents which may now be missing from the job folder, 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, despite the Department's alleged policy of denying access to the contents of job folders during an audit, according to judicial decisions, an agency's policy or regulation may not render records deniable or confidential, unless there is a basis for so doing pursuant to one or more of the grounds for denial appearing in the Freedom of Information Law.

The first ground for denial in the Freedom of Information Law, §87 (2)(a), refers to records that may be characterized as confidential and enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." A statute, based upon judicial interpretations of the Freedom of Information Law, is an act of the State Legislature or congress [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)], and it has been found that agency's regulation or policy is not equivalent to a statute for purposes of §87 (2)(a) of the Freedom of Information Law [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. Therefore, insofar as the Department's policy renders records or portions of records deniable in a manner inconsistent with the Freedom of Information Law or some other statute, such policy would, in our opinion, be invalid.

Further, as you accurately note in your correspondence to the Department, §300(8) of the Multiple Dwellings Law mandates that the requested records shall be public. Additionally, that the records may be used in preparing an audit has no impact on the obligation to disclose under the Freedom of Information Law.

With respect to the Department's lack of response to your written 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, 2005 (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, we note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S.7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of

Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Patricia Lancaster
Christopher Santulli
Mary Mastropaolo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 24, 2006

Ronald P. Colefield, Ph.D.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Colefield:

I have received your letter and the materials relating to it. You have sought assistance in obtaining records from the Mamaroneck Union Free School District.

In an effort to learn more of the matter and to receive current information, I contacted Ms. Bea Cerasoli, the District Clerk and Records Management Officer. According to Ms. Cerasoli, some of the initial difficulty involved the clarity of your requests. However, it appears that your communications with her and perhaps other District staff have resolved those problems.

One of the requests, that involving "copies of transfer sheets concerning the School of Continuing Education account" during a named employee's tenure, was initially denied on the ground that the records consist of "inter-agency documents" that are "exempt from disclosure." That denial of your request was later, in my view, properly reconsidered and reversed. For your information, although the provision in the Freedom of Information Law pertaining to "inter-agency documents" potentially serves as a basis for denying access, due to its structure, it may require substantial disclosure. Specifically, §87(2)(g) states that an agency, such as a school district, may withhold:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Ms. Cerasoli also informed me that you have been granted access to all budget codes, and that you will soon receive materials reflective of payments made to the data processing firm retained by the District.

She also mentioned that it is your belief that the first five pages of records made available pursuant the Freedom of Information Law should be free. There is no such provision in that statute. Some agencies, however, have by policy or rule, determined to make a certain number of copies available at no charge.

Lastly, I would conjecture that some of the difficulty that you have encountered relates to the requirement expressed in §89(3) of the Freedom of Information Law that an applicant must "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 my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the District, to extent that records sought can be located with reasonable effort, I believe that a request would meet the requirement of reasonably describing the records. On the other hand, if records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of a 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

RJF:tt

cc: Bea Cerasoli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4248
FOIL-AO-16128

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August 24, 2006

E-MAIL

TO: Dan Kuchta

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. Kuchta:

I have received your letter in which you raised questions concerning the application of the Freedom of Information and Open Meetings Laws.

You wrote that the government of the town in which you reside is a member of a private organization, the local chamber of commerce ("the COC"). If the Town "has a paid membership...and these dues were paid using Town funds," you asked whether that would "entitle residents of the Town to be able to access any records related to the Town's involvement" in the COC. You also asked whether "[i]f more than 3 Town board members attend a COC meeting, does this constitute a quorum?"

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, such as a town; not-for-profit and other corporate entities are generally not subject to the Freedom of Information Law. In my view, the COC clearly does constitute an agency and, therefore, is not required to comply with the Freedom of Information Law.

Second, and notwithstanding COC'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 the COC or the Town's relationship with the COC come into the possession of a Town official in his or her capacity as such, in my opinion, they constitute agency records that fall within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Next, the presence of three or more members of the Town Board at a COC meeting may or may not constitute a Town Board meeting, depending on the facts associated with their presence. The issue relates to the Open Meetings Law, which pertains to meetings of public bodies, and §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". The definition of "meeting" has been broadly interpreted by the courts, and in a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body convene, collectively, as a body, for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law. However, if there is no intent that a majority of public body gather for purpose of conducting public business, as a body, but rather for the purpose of gaining education, or to listen to a speaker as part of an audience or group, I do not believe that the Open Meetings Law would be applicable.

Analogous questions have arisen in the past, and in some instances, the manner in which members of public bodies are situated suggests whether a meeting is being held. If a majority of the Town Board attending a COC meeting sits at a dais or table together in the front of the room and functions as the Board, I believe that it would be conducting a "meeting" that falls within the coverage of the Open Meetings Law. On the other hand, if Board members are merely attendees,

and not functioning as a body, in my view, their presence would not constitute a "meeting." Similarly, if one Board member is sitting at one table, a second member sits at a different table, and a third is situated apart from the other two, the three Board members clearly would not be functioning as a body, and again, the Open Meetings Law in my opinion would not apply.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 25, 2006

Mr. Lawrence White
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. White:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Village of Schuylerville. Specifically, you requested copies of any and all work permits, certificates of occupancy, correspondence between the owner of a property and the Village, and all inspection reports or other documents pertaining to the condition of the building at 140 Broad Street, Schuylerville. You indicated your art gallery was housed at this location, until the building was found to be unfit for occupancy. You have been denied access to all records requested except for two, and were informed that certain records were transferred to the Village attorney's office and are unavailable because there is a "pending prosecution." In this regard, we offer the following comments.

First, that the records in question might relate to or be used in litigation or enforcement proceedings would not in our view remove them from public rights of access. The initial ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §3101(d) of the Civil Practice Law and Rules, which exempts material prepared for litigation from disclosure. Nevertheless, if the records sought were prepared or acquired in the ordinary course of business, rather than for any purpose relating to litigation, it is our opinion that they would be subject to disclosure. Further, it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

Additionally, 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

> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately 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 the context of your inquiry and in conjunction with the foregoing, insofar as an inspection report may consist of expressions of opinion or recommendation, we believe that those portions may be withheld. Those portions consisting of statistical or factual information, however, must in our view be disclosed under §87(2)(g)(i). Further, insofar as such records indicate violations of building or fire codes, for example, those portions would be reflective of final agency determinations available under §87(2)(g)(iii). We point out, too, that it had been claimed in the past that building code inspection records could be withheld on the ground that they involved "investigatory files compiled for law enforcement purposes." Nevertheless, in one of the first decisions rendered under the Freedom of Information Law, which at the time was not as expansive in terms of rights of access as the current law, the files of a building code enforcement agency, including records indicating code violations, were found to be accessible [see Young v. Town of Huntington, 388 NYS 2d 978 (1976)].

Second, 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 village, 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)]. Therefore, records kept by the Village attorney constitute Village records, irrespective of their location.

Third, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation (i.e., a county, city, town, village, school district, etc.) to adopt rules and regulations consistent 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, and when requests are accepted via email, an email address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (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 must "coordinate" an agency's response to requests. Frequently the records access officer is an agency officer or employee who has familiarity with an agency's records. For example, the town clerk is designated as records access officer in the great majority of towns, for he or she, by law, is also the records management officer and the custodian of town records.

In our opinion, therefore, the records access officer is responsible for timely coordinating the response to your request, including obtaining copies from the attorney, if necessary.

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, 2005 (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 dIting 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 however, 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, on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request .

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Barbara Tierney
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16130

41 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, 2006

Bernard Stack
City of Niagara Falls
Department of Police
520 Hyde Park Boulevard
Niagara Falls, NY 14302

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Stack:

I have received your letter relating to our conversation involving requests by agencies made pursuant to the Freedom of Information Law for records that may ordinarily be withheld. Specifically, you referred to requests made by the Office of Child Protective Services, a unit of the County Department of Social Services, for records that may be withheld from the public under the Freedom of Information Law.

In this regard, as you are aware, the Freedom of Information Law deals with requests by and rights of access conferred upon members of the public. When records are sought under the Freedom of Information Law, it has been held that an applicant does so as a member of the public and that the status or interest of the applicant is irrelevant to rights of access. Additionally, when records are accessible under the Freedom of Information Law, they are equally available to any person, regardless of one's status or interest [see M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984) and Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976)].

In contrast, I do not believe that a request by a County agency seeking records in the performance of its official governmental duties can be equated or should be treated in the same manner as a request made by a member of the public under the Freedom of Information Law. As as a general matter, the Freedom of Information Law is permissive. Stated differently, even though an agency, such as a unit of local government *may* withhold records in accordance with the grounds for denial listed in §87(2), it is not required to do so [see Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562 (1986)]. Therefore, even though records requested under the Freedom of Information Law might justifiably be withheld from a member of the public, the same considerations need not apply when a request is made by a government agency attempting to carry out its governmental duties.

The only circumstance in my view in which an agency, such as the City of Niagara Falls Police Department, could not disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. Pertinent would be §87(2(a), which involves records that are "specifically exempted from disclosure by state or federal statute." For example, if a request involves records concerning the arrest of a juvenile, §784 of the Family Court Act would prohibit the Department from disclosing, absent a court order; similarly, when charges are dismissed in favor of an accused and sealed pursuant to §160.50 of the Criminal Procedure Law, the Department would be prohibited from disclosing.

When records requested by a government agency *may* be withheld from the public under the Freedom of Information Law, but you believe that disclosure would enhance that agency's functions, I believe that you/your Department may choose to disclose the records. It is suggested, however, that you encourage the agency seeking the records in that circumstance to indicate that its request is not being made pursuant to the Freedom of Information Law, but rather in the performance of its official duties. Alternatively, your agency could choose to disclose, with a notation or cover letter indicating that the records ordinarily would be withheld from the public under the Freedom of Information Law, but that your agency is disclosing because the request was clearly made by a governmental entity in the performance of its official duties. By so doing, the Department would be enhancing the ability of the agency seeking records in performing its duties, but avoiding creating a precedent or the appearance of a precedent that might suggest that the records are available to any member of the public under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1013

41 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, 2006

Mr. Robert A. Barlette
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Barlette:

I have received your letter in which you sought an advisory opinion concerning an alleged failure by the Dunkirk School District to respond to your request for certain records in a timely manner. The records sought involve "student behavior incidents reportable to the State and not reportable."

In this regard, first, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 believe that the records in question are accessible to the public, except to the extent that they include information that is personally identifiable to a student. Several provisions of law are pertinent to an analysis of rights of access.

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 (j) of the Law.

Relevant is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." On such statute is the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g), which applies to all educational agencies or institutions that participate in grant or loan programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Concurrently, FERPA provides rights of access to education records to a parent of a student under the age of eighteen.

The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, disclosure of students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

Also relevant is §2802 of the Education Law, which pertains to the "Uniform violent incident reporting system." Under that section, school districts are required to prepare reports regarding violent or disruptive incidents. As in the case of FERPA, §2802 of the Education Law specifies that portions of those reports identifiable to students must be kept confidential. That provision refers to the obligation of the Commissioner of Education to promulgate regulations that require "the confidentiality of all personally identifiable information"[see §2802(6)], and the regulations in §100.2(gg)(6) states that "all personally identifiable information included in a violent or disruptive incident report shall be confidential."

Lastly, following the deletion of personally identifiable information, I believe that the reports, irrespective of whether they have been communicated to the State Education Department, are accessible to the public. In short, following those deletions, the remainder of the reports would consist of factual information available under subparagraph (iii) of §87(2)(g) of the Freedom of Information Law. That provision states that statistical or factual information contained within internal governmental communications are accessible.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Mr. Militello

From: Robert Freeman
To: v[redacted]
Date: 8/25/2006 3:50:59 PM
Subject: http://www.dos.state.ny.us/coog/ftext/f12640.htm

http://www.dos.state.ny.us/coog/ftext/f12640.htm

Dear Ms. Miller:

Attached is an advisory opinion in which one of the issues involved access to the records to which you referred, certified payroll records that identify employees of private contractors performing work for a municipality. In brief, based on an Appellate Division decision, personally identifying details pertaining to those employees, such as their names, residence addresses and social security numbers, may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

You also asked whether you must obtain records from the contractor that have been requested in order to fulfill a request. In short, the Freedom of Information Law pertains records maintained by or for an agency, such as a village. Unless those records are kept for the Village by a contractor, they would be outside the scope of the Freedom of Information Law. Even if they are maintained by the contractor for the Village, again, personally identifying details could be withheld.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

From: Robert Freeman
To: [redacted]
Date: 8/28/2006 9:39:34 AM
Subject: Dear Mr. Ross:

Dear Mr. Ross:

I have received your correspondence in which you asked whether it is "stretching" to "believe you can FOIL a union..."

In my view, "stretching" would not lead to a conclusion that a union is required to comply with the Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to mean an entity of state or local government. While some unions may be associated with government, they are not governmental entities. That being so, I do not believe that a union is subject or required to give effect to 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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Albany, NY 12231
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16134

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 29, 2006

E-Mail

TO: Mr. Carl Campanile

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. Campanile:

We have received your correspondence in which you sought an advisory opinion concerning rights of access to "the names of hospitals and nursing homes applying for funding grants from the New York State Health Department..."

In this regard, first, the Freedom of Information Law is expansive in scope, for it pertains to all government 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, if the Department maintains records identifying entities that have applied for grants, those records fall within the coverage of the Freedom of Information Law, irrespective of their origin or that decisions concerning funding may not yet have been made.

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, one of the grounds for denial may be pertinent in considering rights of access to certain of the applications. However, due to the structure of that provision, it would

require disclosure of the name of a hospital or nursing home appearing in a grant application. Section 87(2)(g) deals with communications within, between or among state and local government agencies. Section 86(3) defines "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Section 87(2)(g) authorizes an agency to deny access to:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Insofar as a grant application submitted to the Department by an agency of state or local government includes the name of that entity, the name would constitute factual information that must be made available under subparagraph (i) of §87(2)(g).

If a grant application is submitted to the Department by a private entity, that entity would not be an "agency", and the exception regarding "inter-agency or intra-agency materials" would not apply. In that event, it is clear in my view that portions of records identifying private hospitals or nursing homes must also be disclosed.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16135

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 29, 2006

E-Mail

TO: Ms. Rosemary De Figlio

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. De Figlio:

Your inquiry addressed to the Office of Counsel at the Department of State has been forwarded to the Committee on Open Government. The Committee on Open Government, a unit of the Department, is authorized to provide advice and opinions pertaining 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 consideration of the foregoing, the Freedom of Information Law, as a general matter, applies to records maintained by entities of state and local government. The organization to which you referred is a not-for-profit entity, rather than an agency of government. Consequently, in my opinion, it is not required to give effect to the Freedom of Information Law. Further, I know of no provision of law that would require the entity in question to disclose its records.

I hope that I have been of assistance.

RJF:jm

FOIL-AO- 16136

From: Robert Freeman
To: Hornbeck, Leigh
Date: 8/29/2006 2:29:15 PM
Subject: Re: need FOIL advice on a suicide

Hi - -

We've been to Saratoga Springs a few times of late, and despite the crowds, my feeling is that it must be a great place to be during the summer. Hope you've been enjoying it.

To business.....If the police have a record indicating that the death was a suicide, I believe that portion of the record must be disclosed. Related questions have arisen in relation to suicide notes, and their content would determine the extent to which they may be withheld. If a note merely says, "I killed myself because the world is a terrible place", I believe that it is public; there is no intimate personal information in that kind of situation. On the other hand, if it says, "I killed myself because my mother never loved me" or "because my wife was cheating", those statements would be somewhat intimate in my view, and they could be withheld as an unwarranted invasion of privacy. Again, however, I believe that portion of a record indicating that a death was the result of a suicide must be disclosed.

I hope that this helps.
Bob
>>> "Hornbeck, Leigh" <LHornbeck@TimesUnion.com> 8/29/2006 1:28:35 PM >>>
Hi Bob, I hope your summer is going well. I am preparing to send a freedom of info request to the Saratoga Springs police about a suicide at a health spa last year. I want the info as part of my reporting about a cop who was fired from the force in Corinth. He was charged with insubordination because he investigated an alleged case of sexual harassment involving a restaurant owner in Corinth after the chief told him not to. The restaurant owner later died, supposedly the result of a suicide at his wife's spa here on Broadway. Do the police who responded have to tell me it was a suicide, and how should I phrase the letter?

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-16137

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 30, 2006

E-MAIL

TO: Karen LaFiandra

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. LaFiandra:

I have received your correspondence concerning a delay in disclosing a record that you have requested under the Freedom of Information Law.

As I understand the situation, the school district in which you reside recently entered into a contract with a consultant. In response to your request for the contract, you were informed that no determination would be made by the district until September 27. You have asked whether "20 days is too long to get a contract."

From my perspective, delaying disclosure for as much as twenty days in this situation would constitute a failure to comply with law. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. I believe that a contract between an agency, such as a school district, and a consultant is clearly available, for none of the grounds for denial of access could properly be asserted.

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.

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." In my opinion, 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).

In the context of your request, assuming that the record at issue is clearly accessible to the public, which I believe to be so, and easily located, it would be unreasonable in my view to delay disclosure beyond five business days of the receipt of your request.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16138

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 30, 2006

Mr. Anthony Brandon
Dutchess County Jail
150 North Hamilton Street
Poughkeepsie, NY 12602

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brandon:

I have received your letter in which you indicated that you have submitted a Freedom of Information Law request to the Merrill Lynch Financial Group and, as of the date of your letter to this office, you had not yet received a response.

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 consideration of the foregoing, the Freedom of Information Law applies to records maintained by entities of state and local government. The company to which you referred is not an agency of government. Consequently, in my opinion, it is not required to give effect to the Freedom of Information Law. Further, I know of no provision of law that would require the entity in question to disclose its records.

I hope that I have been of assistance.

Sincerely,

Janet M. Mercer

Janet M. Mercer
Administrative Professional

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16139

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 30, 2006

E-MAIL

TO: Doreen Tignanelli

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. Tignanelli:

As you are aware, I have received your letter. You asked whether a municipality may "require a person to file a FOIL request each time a person wants to inspect a file they have previously FOILed."

There is no provision of law or decision of which I am aware that focuses on the issue that you raised. However, as a general matter, the Freedom of Information Law authorizes an agency to require that a request to inspect or copy records be made in writing [see §89(3)]. In my view, if a person has asked to inspect records and completed his/her inspection, and then weeks later asks to inspect the same records, an agency may consider the request to be a new request. In that instance, I believe that an agency may require that the new request be made in writing. On the other hand, if a person begins to inspect records today, and informs the agency that he/she has not finished inspecting them, his/her request to continue his/her review of the request tomorrow or soon thereafter in my opinion would not involve a new request. In that situation, it would be unreasonable in my opinion to require that a second written request be made.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1640

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 30, 2006

E-Mail

TO: Mr. Allan Jordan

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. Jordan:

I have received your letter in which you explained that you are "seeking family information for a person who [you] believe was institutionalized in the 1920's at the Rome State School, which is now part of the NY State Department of Mental Health."

In this regard, first, there is no New York State Department of Mental Health. There had been a Department of Mental Hygiene, which was separated several years ago into the Office of Mental Health and Office of Mental Retardation and Developmental Disabilities. It is my understanding that the entity known as the Rome State School was a facility for mentally retarded persons. If that is so, it is likely that the records of your interest, if they continue to exist, would be in the custody of the Office of Mental Retardation and Developmental Disabilities.

Second, the Freedom of Information Law would not serve as a means of obtaining the records sought. Although that statute is based on a presumption of access, one of the grounds for a denial of access pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which in subdivision (a) states in relevant part that:

> "A clinical record for each patient or client shall be maintained at each facility licensed or operated by the office of mental health or the office of mental retardation and developmental disabilities, hereinafter referred to as the offices. The record shall contain information on all matters relating to the admission, legal status, care and treatment of the patient or client and shall include all pertinent documents relating to the patient or client."

Further, subdivision (c) provides that information "about patients or clients reported" to the Office "and clinical records or clinical information tending to identify patients or clients, at office facilities shall not be a public record and shall not be released by the office or its facilities to any person or agency", except in specified circumstances.

As I understand §33.13, the only circumstance under which you might obtain the records would involve disclosure "pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality..." [§33.13(c)(1)].

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1641

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 31, 2006

Ms. Eva Bresee
[redacted]

The staff of the Committee on 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. Bresee:

I have received a copy of your letter to the records access officer of the Charlotte Valley Central School in which you requested to review its "Policy and Procedure manual." You wrote that you were informed verbally by the Superintendent on the day prior to the preparation of your written request that access to the manual would be denied.

From my perspective, to comply with law, the manual must be made available. 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 (j) of the Law.

Although one of the grounds for denial of access is relevant to an analysis of the issue, due its structure, I believe that it requires disclosure in this instance. Specifically, §87(2)(g) pertains to internal governmental communications and authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I point out, too, that in a letter addressed to me dated July 21, 1977 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 would represent a matter that is mandatory or which represents a final step in the decision making process.

In short, based on the foregoing, I believe that the School's policy and procedure manual must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Dupra, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1601/42

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 31, 2006

Ms. Jolie Dunham
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Dunham:

I have received your correspondence in which you asked that I comment with respect to the response to your appeal by Daniel Gartenstein, President of the Board of Education of the Kingston City School District.

First, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency, such as a school district, is not required to create a record in response to a request. Therefore, if, for example, there is no "list" of sites evaluated for a new high school, the District would not be required to prepare a list on your behalf.

Second, it is emphasized that the Freedom of Information Law is applicable to all agency records, 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."

The foregoing may be significant, because records produced by, with or for the District fall within the coverage of the Freedom of Information Law. I note that a portion of Mr. Gartenstein's response concerning certain surveys indicated that "no such surveys were formally conducted by the administration." I am unaware of his intent relative to the use of the term "formally." If surveys exist and are maintained or were produced by or for the District, I believe that they constitute agency records subject to rights of access.

Lastly, Mr. Gartenstein repeatedly wrote that your requests "lack specificity." In this regard, 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.).

Insofar as District staff can locate records of your interest with a reasonable effort analogous to that described above, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Daniel Gartenstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16143

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 31, 2006

Ms. Vicki Ophals
[redacted]

The staff of the Committee on 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. Ophals:

I have received your letter, which reached this office on July 20, and the materials attached to it. You applied to the Massapequa Union Free School District on January 17 and requested the following pursuant to the Freedom of Information Law:

> "1. A printed copy of the current contract with the teachers' union.
> 2. A list of all teachers and administrators employed by the District during 2005 and total remuneration paid to each, as reported to the I.R.S."

The receipt of your request was acknowledged by the Assistant Superintendent for Business on February 17, when he wrote that "we are still researching your request and will contact you with the results as soon as possible." Although certain records were made available, as of the date of your letter to this office, June 29, the records sought had not yet been disclosed.

You have requested assistance in the matter, and in this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

From my perspective, assuming that a contract between the teachers' union and the District exists, it is clearly accessible. In short, none of the grounds for denial of access could properly be asserted to withhold a record of that nature.

Similarly, records or portions of records indicating gross wages of public employees are, in my view, clearly public. 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, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed for the following reasons.

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)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

It has been contended that W-2 forms indicating gross wages 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. Moreover, in the only judicial decision of which I am aware that focused on the issue, the same conclusion was reached, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

It is my understanding that agencies send to the IRS a record that identifies all of their employees that includes their gross wages. That record, for the reasons indicated above, must, in my opinion, be made available, perhaps following the deletion of those items, such as social security numbers and net pay, which if disclosed would constitute an unwarranted invasion of personal privacy.

Second, I believe that the Assistant Superintendent failed comply with provisions concerning the promptness of responses to requests. Specifically, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees (hereafter referenced "attorneys fees") when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be sent to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Board of Education
Alan Adcock

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1614

41 State Street, Albany, New York 12231
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September 1, 2006

Hon. Helen Hall
Town Clerk
Town of Osceola
42 Ryan Road
Williamstown, NY 13493

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Hall:

I have received your letter in which, as Town Clerk of the Town of Osceola, you requested an advisory opinion. In brief, you wrote that the new Town Supervisor has forbidden you from gaining access to various Town records. In this regard, I offer the following comments.

First, §30 of the Town Law entitled "Powers and duties of town clerk" states in subdivision (1) that the town clerk "Shall have the custody of all the records, books and papers of the town." That being so, although various records may come into the physical possession of the Town Supervisor, I believe that you as Town Clerk have legal custody of any such records.

Second, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

To implement §57.25, §57.19 of the Arts and Cultural Affairs Law states that town clerk is the "records management officer" for a town.

A failure to share the records or to inform the clerk of their existence may effectively preclude the clerk from carrying out her duties as records management officer or as records access officer for purposes of responding to requests under the Freedom of Information Law. The records access officer, according to the regulations promulgated by the Committee on Open Government, has the duty of coordinating an agency's response to requests (see 21 NYCRR §1401.2). In short, if the records access officer does not know the existence or location of Town records, that person may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law.

There are other instances, too, in which the town clerk, by law, must have access to and custody of records. For instance, §119 of the Town Law entitled "Audit of claims and issuance of warrants" requires the town clerk to present claims to the town board, and after claims have been audited by the board, "the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the claims..." In short, as town clerk, you have a need and a right to obtain various records to carry out your statutory duties.

Lastly, although the Town Supervisor may have certain areas of authority or responsibility, she is but one among five members of the Town Board. In my view, she is obliged to comply with rules and resolutions adopted by a majority of the Board, so long as such rules or resolutions are not inconsistent with law. I note that §64(3) of the Town Law states that the Town Board "Shall have the management, custody and control of all town lands, buildings and property of the town." Town property in my view clearly includes "records" as defined by both the Freedom of Information Law and the Arts and Cultural Affairs Law. Similarly, §63 of the Town Law provides that "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board", and that "The board may determine the rules of its procedure."

In sum, I do not believe that the records that are the subject of your correspondence are the property of Supervisor or that she has the legal authority to exercise control over the records in the manner described in your letter.

In an effort to enhance compliance with and understanding of applicable law, a copy of this response will be sent to the Supervisor.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Supervisor, Town of Osceola

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16145

41 State Street, Albany, New York 12231
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September 1, 2006

Ms. Jennifer Hallman
[redacted]

The staff of the Committee on 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. Hallman:

I have received your letter and the materials attached to it. You submitted a request under the Freedom of Information Law for a copy of "Commissioner Glenn Goord's Violent Offender Incarceration Truth-in-Sentencing Grant Applications for FY 2004 and FY 2005." Your request was denied on the ground that the information sought does not exist, and you asked whether the Department of Correctional Services may "deny that the documents exist as a means of denying a FOIL request."

In this regard, first, because the Freedom of Information Law pertains to existing records and indicates that an agency is not required to prepare a record in response to a request [see §89(3)], I do not believe that a response stating that records sought do not exist, in a technical sense, constitutes a denial of access. In my view, a denial of access that may be appealed occurs when an agency maintains requested records and determines to withhold them based on one or more of the grounds for denial of access appearing in §87(2).

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, while I am not familiar with the grant program at issue, it is possible that an application was made by a different agency or in the name of a person other than Commissioner Goord. Also, if you are aware of the federal agency that receives grant applications, a request for records of that agency could be made pursuant to the federal Freedom of Information Act, 5 USC §552.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chad Powell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16146

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 1, 2006

Mr. Barry Loeb
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Loeb:

As you are aware, I have received your letter and the materials attached to it. You have questioned the propriety of a form, an "application for public access of records", developed by the Port Washington Police District.

In this regard, first, it is noted that, in my opinion, an agency cannot require that a request be made on a prescribed form. Section 89(3) of the Freedom of Information 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.

Second, with respect to the District's form, other than being out of date in certain respects, I do not believe that it is unusual or inappropriate.

In the portion of the form under "Denied", there are several reasons indicated. However, they represent few of the grounds for denial of access appearing in §87(2) of the Freedom of Information Law. This is not intended to suggest that all of the grounds for denial be listed. Preferable in my view would be space in which the agency could offer a reason for a denial of access. I point out, too, that the phrase "part of investigatory files" was contained in the Freedom of Information Law as originally enacted; it has not appeared in the law since 1978. Also, §89(4)(a) of the Freedom of Information Law states that a person denied access to records may appeal the denial within thirty days, and that the appeals person or body must determine the appeal within ten business days (not calendar days) of its receipt.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Port Washington Police District Commissioners
Stephen Ressa

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 1, 2006

Ms. Claire McKeon
[redacted]

The staff of the Committee on 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. McKeon:

As you are aware, I have received your letter concerning "FOIL / E- Mails." Having requested email communications sent between school board members and administration during certain dates, you wrote that you "received 8 copies of e-mails from Administration to the Board, no e-mails between Board members and no written explanation as to why [your] request in essence has been denied." It is your belief that the Board "has been conducting business via e-mail" and "that is a violation of law." You have asked what recourse there may be.

In this regard, although the subject of access to email communications between board members was addressed in an opinion sent to you on August 14, I offer the following additional comments.

First and perhaps 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.

Moreover, 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.

The foregoing is not intended to suggest that the email communications that you requested must be disclosed in their entirety. As indicated in the earlier opinion, like other records, the content of those communications is the primary factor in ascertaining rights of access.

When records falling within the scope of a request are denied, the agency is required to inform the applicant of the denial in writing and of his/her right to appeal the denial [see Freedom of Information Law, §89(3) and (4); 21 NYCRR §1401.7]. 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 may seek such a certification.

Second, with respect to "conducting business via e-mail", I direct your attention to the Open Meetings Law. There is nothing in that statute that would preclude members of a public body, such as a board of education, from conferring individually, by telephone, via mail or e-mail. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting or vote held by means of a telephone conference, by mail or e-mail would in my opinion be inconsistent with law.

From my perspective, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by

videoconference. It is noted that the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Further, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the a board of education, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

The provisions in the Open Meetings Law concerning videoconferencing are newly enacted (Chapter 289 of the Laws of 2000), and in my view, those amendments clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law.

As indicated earlier, the definition of the phrase "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly

> adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of e-mail.

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the first 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..."

More recently, the Appellate Division confirmed that a valid meeting cannot be held by telephonic means and that a member of a public body cannot vote by use of the telephone [see Town of Eastchester v. NYS Board of Real Property Services, 23 AD3d 485 (2005)].

Lastly, if a majority of the members of the board 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.

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

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September 5, 2006

Ms. Jo Moseley-Wall
[redacted]

The staff of the Committee on 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. Moseley-Wall:

I have received your letter in which you raised issues concerning the Village of Naples' authority to limit your ability to speak at meetings of the Board of Trustees, and an unanswered request made under the Freedom of Information Law.

As I understand the situation, members of the public in the past could be placed on the agenda for the purpose of addressing the Board, but that practice was recently changed. It unclear from your letter whether the new practice was the result of action taken unilaterally by the Mayor, or whether action was taken by the Board. In this regard, I offer the following comments.

First, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body, such as a village board of trustees, may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak or otherwise authorize public participation, I believe that it should do so based upon reasonable rules that treat members of the public equally.

Although public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. By means of example, in a decision rendered in 1963 concerning the use of tape recorders, it was found that the presence of a tape recorder, which then was a large and obtrusive device, would detract from the deliberative process and that, therefore, a policy prohibiting its use was reasonable [Davidson v. Common Council, 40 Misc.2d 1053]. However, when changes in technology enabled the public to use portable, hand-held tape recorders, it was found that their use would not detract from the deliberative

process, because those devices were unobtrusive. Consequently, it was also determined that rules adopted by public bodies prohibiting their use were unreasonable [People v. Ystueta, 99 Misc.2d 1105 (1979); Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985). Specifically, in Mitchell, it was held that: "While Education Law §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."

If, for example, the Board adopted a rule or policy indicating that members of the public could be placed on the agenda if they request to do so within a specific time prior to a meeting, such a rule would, in my view, be valid, so long as it applied equally to everyone. Similarly, in the context of the situation that you described, I believe that the Board could have authorized you to give a speech for whatever length it chose; I do not believe, however, that you would have had the right to do so. Further, if the Board's new practice permits those in attendance to speak for up to three minutes or some other particular time period, and if that practice is carried out uniformly, the Board in my opinion would have the authority to do so.

Considering the matter from a different vantage point, it is unlikely that the Mayor has the authority to adopt policy or rules unilaterally. Pertinent to the matter are requirements involving a quorum and the ability to take action. Specifically, §41 of the General Construction Law states that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed on exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at a 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 one of the persons or officers disqualified from acting."

Based upon the foregoing, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of a public body. In addition, when the Open Meetings Law is read in conjunction with §41 of the General Construction Law, I believe that action may be taken only at a meeting during which a majority of the total membership of a public body is present.

In my view, unless there is some statutory basis to do so, the Mayor has no authority to render a decision or make policy unilaterally. Policy can be made by the Board only by means of a majority vote of its total membership taken at a meeting conducted in accordance with the Open Meetings Law.

Second, with respect to your request for a "decibel rating of the fire siren," if such a record exists, I believe that it must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial of access would enable the Village to deny such a record, if it exists.

Next, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees (hereafter referenced "attorneys fees") when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1616/9

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September 8, 2006

Dr. Carmine Vasile, CEO
Waterfilm Energy Inc.
P.O. Box 128
Medford, NY 11763

The staff of the Committee on 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. Vasile:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Town of Brookhaven. Specifically, you requested copies of reports authored by various engineering firms relating to the "Caithness File". By letter dated May 31, 2006, you were informed by the Town that due to the nature and size of your request, it would not be able to fulfill your request until July 15, 2006. To date, you have received no further written communication from the Town.

In your request to this office you indicated your concern that the records may have been removed from the Town offices, and that previously they had been made available to the public in their entirety at the Town Library. You attached a copy of an appeal filed by Mr. Thomas Bermel, who was denied access to records at issue. In this regard, we 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 town, 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)].

Second 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 requires the governing body of a public corporation (i.e., a county, city, town, village, school district, etc.) 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, and when requests are accepted via email, an email address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (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 must "coordinate" an agency's response to requests. Frequently the records access officer is an agency officer or employee who has familiarity with an agency's records. The town clerk is designated as records access officer in the great majority of towns, for he or she, by law, is also the records management officer and the custodian of town records.

In our opinion, therefore, the records access officer is responsible for timely coordinating the response to requests and, in the context of your request, obtaining copies of records from the consultant engineering firms if necessary.

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 (j) of the Law. Based on your representation that the records were previously made available at the local library, it is likely that they should be made available in their entirety again. In short, once they have been disclosed to the public, there would appear to be no basis for denying access to the records.

With respect to the Department's untimely response to your written requests and the length of time which has elapsed since you made your request, we note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

It is our opinion that a three month delay in providing access to the requested records is unreasonable, and has now resulted in a constructive denial of access to records.

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.

Further, on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S.7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Thomas Ventura

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 11, 2006

Mr. Clarence J. Williams
[redacted]

Dear Mr. Williams:

Thank you for your correspondence of September 1, 2006. In light of the circumstances of your requests to the Lee Center Fire District and Lee Center Fire Department, we would like to reiterate 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, 2005 (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 Law and Rules.

Further, on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S.7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

From: Robert Freeman
To: [redacted]
Date: 9/11/2006 4:09:56 PM
Subject: Re: http://www.dos.state.ny.us/coog/otext/o3215.htm

This office has consistently advised that any portion of a complaint that identifies the person who made the complaint may be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." From the government's perspective, the identity of the complainant is largely irrelevant; its interest is in whether the complaint has merit.

For a more complete explanation of the matter, several opinions are available via the FOIL index to opinions under "complaints."

Robert J. Freeman
Executive Director
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>>> [redacted] > 9/11/2006 3:48:15 PM >>>

One last question if I may

A person has sent the town zoning officer a complaint about a building of mine that burned. The town has set a public hearing to hear comments from the community. I asked for a copy of the complaint and the clerk sent me a copy without the persons name, citing a section that it is a invasiion of that persons privacy.

Is this permissable under the FOI law? Because of this complaint, which is filed by I believe the person who is taking over a piece of land that I have an interest in via adverse possession, and has conducted a vurtural terror campagin againt me and myfamily for years, I have had to hire a lawyer,and all that goes with this. He wants the building cleaned up , after it was arsoned last year so that he can further use the property. I think under the circumstances, I should be able to get a copy of the complaint, unaltered to know who is doing this, for the record so my lawyer and I can present a realistic response to the town board about all of this.

Thank you for your reply.

Gary L. Rhodes
Henderson, New York

Quoting Robert Freeman <RFreeman@dos.state.ny.us>:

> The opinion deals with the use of recording devices at meetings subject
> to the Open Meetings Law. In that situation, so long as the use of the
> device is neither obtrusive nor disruptive, the courts have held that
> its use cannot be prohibited. A hearing may be different from a

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September 12, 2006

Mr. Andrew Coe
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Coe:

I have received your latest correspondence involving your efforts in gaining access to records of the New York City Police Department under the Freedom of Information Law.

The chronology of your efforts is significant, for most recently, in a letter dated August 15, a request was denied on the ground that it is "duplicative of your previous request" and because it "does not reasonably describe a specific document." On April 30, 2005, you submitted a request for records pertaining to Raymond Marquez, "particularly those related to the old Gambling Squad and the present-day Vice Squad". You also expressed the belief that the Gambling Squad records from the 1960's were in possession of a former assistant district attorney whom you named. In a response dated May 16, 2005, you were informed that the request was too broad and that you could appeal to Mr. Jonathan David. You appealed in a letter of May 19, 2005 and provided additional detail, including the dates and nature of charges brought against Mr. Marquez. In his response to the appeal dated August 4, Mr. David denied the appeal because the records access officer, in his view, "correctly determined that your request was too broad in that it failed to describe a specific document." However, because you provided additional information, he wrote that "your appeal letter is deemed a new request, and is referred to the Records Access Officer for consideration." He also asked that you "deem *this* letter as an acknowledgment as required under Public Officers Law §89(3)" (emphasis his), and indicated that a new determination would be rendered by the records access officer within ninety days.

In a letter of January 9, 2006, more than five months after the acknowledgment by Mr. David, you received a letter from Sgt. James Russo stating that 15 pages of documentation had been located, that redactions had been made, and that the documentation would be mailed to you upon receipt of payment in the amount of $3.75. You again appealed to Mr. David, referring to the "Department's effective denial" of your request, referring to Mr. Marquez' "extensive criminal history stretching back to the 1950's", and emphasizing that he was "the target of numerous large-scale organized crime, racketeering and gambling investigations by the NYPD." You contend that

"[h]is appearance in NYPD files, including all the various gambling, vice and organized crime squad records, must run to hundreds if not thousands of pages", rather than "a paltry 15 pages with Raymond Marquez's name on them." Having received no further response from Mr. David, you contacted this office, and I recommended that you resubmit your request, including whatever additional detail you could provide to enable Department staff to locate the records of your interest. You did so in a new request dated June 15.

In response to that request, Sgt. Russo wrote on July 13, 2006 as follows:

> "...it appears that some of the records that you have requested may be in the possession of this department and, if so, may be disclosable under FOIL. However, before you can be granted access to specific records or portions thereof that are responsive to your request, a search for such records must be conducted. If records responsive to your request are located, such records must be reviewed to assess the applicability of any particular exemptions from disclosure set forth in FOIL.
>
> "Due to the large volume of pending FOIL requests, which are processed in the order in which they are received, and due to the fact that NYPD records are kept in many offices located in five counties, it is anticipated that your request will require more than twenty days. It is anticipated that a determination will be reached on 10/23/2006."

Notwithstanding that response, Sgt. Russo wrote to you again on August 15, denying your request on the ground that it is "duplicative" of a previous request and informed you of your right to appeal to Mr. David.

In this regard, I offer the following comments.

First, as advised in an advisory opinion addressed to you on June 27, 2006, the Department's mantra-like response that your request is "too broad in nature and does not describe a specific document", is, in my view, inconsistent with the direction provided by the state's highest court. Rather than reiterating the analysis offered in that opinion, copies of which were sent to Mr. David and the Department's records access officer, I would merely suggest, in brief, that the Freedom of Information Law has not since 1977 required an applicant to request a "specific document". In the words of the Court of Appeals, an agency may reject a request on the ground that it fails to "reasonably describe" the records only when "the descriptions were insufficient for purposes of locating and identifying the records sought" the descriptions were insufficient for purposes of locating and identifying the records sought" [Konigsberg v. Coughlin, 68 NY2d 245, 249 (1986)]. In consideration of the detail that you offered, including the dates and nature of charges, as well descriptions of Mr. Marquez' activities and the units within the Department that were involved with them, it would appear that many more than 15 pages of material can be found based on the terms of your request.

Second, while your most recent request may be "duplicative" in many respects of your previous request, it appears that you submitted that request due to the Department's failure to locate records or respond in a timely manner to both your requests and appeals. In short, I believe that you have strenuously attempted to provide the Department with opportunities to give appropriate effect to the Freedom of Information Law. To reject your request as duplicative when the Department itself has failed to comply with its obligation to respond in a timely manner to requests and appeals is, in my opinion and in consideration of the facts, unreasonable.

I note that amendments to the Freedom of Information Law that became effective on May 3, 2005, sought to require that agencies respond to requests in a timely and effective manner. 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..."

The 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. 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*." 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 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 encourage compliance with law and a substantive response to your request, copies of this opinion will be forwarded to Mr. David and Sgt. Russo.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jonathan David
Sgt. James Russo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 12, 2006

Ms. Carole A. Dwyer
[redacted]

The staff of the Committee on 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. Dwyer:

I have received your correspondence in which you indicated that are a newly elected member of the LaFayette Central School District Board of Education and raised a series of questions. As you may be aware, the advisory jurisdiction of the Committee on Open Government relates to matters involving access to and the disclosure of government information. Insofar as your questions pertain to those matters, I offer the following remarks.

In your initial communication you referred to a "scheduled executive work session, part of a scheduled district retreat." The terms "work session" and "retreat" are not found in any aspect of the Open Meetings Law or any other statute of which I am aware, and the issue, in short, is whether the gathering in question constituted a "meeting" that fell within the coverage of the Open Meetings Law.

By way of background, the Open Meetings Law applies to meetings of public bodies, and a board of education clearly constitutes a public body required to comply with that statute. Section 102(1) defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body, such as a board of education, will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

It appears that the gathering to which you referred constituted a "meeting" subject to the Open Meetings Law. If that is so, it should have been preceded by notice given to the news media and posted in accordance with §104 of the Open Meetings Law and conducted open to the public, except to the extent that an executive session might properly have been held.

You asked whether the president of a board of education may "force executive session at the mere mention of an employee's name, claiming it would violate contractual matters." In my opinion, the answer must clearly be in the negative. The Open Meetings Law, not the terms of a contract, provide the grounds for conducting an executive session. Stated differently, if there is no basis for entry into executive session that is authorized by the Open Meetings Law, a contractual provision cannot authorize a board of education to eliminate the public's right to attend a meeting. Section 110 deals

with the relationship between the Open Meetings Law and other provisions and 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."

Moreover, although it is used frequently, it is emphasized that a careful reading of the Open Meetings Law indicates that the word "personnel" appears nowhere in that statute. To be sure, there are some issues that relate to "personnel" that may properly be considered during executive sessions. Nevertheless, there are many others that do not fall within any of the grounds for entry into executive session. Moreover, there is simply nothing in the Open Meetings Law that specifies that personnel-related issues are confidential.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

Further, in instances in which §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division has confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as a "personnel matter" is inadequate, for it fails to enable the public or even members of the Board to know whether subject at hand may properly be considered during an executive session. Similarly, even though an employee's names is mentioned, unless the subject matter falls within the language of §105(1)(f) or a different basis for entry into executive session, the discussion must occur in public.

Even when there is a basis for entry into executive session, there is no obligation to convene in private. Section 105(1) prescribes a procedure that must be accomplished in public before an executive session may be held. That provision states that:

> " Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only,

> provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

If no motion is made to enter into executive session, or if a motion to conduct an executive session is not approved, a public body is generally free to discuss issues in public.

The only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential. W hen a public body has the discretionary authority to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential."

Many judicial decisions have focused on access to and the ability to disclose records, and this office has considered the New York Freedom of Information Law, the federal Freedom of Information Act, and the Open Meetings Law in its analyses of what may be "confidential." To be confidential under the Freedom of Information Law, I believe that records must be "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a). Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

Both the state's highest court, the Court of Appeals, and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

In like manner, in construing the equivalent exception to rights of access in the federal Act, it has been found that:

> "Exemption 3 excludes from its coverage only matters that are:
>
> > *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

> "5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

In short, to be "exempted from disclosure by statute", both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records.

In contrast, when records are not exempted from disclosure by a separate statute, both the Freedom of Information Law and its federal counterpart are permissive. Although an agency *may* withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals held that the agency is not obliged to do so and may choose to disclose, stating that:

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" (Capital Newspapers, supra, 567).

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose. Stated differently, there is nothing inherently confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).

The same analysis is applicable in the context of the Open Meetings Law. While that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), again, there is no requirement that an executive session be held even though a public body has the right to do so. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

Since a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not "confidential." To be confidential, again, a statute must prohibit disclosure and leave no discretion to an agency or official regarding the ability to disclose.

By means of example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you know, FERPA generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality. Again, the Freedom of Information Law states that an agency *may* withhold records in certain circumstances; it has discretion to grant or deny access. The only instances in which records may be characterized as "confidential" would, based on judicial interpretations, involve those situations in which a statute prohibits disclosure and leaves no discretion to a person or body.

Finally with respect to the Open Meetings Law, you questioned whether the president of a board of education may "send letters out representing the other members without their signatures or even participation." It is my understanding that many activities of a president of a board of education are ministerial in nature or are carried out through a delegation of authority by a board. However, I do not believe that a president of a board alone or fewer than a majority of its members may take

action on behalf of the board when only the board has the authority to do so. Further, from my perspective, voting or action by a board 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" in its entirety 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, or a convening that occurs through videoconferencing.

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, by e-mail, or perhaps by signing a letter in serial fashion at different times, would be inconsistent with law.

I point out that the definition of the phrase "public body" in §102(2) refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties.

Moving to issues involving records, you referred to "challenging student discipline records" and expressed the belief that "FERPA regulations would allow a parent/guardian the opportunity to contest and correct records". You asked how a parent enforces those regulations when a school district official denies a parent the ability to do so. The regulations promulgated by the U.S. Department of Education pursuant to FERPA (34 CFR Part 99), as you suggest, include provisions concerning the ability of a parent of a student or an "eligible student", a student 18 years of age or who is attending an institution of postsecondary education to seek to amend records. Specifically, §99.20 states that:

> "(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.
>
> (b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.
>
> (c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under §99.21."

Section 99.21 states in relevant part that:

> "(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading or otherwise in violation of the privacy rights of the student, it shall:
>
> (i) Amend the record accordingly; and
>
> (ii) Inform the parent or eligible student of the amendment in writing."

Section 99.22 requires that a hearing be held "within a reasonable time" after it has been requested, that a decision must be rendered within a reasonable time, and that the decision "must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision."

When an educational agency fails to comply with FERPA, it has been suggested that the unit of the U.S. Department of Education that oversees FERPA, the Family Policy Compliance Office, be contacted at (202)260-3887.

You also asked whether an individual member of a board of education my gain access to records relating to a determination in a disciplinary hearing "without consensus by the Board." In my opinion, the only method of so doing would involve obtaining an authorization from a parent of the student who is the subject of the determination. In essence, the parent in that situation would transfer rights accorded to him/her by FERPA to a third party, such as a board member.

In a somewhat related vein, you asked how parents can request copies of police reports involving a school and their children. When such records are maintained by a school district, either the Freedom of Information Law or FERPA would govern rights of access. FERPA pertains to education records identifiable to students, and the phrase "education record" is defined in federal regulations to mean records relating to a student that are maintained by an educational agency or institution (34 CFR §99.3). However, the definition specifically excludes:

> "Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are -
>
> (i) Maintained separately from education records;
>
> (ii) Maintained solely for law enforcement purposes; and
>
> (iii) Disclosed only to law enforcement officials of the same jurisdiction..."

In addition, §99.8(b)(1) states that:

> "Records of a law enforcement unit means those records, files, documents, and other materials that are -
>
> (i) Created by a law enforcement unit;
>
> (ii) Created for a law enforcement purpose; and
>
> (iii) Maintained by the law enforcement unit."

Based on the foregoing, if a report can be characterized as a record of a law enforcement unit, FERPA would not apply. In that case, the record would be subject to whatever rights exist under the Freedom of Information Law.

If no law enforcement unit has been developed and FERPA applies, I believe that a police report or other document pertaining to a student is in possession of school district would be accessible to a parent of the student. I note, however, that those portions of those records that include personally identifiable information pertaining to other students must be deleted to protect the privacy of those students, unless consent to disclose is given by parents of those students.

If FERPA does not apply because the record is maintained by a law enforcement unit, or if the record is not maintained by a school district but rather by a police department, a request should be made by a parent to the department pursuant to the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Several grounds for denial of access might be relevant in considering rights of access or the ability of a police department to deny access. For instance, if a police report identifies students other than the child of a parent seeking access, identifying details might properly be deleted on the ground that disclosure would result "an unwarranted invasion of personal privacy [§87(2)(b)]. Insofar as disclosure would interfere with a law enforcement investigation, records may be withheld [§87(2)(e)(i)]. Other exceptions might also be pertinent, depending on the contents of the record, the nature of an event and the effects of disclosure.

You asked whether the public has "a right to know of major incidences occuring on school property, for example: lockdowns, incidents of violence, drugs or alcohol charges, vandalism." Some of the events to which you referred, such as lockdowns or vandalism, are clearly not secret; students and others are aware of those events. That being so, records that relate to those events are subject to rights of access conferred by the Freedom of Information Law. Again, the content of the records serves as the primary factor in determining the extent to which they must be disclosed or, contrarily, to which they may be withheld in accordance with the exceptions to rights of access appearing in §87(2) of the Freedom of Information Law.

Also relevant may be §2802 of the Education Law, which pertains to the "Uniform violent incident reporting system." Under that section, school districts are required to prepare reports regarding violent or disruptive incidents. As in the case of FERPA, §2802 of the Education Law specifies that portions of those reports identifiable to students must be kept confidential. That provision refers to the obligation of the Commissioner of Education to promulgate regulations that require "the confidentiality of all personally identifiable information"[see §2802(6)], and the regulations in §100.2(gg)(6) states that "all personally identifiable information included in a violent or disruptive incident report shall be confidential."

Lastly, following the deletion of personally identifiable information, I believe that the reports, irrespective of whether they have been communicated to the State Education Department, are accessible to the public. In short, following those deletions, the remainder of the reports would consist of factual information available under subparagraph (iii) of §87(2)(g) of the Freedom of Information Law. That provision states that statistical or factual information contained within internal governmental communications are accessible.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 14, 2006

E-Mail

TO: Mr. Jerry Romano

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. Romano:

As you are aware, I have received your letter in which you questioned the propriety of a denial of your request for a certain record by the Village of Sea Cliff. Specifically, the Village denied access to "the names and phone numbers of people on the 'boat rack waiting list'" on the ground that disclosure would involve an "invasion of privacy."

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 (j) of the Law.

From my perspective, the only exception to rights of access pertinent in the context of your request is §87(2)(b). That provision authorizes an agency, such as the Village, to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While that standard is flexible and cannot be precisely defined, the Court of Appeals, the state's highest court, has referred to an agency's ability to withhold items of an intimate or personal nature, those which if disclosed would be offensive to a reasonable person of ordinary sensibilities [see Hanig v. State Department of Motor Vehicles, 79 NY2d 106 (1992)].

In my opinion, the name of a person who has applied for a boat rack permit does not involve information that may be characterized as intimate or personal. For that reason, it is my view disclosure of the names of the list would, if disclosed, constitute a permissible, not an unwarranted invasion of personal privacy. However, many attempt to prevent disclosure of or the use of their telephone numbers. Unlisted phone numbers are common, and thousands have sought to prevent contact by phone through a "do not call" registry. For that reason, I believe that the Village may justifiably withhold the phone numbers appearing on the list.

I hope that the foregoing serves to enhance your understanding and that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
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S

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E-Mail

TO: Mr. Carl Campanile

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. Campanile:

I have received your letter in which you requested an advisory opinion concerning rights of access to certain records.

Specifically, you asked whether records reflective of criminal and civil litigation initiated by the New York City Department of Social Services against recipients of public assistance are accessible under the Freedom of Information Law. You wrote that you are "researching cases in which recipients allegedly defrauded or misled the government by obtaining Medicaid or other public assistance benefits after failing to disclose true financial assets." You added that you are particularly interested in obtaining "the names and addresses of the defendants/recipients - and dollar amounts owed..."

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 (j) of the Law.

Relevant is the first 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, §136 of the Social Services Law, states that: "the names and addresses of applicants for or recipients of public assistance care" are exempt from disclosure, "except as expressly permitted by subdivision four..." Similarly, subdivision (2) states in part that:

> "All communications and information relating to a person receiving public assistance or care obtained by any social services official,

> service officer, or employee in the course of his or her work shall be considered confidential...except as otherwise provided in this section..."

Subdivision (4), which is pertinent to the matter, states in relevant part that:

> "Nothing in this or the other subdivisions of this section shall be deemed to prohibit bona fide news media from disseminating news, in the ordinary course of their lawful business, relating to the identity of persons charged with the commission of crimes or offenses involving their application for or receipt of public assistance and care, including the names and addresses of such applicants..."

As I understand the foregoing, while records pertaining to persons who have applied for or have received public assistance are confidential, except when the records relate "to the identity of persons charged with the commission of crimes or offenses involving their application for or receipt of public assistance and care..."

Second, as you may be aware, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts 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 often grant broad public access to those records. In the context of your inquiry, if you are able to locate court records relating to litigation involving allegations of fraud against applicants for or recipients of public assistance, I believe that they would be accessible pursuant to §255 of the Judiciary Law, unless charges were dismissed. In those instances in which charges are dismissed in favor of an accused, the records become sealed pursuant to §160.50 of the Criminal Procedure Law.

Third, assuming that they have not been sealed, it has been determined by the Court of Appeals that court records that come into the possession of an agency are agency records that fall within the scope of the Freedom of Information Law [Newsday v. Empire State Development Corporation, 98 NY2d 746 (2002)]. Therefore, copies of records filed with or maintained by a court

that are in possession of the Department of Social Services constitute agency records that fall within the coverage of the Freedom of Information Law.

Lastly, when records have become available from the courts via public judicial proceedings, duplicate records maintained by agencies have been found to be accessible from those agencies pursuant to the Freedom of Information Law, even when the records might ordinarily be withheld under that statute. As stated in Moore v. Santucci:

> "...while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (*see, Matter of Knight v Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [151 AD2d 677,679 (1989)].

In short, when a record is made available through a public judicial proceeding, unless it is later sealed, in my opinion, nothing in the Freedom of Information Law would serve to enable an agency to deny access to that record.

In consideration of the foregoing, it appears that litigation files containing the information of your interest maintained by the Department of Social Services that have been used in or are accessible from a court are accessible under the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 14, 2006

Mr. John F. Darnowski
[redacted]

The staff of the Committee 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. Darnowski:

I have received your letter and the materials attached to it. You have sought an advisory opinion concerning rights of access to portions of records indicating "the specific work location of City of Albany Police Officers." The City has denied access pursuant to §87(2)(f) of the Freedom of Information Law, with authorizes an agency to withhold records insofar as disclosure "could endanger the life or safety of any person." The City has contended that disclosure could endanger the lives or safety of its police officers.

I respectfully disagree with the City's determination. In this regard, I offer the following comments.

As you are aware and as the City's responses acknowledge, §87(3)(b) of the Freedom of Information Law requires that each agency maintain a record that includes the name, "public office address", title and salary of every officer or employee of the agency. The City has asserted that the public office address of all of its police officers is 165 Henry Johnson Boulevard. You wrote that police officers are assigned to and work out of at least five office locations. Whether a court would determine that the office location to which an officer is assigned is his or her "public office address" is conjectural. However, based on the correspondence and your receipt of records in the past, it is clear that the City maintains records indicating the offices to which its police officers, their "work locations", are assigned. The issue in my view, therefore, is whether the exception to rights of access cited by the City can be justified.

In my opinion, in consideration of information routinely disclosed to the public, I believe that portions of records containing officers' work locations must be disclosed. In a large municipality, such as New York City, I believe that it is routine and normal practice for the Department to disclose and for officers to state that they work at a particular precinct, not at One Police Plaza. In small municipalities, there is frequently only one work location of a police department. In neither of those

instances could it properly be contended, in my opinion, that §87(2)(f) would justify a denial of access to records indicating officers' work locations. Further, news articles published locally have indicated that residents of neighborhoods within the city and police officers assigned to an office or station in or near a neighborhood have sought to develop relationships in an effort to enhance public safety. In short, I do not believe that the work locations of police officers are generally secret, and consequently, in my opinion, the City should have disclosed portions of records indicating the work locations of its police officers to comply with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J . Freeman
Executive Director

RJF:tt

cc: Harold Greenstein
Hon. John Marsolais

STATE OF NEW YORK
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September 14, 2006

Mr. Paul E. Rice
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rice:

I have received your letter and the material attached to it.

Having been denied the opportunity to take a competitive examination administered by the City of Yonkers, you requested "copies of the applications of those persons they deemed were qualified," as well as "the qualifications and application for anyone that is currently holding [a particular] position provisionally or has held it since 01/01/2004." The City denied the request, stating that:

> "By gaining access to the applications, even if redacted, and the employment history of unnamed individuals, it would still be possible to identify these individuals and thus, identify the names of those persons who took and failed the examination. Consequently, the applications in question, despite having some information deleted may be withheld from inspection pursuant to Civil Service regulations and §89(2)(b) of the Public Officers Law, as an unwarranted invasion of personal privacy, not limited to disclosure of employment history."

Based on the terms of the Freedom of Information Law and its judicial interpretation, I respectfully disagree with the City's response to your request.

In this regard, first, §89(7) of the Freedom of Information Law states that an agency, such as the City of Yonkers , is not required to disclose the name of an applicant for appointment to public employment. Therefore, although the City could choose disclose the identities of the applicants, it would not be obliged to do so.

Second, notwithstanding the foregoing, I believe that some aspects of the applications regarding those who were not hired by the City, as well as a variety of details regarding any incumbent of the position in question, 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 (j) of the Law. It is emphasized that the phrase quoted in the preceding sentence indicates that there may be instances in which portions of records might justifiably be withheld, while the remainder must be disclosed.

Third, as the City suggested, one of the grounds for denial of access, §87(2)(b), authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In my view, in consideration of §§87(2)(b)and 89(7), the City might properly withhold any portion of an application for employment pertaining to a person who was not hired which if disclosed could reasonably be used to identify an applicant. Depending on the uniqueness of the content of an application, the extent to which portions of an application may be withheld may differ from one application to the next. However, I believe that a blanket denial of access to the applications is inconsistent with law. I point out that in a case in which an individual wanted to compare his qualifications with the qualifications of others, it was determined that resumes of those others must be disclosed, following the deletion of personally identifying details [see Harris v. City of University of New York, Baruch College, 114 AD 2d 805 (1985)].

With respect to the records pertaining to the incumbent of a position, the judicial interpretation of the Freedom of Information Law indicates that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

I note, too, that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Additionally, in a recent judicial decision, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's prior public employment must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

> "Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

In short, it is likely that some aspects of the application of an incumbent must be disclosed, while others could be withheld to protect personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Kevin D. Crozier
Frank J. Rubino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1658

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September 14, 2006

Hon. Kathleen R. Pacella
Town Clerk
Town of Somers
Town House
335 Route 202
Somers, NY 10589

The staff of the Committee on 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. Pacella:

I have received your memorandum in which you asked whether "a tape recorded at an executive session [of the Somers Town Board] could be FOILED" and whether "it is still able to be FOILED due to the nature of receiving Legal Advice."

In this regard, first, there is no statute that deals directly with the taping of executive sessions. Several judicial decisions, however, have dealt with the ability to use recording devices at open meetings, and although those decisions do not refer to the taping of executive sessions, their thrust is pertinent to the matter. Perhaps the leading decision concerning the use of tape recorders at meetings, a unanimous decision of the Appellate Division, involved the invalidation of a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

Again, while there are no decisions that deal with the use of tape recorders during executive sessions, I believe that the principle in determining that issue is the same as that stated above, i.e., that the Board may establish reasonable rules governing the use of tape recorders at executive sessions.

Unlike an open meeting, when comments are conveyed with the public present, an executive session is generally held in order that the public cannot be aware of the details of the deliberative process. When representatives of public bodies have asked whether they should tape record executive sessions, I have suggested that doing so may result in unforeseen and potentially damaging consequences. For reasons to be discussed later in detail, I believe that a tape recording is a "record" as that term is defined in section 86(4) of the Freedom of Information Law and, therefore, would be subject to rights conferred by that statute. Further, a tape recording of an executive session may be subject to subpoena or discovery in the context of litigation. Disclosure in that kind of situation may place a public body at a disadvantage should litigation arise relative to a topic that has been appropriately discussed behind closed doors.

In short, I am suggesting that tape recording an executive session could potentially defeat the purpose of holding an executive session, and that, in my opinion, the Board could, by rule, prohibit the use of a tape recorder at an executive session absent the consent of a majority of the board.

Second, from my perspective, a tape recording of an executive session would fall within the coverage of the Freedom of Information Law. That statute pertains to all agency records and defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

Additionally, in another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Based upon the foregoing, I believe that the tape recording would constitute a "record" that falls within the coverage of the Freedom of Information Law.

With respect to the public's right to obtain the tape recording, as in the case of other records, its content is the primary factor in determining rights of access. 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 (j) of the Law.

In my view, at least three of the grounds for denial are pertinent to an analysis of rights of access.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged

under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101(c) of the Civil Practice Law and Rules. In my view, there need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (I) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, insofar as the tape consists of legal advice or opinion provided by counsel to the client, I believe that it would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

Another ground for denial of potential significance, §87(2)(g), permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical

or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. The communications captured on tape appear to consist of intra- agency material falling within the scope of §87(2)(g).

The remaining provision of possible significance, §87(2)(c), authorizes an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16159

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September 15, 2006

Mr. Anthony Brandon
Dutchess County Jail
150 North Hamilton Street
Poughkeepsie, NY 12602

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brandon:

I have received your letter in which you indicated that you have submitted a request to the Town of Fishkill Police Department on August 24 and, as of the date of your letter to this office, you had not yet received a 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, 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, 2005 (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 compliance with law, a copy of this opinion will be forwarded to 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 19, 2006

E-MAIL

TO: Mary Donna Kappel

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. Kappel:

We are in receipt of your August 8, 2006 request for an advisory opinion concerning the application of the Freedom of Information Law to requests made to the village in which you reside. You indicated that you have filed 10 to 15 requests for records pertaining to a particular builder, and asked "Does the fact that I have filed FOILS (and received information) constitute harassment of the builder?" Further, you asked whether a municipality is required to "keep track of who file[d] what FOIL?"

The Committee on Open Government is authorized to offer advice and opinions pertaining to the Freedom of Information Law. It is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law. While we are not empowered to render legal advice with respect to whether certain behavior rises to the level of criminal harassment, requesting and accessing records which are publicly available under the Freedom of Information Law is the right of any person and clearly does not involve the commission of a crime.

With respect to your other questions, 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 (j) of the Law. From our perspective, with the exception of portions of certain kinds of requests, copies of requests made to the village pursuant to the Freedom of Information Law are accessible under the law.

In our view, the only instances in which request for records may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, 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 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, we believe that requests made under the Freedom of Information Law should generally be disclosed.

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. We 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 our 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 our 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 our opinion, be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, we 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)].

Accordingly, if the Village does not now "track" requests made pursuant to the Freedom of Information Law, an agency would not, in our opinion, be obliged to develop new programs or modify its existing programs in an effort to generate tracking data.

Assuming that the tracking information that you mention exists or can be generated, we believe that it would be available, for §87(2)(g)(i) of the Freedom of Information Law requires that "intra-agency materials" consisting of "statistical or factual tabulations or data" must be disclosed.

On behalf of the Committee on Open Government we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 19, 2006

E-MAIL

TO: Jeff Jasuta

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. Jasuta:

We are in receipt of your request for an advisory opinion concerning the application of the Freedom of Information Law to a request you have made to your school district employer for a record indicating the "current step level of a fellow employee." In general, records reflective the salary of or payments made to present or former public employees are, in our view, clearly available. Similarly, records indicating the pay step level of a particular employee are accessible. In this regard, we offer the following comments.

First, 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. It is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the 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 (j) of the Law. While two of the grounds for denial are relevant to an analysis of rights of access, neither in our opinion could validly be asserted to withhold the information in which you are interested.

Of significance is §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld.

The record in question would constitute "intra-agency material." However, they would appear to consist solely of statistical or factual information that must be disclosed under §87(2)(g)(i), unless a different ground for denial could properly be asserted.

Of primary relevance is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Although somewhat tangential to the matter, we point out 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, we believe that the payroll record and other related records identifying employees and their wages, including their pay step level, must be disclosed, for disclosure would constitute a permissible, not an unwarranted invasion of personal privacy.

On behalf of the Committee on Open Government we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-16162

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September 19, 2006

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 request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Town of Mamakating. You sought copies of minutes of meetings of the Town Board and the Zoning Board of Appeals and were provided some but not others. You indicated your frustration with the Town's "record of likely noncompliance with the Freedom of Information Law and Open Meetings Law" and inquired whether, short of filing a lawsuit, there are courses of action to take to force the Town to comply with the law.

While the Committee on Open Government is authorized to issue advisory opinions concerning application of the Freedom of Information and Open Meetings Laws, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. It is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law. In this regard, we offer the following comments.

First, the Open Meetings Law requires that minutes of meetings be prepared and made available in accordance with §106 of that statute. That section states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter

> which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear that minutes must be prepared and made available within two weeks of the meetings to which they pertain.

We point out 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 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.

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, 2005 (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.

Further, in a related vein, on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S.7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

Finally, from our perspective, insofar as the requested records exist, they must be disclosed. If the Town does not maintain minutes of meetings of the Town Board or the Zoning Board of Appeals, a court could compel those boards to perform functions that are mandated by law.

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."

Lastly, since its enactment in 1974, the Freedom of Information Law has included an "open vote" requirement. Section 87(3)(a) states that "[e]ach agency shall maintain a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, in each instance in which a public body, such as the Town Board or the Zoning Board of Appeals, takes action, a record must be prepared specifying the manner in which each member cast his or her vote. Typically, the record of votes appears in minutes of meetings.

On behalf of the Committee on Open Government 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-1606 3

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September 25, 2006

E-Mail

TO: Ms. Jackie Wiegand

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. Wiegand:

I have received your letter in which you asked whether, as a parent, you can "call a school with the name of a student [you] know is in [your] child's class" to ascertain whether they are in the same class. You wrote that it is your "understanding...that simple names constituted directory information and was thus public information."

In this regard, the Freedom of Information Law generally governs access to records of state and local government agencies in New York. In brief, that law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Relevant in the context of your question is the first 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 the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). In brief, FERPA applies to all educational agencies or institutions that participate in 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.

However, an exception to the rule of confidentiality in FERPA involves "directory information", which is defined in the regulations of the Department of Education to include:

> "....information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended."

Prior to disclosing directory information, educational agencies must provide notice to parents of students or students in order that they may essentially prohibit any or all of the items from being disclosed. Therefore, if an educational agency or institution has adopted a policy on directory information, those items designated as directory information would be available to any person. If, however, an educational agency or institution has not adopted a policy on directory information, it would in my view be prohibited from disclosing records identifiable to students without the written consent of the parents of the student, or the students as the case may be.

Lastly, assuming that a policy on directory information has been adopted and that a school district may disclose a student's name, I do not believe that there would be an obligation to do so in response to an inquiry made by phone. While staff may choose to confirm the identity of a student verbally, in my view, it could require that a request for information about a student be made in writing.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 25, 2006

Ms. Rhonda Brooker
Special Projects Coordinator
New York Central Mutual
1899 Central Plaza East
Edmeston, NY 13335-1899

The staff of the Committee on 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. Brooker:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to a shopping mall for incident reports generated by the mall's private security agency.

In this regard, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

A shopping mall is not a governmental entity and does not perform a governmental function. Accordingly, records maintained by the mall would not be subject to the Freedom of Information Law. Similarly, records maintained by a private security company retained by a mall would not be records of an "agency" subject to the Freedom of Information Law.

Incident reports generated by a local law enforcement agency that is called to the mall should be requested directly from that agency.

On behalf of the Committee on Open Government 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-16165

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September 26, 2006

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 facts presented in your correspondence.

Dear Mr. Diggs:

I have received your letter in which you complained concerning delays in responding to your request for records and an appeal.

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, 2005 (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

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September 26, 2006

Mr. John Prianti
97-A-7099
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Prianti

I have received your letter in which you complained concerning a delay in responding to your request for records.

In this regard, The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

For your information, the person designed by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 27, 2006

Mr. Jack Duffy
[redacted]

Dear Mr. Duffy:

I have received your letter addressed to Secretary of State Jacobs, who serves as a member of the Committee on Open Government. The staff of the Committee is authorized to respond on behalf of its members.

You referred to the Secretary as the "chief custodian" of records for the State of New York and wrote of difficulty encountered in attempting to gain access to divorce records, as well as others involving your "roots." In this regard, I offer the following comments.

First, while he serves as the legal custodian of some records, the Secretary of State is not generally the custodian of State records.

Second, with respect to divorce records, by way of brief background, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not often available to the public, for other provisions of law may grant broad public access to those records. Although §255 of the

Judiciary Law generally requires the disclosure of court records, a separate statute deals directly with records concerning divorce and other matrimonial actions or proceedings. Specifically, access to records relating to matrimonial proceedings is governed by §235(1) of the Domestic Relations Law, which states that:

> "An officer of the court with whom the proceedings in a matrimonial action or a written statement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of act, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination of perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court."

Based on the foregoing, the details of a matrimonial proceeding are considered confidential.

However, subdivision (3) of §235 states that:

> "Upon the application of any person to the county clerk or other officer in charge of public records within a county for evidence of the disposition, judgment or order with respect to a matrimonial action, the clerk or other such officer shall issue a 'certification of disposition', duly certifying the nature and effect of such disposition, judgment or order and shall in no manner evidence the subject matter of the pleadings, testimony, findings of fact, conclusions of law or judgment of dissolution derived in any such action."

While any person may request a "certification of disposition" which indicates that a divorce has been granted, I believe that other records involving separation and divorce are exempt from disclosure, except as provided in subdivision (1) of §235.

Lastly, although the Freedom of Information Law pertains generally to access to agency records and the fees that may be charged for copies of records, provisions of the Public Health Law deal specifically with birth and death records and fees for services rendered relating to searches for and copies of those records; the Domestic Relations Law includes provisions pertaining to marriage records. In brief, §4173 of the Public Health Law permits the disclosure of birth records by a registrar only upon issuance of a court order, or to the subject of the birth record or the parent or other lawful representative of a minor. Similarly, §4174 of the Public Health Law limits the circumstances under which the Commissioner of the Department of Health or registrars of vital records (i.e., town clerks) may disclose death records and specifies that those records are not subject to the Freedom of Information Law. As such, birth and death records are generally confidential and exempt from the disclosure requirements found in the Freedom of Information Law. Section 19 of the Domestic Relations Law pertains to marriage records maintained by town and city clerks and

provides that some aspects of those records are available to the public, while others may be withheld unless there is a showing of a "proper purpose" that would justify disclosure.

The Public Health Law includes provisions that deal directly with genealogical records. Specifically, subdivision (3) of §4174 refers to searches for and the fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., a registrar designated in a city, or town. That provision states that:

> "For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

Further, the Commissioner of Health has promulgated "Administrative Rules and Regulations" pertaining to genealogical research indicating that birth records need not be disclosed unless the subject of the birth record is known to have been deceased prior to 1924; death records need not be disclosed regarding deaths occurring after 1949. The summary also includes a restriction regarding the disclosure of marriage records. However, in an opinion rendered by this office with which the Department of Health has agreed, it was advised that basic information contained in marriage records, such as the names of the parties, the dates of a marriage or marriage application, the duration of the marriage and the municipality of residence of licensees should be made available to any person, unless a request is made for commercial or fund-raising purposes. More intimate information would only be disclosed upon a showing of a "proper purpose."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1616 8

41 State Street, Albany, New York 12231
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September 27, 2006

Mr. Christopher Foye
03-R-6124
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

Dear Mr. Foye:

I have received your correspondence in which you requested various materials 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 does not maintain or have control over records generally, and we do not possess records falling within the scope of your request.

Although you referred to case and judgment numbers, there is no indication of the location or the entity that maintains the records of your interest. If the records sought are in possession of an agency subject to the New York Freedom of Information Law, a request should be made to the records access officer at that agency. The records access officer has the duty to coordinate an agency's response to requests for records.

I note, too, that you referred to the federal Freedom of Information Act, 5 USC §552, which applies only to federal agencies. If the records of your interest are maintained by an agency of state or local government, the federal Act would not apply; the New York Freedom of Information Law would be the applicable statute.

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-16169

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 29, 2006

E-Mail

TO: Mr. Christopher Fiore

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. Fiore:

I have received your letter in which you raised two issues relating to the Freedom of Information Law.

First, you referred to a "convenience fee" charged by a county clerk under which certain records are accessible via the internet through a subscription service requiring the payment of a fee exceeding that ordinarily permitted. In this regard, §87(1)(b)(iii) of the Freedom of Information Law deals with the fees that agencies may charge for reproducing records, and it contains two components. One deals with photocopies of records up to nine by fourteen inches, in which case an agency may charge a maximum of twenty-five cents per photocopy. The other involves any other records, i.e., those larger than nine by fourteen inches or those that cannot be reproduced by means of photocopying, such as tape recordings or computer tapes or disks, in which case the fee is based on the "actual cost" of reproduction.

As I understand the matter, the "convenience fee" does not involve the reproduction of records, but rather a service provided by the County in which subscribers may gain online access to certain records. From my perspective, there is nothing in the Freedom of Information Law that requires agencies to make records available online via the internet. When they choose to do so, they would be acting above and beyond the responsibilities imposed upon them by law, and in those cases, the provisions in the Freedom of Information Law pertaining to fees, in my view, do not apply.

Second, you asked whether there may be any "legal decisions that would preclude a County from posting" the content of an assessment roll on a website. In short, I know of no such decisions. Further, there is currently nothing in any law of which I am aware that would prohibit an agency from posting on a website the kind of information to which you referred.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4126
FOIL-AO- 16170

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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 29, 2006

E-MAIL

TO: Peter Ward

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. Ward:

I have received your letter in which you asked whether the minutes of a library board meeting had to include a notation as to how each member actually voted on all items of business for which a vote was taken."

In this regard, first, §87(3)(a) of the Freedom of Information Law provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3), a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually concerning particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

> "it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the

> performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)].

There is nothing in either the Freedom of Information or Open Meetings Laws that specifies that a vote must be accomplished by means of a roll call or that a vote be "announced exactly as the same time it is cast." In my view, so long as a record is prepared that indicates the manner in which each member cast his or vote, an entity would be acting in compliance with the open vote requirements imposed by those statutes. I note that the decision cited above referred to "open voting" in the context of both open and executive sessions. Since the Open Meetings Law permits public bodies to vote in proper circumstances during an executive session [see §§105(1) and 106(2) and (3)], it is clear in my view that roll call voting in public is not required. That being so, I believe that the procedure that you proposed would be consistent with law.

Lastly, while the record of votes by members ordinarily is included in minutes, there is no requirement that it be included in minutes. While such a record must be prepared and made available, the Court of Appeals, the state's highest court, has held that such a record may be maintained separate from the minutes [Perez v. City University of New York, 5 NY3d 522, 530 (2005)].

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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September 29, 2006

E-MAIL

TO: Mitchell

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 Mitchell:

I have received your letter in which you asked whether "government records (state, city, county government) pertaining to personnel salaries, promotions and civil service title actions [are] foilable." You sought examples of items that may properly be redacted.

In this regard, first, the Freedom of Information Law pertains to agency records, and §86(3) defines the term "agency" to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law pertains to records of entities of state and local government in New York.

Second, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) 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.

Third, 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.

Next, based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of those persons are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

In short, the kinds of items to which you referenced are, in my opinion, clearly accessible, for they relate to public employees' duties. 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.

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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October 3, 2006

Mr. Michael Meehan
c/o Mrs. K & B Andersen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Meehan:

I have received your letter and, as requested, have enclosed a brochure concerning New York's open government laws.

You also sought information concerning power of attorney and Surrogate's Court records. In this regard, issues involving power of attorney are beyond the jurisdiction or the expertise of this office, and we have no information on the subject. Further, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the Freedom of Information Law does not pertain to the courts or court records. This is not to suggest that court records are confidential; on the contrary, court records in many instances must be made available by the court or court clerk. In the case of a Surrogate's Court, §2501 of the Surrogate's Court Procedure Act states in relevant part that:

> "1. The clerk of the court shall keep a record of and be responsible for the proper indexing, filing or recording, as the case may be, collating, arranging, restoring and preserving of all records, documents, books, maps, instruments and other matter specified in this article or by other requirement of law heretofore or hereafter deposited, filed or recorded, of all matters specified by this article or by other requirement of law...
>
> 8. All books and records other than those sealed are open to inspection of any person at reasonable times."

Therefore, insofar as records in which you are interested are maintained by a Surrogate's Court, I believe that they would be available, except to the extent that the records may be sealed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 5, 2006

Ms. Amy McKnight
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. McKnight:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Big Tree Volunteer Fire Company. You inquired whether you may "FOIL the fire companies [sic] accountant directly to get all the requested documents because the fire company is only providing partial answers", and further, in order to pursue legal action against the Fire Company, you asked "what type of paperwork needs to be filed in the Supreme Court?"

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. It is our hope that our opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law. In this regard, we offer the following comments.

First, whether an accountant is an employee of the Fire Company, or whether the Fire Company contracts with an accountant for professional services, it may be that some records are maintained by the accountant physically apart from those maintained by the Fire Company. In our opinion, however, based on the relationship between the Fire Company and the accountant, records pertaining to the Fire Company would fall within the framework of the Freedom of Information Law. That statute pertains to agency records, such as those of a fire company, 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. 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 NY 2d 410. 417 (1995)].

Insofar as records maintained by the accountant are "kept, held, filed, produced or reproduced...*for* an agency", such as the Fire Company, i.e., for the purpose of providing services that would otherwise be carried out by the Fire Company, 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 a private accountant 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 you may have done 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 the accountant maintains records for the Fire Company, to comply with the Freedom of Information Law and the implementing regulations, the records access officer must either direct the accountant to disclose the records in a manner consistent with law, or acquire the records from the accountant in order to review the records for the purpose of determining rights of access.

Second, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. Without knowing more about the nature of the records you have requested or what has already been provided in response, we are not able to render any specific advice regarding the accessibility of any particular record.

Finally, with respect to your question about what documentation is required to pursue an Article 78 proceeding in Supreme Court, we suggest that you consult with an attorney for advice with respect to this issue, or in the alternative, perhaps the Erie County Supreme Court has pertinent information for pro se applicants.

On behalf of the Committee we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Steven J. Walters
Richard G. Boehm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16174

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October 5, 2006

Mr. Eli Fritz
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fritz:

I have received your correspondence and the materials relating to it. You have sought guidance concerning your efforts in obtaining information from the City of White Plains concerning the inspection of "the sewer from [your] basement blocked at the City's sewer line" and work records relating to the City's "Old Farm Circle sewer."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no record "authorizing the videotaping" of the sewer line from your basement blocked at the City's sewer line", the City would not be required to prepare a record on your behalf in an effort to satisfy your request.

Second, insofar as records falling within the scope of your request exist, a potential issue involves the extent to which your request "reasonably describes" the records sought. It has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the

> Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the City, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

Third, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Next, insofar as existing records can be located, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the 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, 2005 (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: Hon. Joseph Delfino
Dennis DeFilippis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16175

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October 5, 2006

Mr. Richard C. Cahn
Cahn & Cahn, LLP
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cahn:

I have received your letter and the materials attached to it. You described repeated requests for records of the Village of Westhampton Dunes that have been fulfilled only in part, despite repeated communications with Village officials and repeated assurances that the records would be made available.

In this regard, I offer the following comments.

First, although doubtful, a possible issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought." I note that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path

> already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Village, to extent that the records sought can be located with reasonable effort, I believe that the requests would have met the requirement of reasonably describing the records. 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 Village staff can locate the records of your interest with a reasonable effort, it would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Village maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Gary Vegliante
Hon. Laura Dalessandro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 5, 2006

Mr. Herbert R. Runyon, 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. Runyon:

I have received your letter in which you requested an advisory opinion concerning "compliance or non-compliance...with the Open Meetings Law" by the Board of Assessment Review of the Town of Greenport.

According to your letter, when you arrived at Town Hall to protest your assessment before the Board, The Board conducted its business in a "conference room...kept closed except to allow persons grieving their tax assessment to enter and exit." You wrote that you "asked the clerk if [you] could observe the proceedings and was told no, that only the person grieving was allowed entry into the conference room."

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, as well as a record of the votes of each member in conjunction with §87(3)(a) of the Freedom of Information Law, which are often included in the minutes.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Assessment Review

STATE OF NEW YORK
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October 5, 2006

Ms. Betsy Combier
The E-Accountability Foundation
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Combier:

I have received your correspondence relating to a request made under the Freedom of Information Law to the New York City Department of Education that does not, in my opinion, "reasonable describe" the records as required by §89(3) of that statute.

The request involved:

> "...all files, records (including electronic or magnetic), books, and papers located in Virginia Caputo's inner office and all files, records (including electronic or magnetic), books, and papers located in Virginia Caputo's outer office(s), or any rooms or hallways of the Office of Appeals and Reviews under her general supervision..."

In this regard, in Konigsberg v. Coughlin [68 NY2d 245 (1986)], the Court of Appeals, the state's highest court, held that a request reasonably describes the record sought when agency staff has the ability, with reasonable effort, to locate and identify the records sought. In my opinion, in consideration of the nature of your request, staff cannot "identify" the records of your interest. If, for instance, numerous filing cabinets are located in the offices of or under the general supervision of a particular employee, I do not believe that a request for all records contained in those filing cabinets or the employee's inner and outer offices would identify records in any meaningful way or, therefore, reasonably describe records.

In considering a request that may have been similar, the court upheld the agency's denial, stating that:

> "Petitioner's actual demand transcends a normal or routine request by a taxpayer. It violates individual privacy interests of thousands of persons...and would bring in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already heavily burdened bureaucracy" (Fisher & Fisher v. Davison, Supreme Court, New York Cty., Oct. 6, 1988).

You also sought clarification concerning the time within which the Department must respond to requests. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

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, you asked why this office "does not take the NYC Office of Legal Services [of the Department of Education] to task about their actions." In short, the Committee on Open Government has the authority to provide advice and guidance concerning the Freedom of Information Law. It is not empowered to enforce that statute or otherwise compel an agency to grant or deny access to records.

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Best
Susan W. Holtzman

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October 5, 2006

E-Mail

TO: Mr. Barlow Humphreys

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Humphreys:

I have received your letter in which you raised issues relating to both the Open Meetings Law and the Freedom of Information Law.

You wrote that you serve on the Town of Somers Master Plan Committee and "asked that a 2 minute exchange of conversation in a recent meeting be included in the minutes of the meeting." Your request to do so was denied by the Chairman, as was your request for "the tape transcription of the meeting."

In the regard, first, the Open Meetings is applicable to meetings of public bodies, and §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."

It has been held that advisory bodies are not required to comply with the Open Meetings Law [see e.g., NYPRIG 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)]. However, based on our conversation, it appears that the Committee may 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.

Second, §106(1) of the Open Meetings Law pertains to minutes of open meetings of public bodies and states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Based on the foregoing, minutes need not consist of a verbatim account of everything said at a meeting; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements.

I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a public body requests that a statement or exchange be entered into the minutes, the body must determine, under its rules of procedure, whether to record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181). From my perspective, a special board, like other public bodies, functions by means of action taken by a majority vote of its total membership. Pertinent is §41 of the General Construction Law, entitled "Quorum and majority", which states that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of a public body.

In the context of the issue presented, I do not believe that a single member could insist or require that his/her comments or an exchange be included in minutes. However, I believe that you or any member of the Committee could introduce a motion to include the exchange in the minutes. If the motion is approved by a majority vote of the Committee's total membership, I believe that the minutes must be amended accordingly, notwithstanding the preference of the Chairman.

Lastly, based on the language of the law and judicial precedent, a tape recording of an open meeting is accessible to any person under the Freedom of Information Law.

That statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever

> including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when a municipal board maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law, irrespective of the reason for which the recording was prepared.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. More importantly, judicial precedent 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.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 5, 2006

Ms. Margaret C. Kearney
[redacted]

The staff of the Committee on 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. Kearney:

I have received your letter and the materials attached to it. You have sought guidance concerning a request made to the Village of Fleischmanns for "minutes and other Village documents."

In this regard, with respect to minutes of meetings, in my opinion, 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 draft or final.

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.

A potential issue relating to another aspect of your request involves whether it "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I refer to that portion of the request involving building permits and certificates of occupancy issued by the Village from January through August 25, 2006. The matter involves the manner in which those records are kept and retrieved. If they are kept chronologically, they may be easy to locate. If, however, they are kept by address, and if hundreds of files would have to be reviewed individually to locate the records at issue, it might be found by a court that that portions of your request does not reasonably describe the records [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Lastly, with respect to records other than minutes that can be found with reasonable effort, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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, 2005 (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: Hon. Lorraine DeMarfio

FOIL-AO-16180

From: Robert Freeman
To: Karen LaFiandra; Terry Campanella
Date: 10/6/2006 8:57:10 AM
Subject: Re: Delay of FOIL Information re. A. Albers Invoices

The FOIL provides in §89(3) that if more than five business days is needed to determine rights of access, the receipt of the request must be acknowledged within that time, including "a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied", and that the approximate date cannot exceed twenty business days, except in rare instances that require an explanation of the reason for further delay.

In short, the issue is whether a delay in disclosure of as long as twenty additional business days following the acknowledgment of the receipt of a request is "reasonable under the circumstances." If the records are easy locate, clearly public and not unusually voluminous, a delay of up to twenty business days would, in my view, inconsistent with law.
>>> "Terry Campanella" <tcampanella@SOCSD.ORG> 10/6/2006 8:20:11 AM >>>

On September 28, 2006, I sent you a letter stating that the information
you requested, if available, will be sent to you by October 27, 2006,
which is twenty business days after acknowledgement of the receipt of your
FOIL, as stated in the law.

Terry

Karen LaFiandra <[redacted] on Friday, October 06, 2006 at
8:07 AM -0500 wrote:
>Dear Terry,
>
>On September 21st, I submitted a FOIL for Amy Albers invoices. I did
>not receive a response from you yet. It is now beyond the five days
>allowed by law. Would you please respond to me in e-mail form today, as
>I need to know when I can expect this information. If a response has
>gone out by mail, would you please send it in an e-maill attachment
>today. According to Robert Freeman, Executive Director of the Committee
>on Open Government, invoices and information that is easy to find should
>not take more than a couple of days to provide. This is public
>information to which we are entitled. I am beginning to see a pattern
>whereby information is not being provided in a timely manner. We are
>getting responses on after five days of the request, and then we are
>given a date of 20 business days beyond that. According to Robert
>Freeman, this is not acceptable when the information is easy to find.
>Thank you.
>
>Karen LaFiandra

>
>

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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CC: annmarie uhl; jacobs.BOE@qmail.com; Rosemary Pitruzzella; SSpiroBOE@msn.net

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 16181

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 6, 2006

Ms. Kathy Barrans
Special Projects Producer
WNYT Albany
P.O. Box 4035
Albany, NY 12204

The staff of the Committee 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. Barrans:

I have received your letter in which you requested an advisory opinion concerning rights of access to "a copy of the taped interview that Bethlehem Police conducted of Christopher Porco."

The events associated with Mr. Porco were widely reported and culminated in a jury trial in which he was found guilty of the murder of his father and the attempted murder of his mother. Nevertheless, the Office of the Albany County District Attorney denied your request, contending that:

> "The request seeks information related to an ongoing, pending matter. Statements of a defendant, co-defendant and/or witnesses obtained in preparation for trial are exempt, Matter of Knight v. Gold, 53 AD2d 694. Court records, motions and transcripts are similarly exempt."

The trial judge had determined that the tape was not admissible as evidence.

Following the denial of your request, you appealed and suggested that the trial judge indicated that the recording should be made available to the news media. Despite your efforts to gain confirmation of your contention, you apparently did not receive any written confirmation from the judge. In response to the appeal, Paul F. Collins, the person designated to determine appeals directed that:

> "...within five business days from receipt of this letter, the Parties are requested to respond, in writing, as follows: first, WNYT is requested to provide either a copy of the June 15th order, or a copy of pertinent

> sections of the transcript of the proceeding in which the alleged order issued; second, both WNYT and the D.A. are requested to advise as to whether portions of the record requested were presented or revealed, in any manner whatsoever, in a court proceeding open to the public, and if so, to further provide a description of the portions revealed; finally, the D.A. is requested to specifically address and articulate a position with regard to the alleged June 15th order, and, to provide a particularized articulation of specific exemption(s) claimed."

As of the date of your letter to this office, no additional information of substance had been submitted in accordance with the direction provided by Mr. Collins.

In this regard, I offer the following comments.

First, although I believe that Mr. Collins clearly sought to resolve the matter fairly, his response, in my view, was inconsistent with the direction found in §89(4)(a) of the Freedom of Information Law concerning the right to appeal a denial of a request for a record or records. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

While nothing in the language quoted above precludes a person denied access from offering facts or arguments encouraging disclosure, there is no requirement that he or she do so. Rather, the affirmative obligations imposed by §89(4)(a) involve an agency's duty to render a determination within ten business days of the receipt of an appeal by taking one of two courses of action: to grant access to the records, or to fully explain in writing the reasons for further denial. Neither of those actions was taken. That being so, I believe that your appeal may be deemed to have been denied and that you may, should you choose to do so, seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

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 (j) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that

it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception different from that cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the Office of the District Attorney has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by that agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the

grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In short, I believe that the blanket denial of the request was inconsistent with law. The decision upon which the denial is based, Knight v. Gold, supra, was rendered in 1976, under provisions of the Freedom of Information Law as originally enacted. That statute was repealed and replaced with the current Freedom of Information Law, which became effective on January 1, 1978. It is noted that the original statute indicated that "investigatory files compiled for law enforcement purposes" could be withheld [see original Law, formerly §88(7)(d), Public Officers Law]. In contrast, the current provision pertaining to records compiled for law enforcement purposes, §87(2)(e) limits the ability of an agency to deny access to those instances in which disclosure would result in some sort of harm. Specifically, §87(2)(e) permits an agency to deny access to records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The provision quoted above indicates that records might justifiably be withheld in certain circumstances, but that those same records may later be accessible, for the harmful effects of disclosure may have, in essence, disappeared. If you had requested the records at issue soon after the event or at any time prior to the trial, it is likely that disclosure would have interfered with an investigation or judicial proceeding or deprived the defendant of the right to a fair trial. At that time, the records could likely have been properly withheld under subparagraphs (i) and (ii). However, because the trial, a lengthy proceeding involving several weeks, the testimony of dozens of witnesses and the introduction of scores of items into evidence, resulted in a guilty verdict, the harmful effects of disclosure described in §87(2)(e) would no longer arise.

In an Appellate Division decision that is often cited in the context of records relating to law enforcement, Pittari v. Pirro, [258 Ad2d 202 (1999)], it was stated that:

> "[t]he question is whether the nature of the records sought and the timing of the FOIL request rendered those records exempt from disclosure under FOIL. The Court of Appeals, in *Matter of Fink v.*

Lefkowitz, 47 N.Y.2d 567, 572, 419 N.Y.S.2d 467, 393 N.E.2d 463 noted:

> '[T]he purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution'" (id., 169).

The timing in this instance is clearly different from that in Pittari. As I understand the matter, the defendant in that case sought records under the Freedom of Information Law *prior* to discovery, for the court found that "[i]f a criminal proceeding is pending, mandating FOIL disclosure would interfere with the orderly process of disclosure in the criminal proceeding set forth in CPL article 240" (id., 171). In contrast, you have requested records *after* conviction and the conclusion of the proceedings. Consequently, the harm sought to be avoided by the court in Pittari is not a consideration, and §87(2)(e) in my view cannot validly serve as a basis for a denial of access.

Lastly, the only exception to rights of access likely to be pertinent in determining rights of access at this juncture in my opinion would be §87(2)(b), which authorizes an agency to deny access insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In consideration of the disclosures made over the course of months and during the trial regarding the defendant, it appears unlikely that disclosure would result in an unwarranted invasion of his privacy. However, the records might include references to others, and it is possible that disclosure of those portions of the records would, if disclosed, result in an unwarranted invasion of their privacy. To that extent, I believe that those portions may be redacted, followed by the disclosure of the remainder.

I note, too, that while the records at issue were prepared by an agency, the Town of Bethlehem Police Department, the Court of Appeals rejected a claim by the New York City Police Department that similar records could be withheld under §87(2)(g) concerning "intra-agency" materials. In Gould, the Court determined that the exception is intended to deal with internal governmental communications, and that statements made by members of the public, such as the defendant in this instance, fell beyond the scope of that exception. Further, although the courts are not subject to the Freedom of Information Law, it has been held by the Court of Appeals that when records emanating from a court come into the possession of an agency, such as a police department or the office of a district attorney, they constitute agency records falling within the coverage of the Freedom of Information Law [Newsday v. Empire State Development Corp., 98 NY2d 746 (2002)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, and to attempt to avoid the initiation of litigation, copies of this opinion will be forwarded to Mr. Collins and the Office of the District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul M. Collins
Hon. David Soars
Bradley A. Sherman

From: Robert Freeman
To: [redacted]m
Date: 10/10/2006 11:54:54 AM
Subject: Dear Mr. Murray:

Dear Mr. Murray:

I have received your letter in which you sought guidance in an effort to locate your uncle. You indicated that he retired from teaching in the East Meadow School District and moved to Florida.

In this regard, the Freedom of Information Law, §89(7), specifies that the home address of either a present or former public employee need not be disclosed. It is emphasized, however, that an agency, such as a school district, may choose to disclose employees' home addresses. That being so, it is suggested that you contact the District, with proof that you are indeed the former employee's relative, explaining the reason for your request, and indicating your understanding that the Freedom of Information Law neither grants access to the residence address nor prohibits its disclosure.

In the alternative, you might merely request the zip code of your uncle's current residence. The zip code would enable you to locate the municipality in which he lives. From there, I would conjecture that Florida law requires the disclosure of voter registration or real property assessment records that include residence addresses.

I hope that the foregoing will be useful to you.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

16183

From: Robert Freeman
To: thaynes@ogdensport.com
Date: 10/10/2006 10:16:34 AM
Subject: Dear Ms. Haynes:

Dear Ms. Haynes:

I have received your letter in which you asked whether when an agency's records "are not already in electronic format", it is "required to put them in electronic format (via scanning or creating a new document) for the recipient."

In this regard, in our view, there is no obligation to scan records or create a new document in the context of your question. If, for example, records are maintained only on paper, and as in the case of this office, they were prepared before gaining the ability to store their content electronically, I do not believe that this agency or another in similar circumstances would be required to scan the records or create new records to accommodate a person seeking to gain access to them.

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-16184

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 10, 2006

E-MAIL

TO: David Van Pelt

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. Van Pelt:

I offer you congratulations concerning the positive events in your life and appreciate your kind words.

With respect to the issue that you raised, although the Freedom of Information Law generally provides broad rights of access, a separate statute requires that minutes of grand jury proceedings and related records are confidential. Further, I know of no provision that authorizes disclosure of those records after a certain period of time.

The initial ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

Based on the foregoing, grand jury minutes or other records "attending a grand jury proceeding" would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1601 85

41 State Street, Albany, New York 12231
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October 10, 2006

Mr. Michael K. Meehan
[redacted]

Dear Mr. Meehan:

I have received your letter in which you raised questions concerning power of attorney as it relates to Surrogate's Court proceedings. Additionally, you sought advice concerning access to "medical records from the Veterans Hospital." In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning the Freedom of Information Law.

The issues that you raised are beyond the jurisdiction or expertise of this office. I note, however, that federal and New York laws generally provide the subjects of medical records with the right to inspect and obtain copies of medical records pertaining to them. It is my understanding that both the federal Privacy Act and HIPAA include provisions authorizing the subjects of records to gain access to them in the context of your question. Similarly, providers of medical services in New York are subject to similar requirements under §18 of the Public Health Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 10, 2006

E-MAIL

TO: Gregg Deitch

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. Deitch:

I have received your letter in which you indicated that you received notification on May 4 that your request for records would be honored within twenty days. As of October 6, however, you apparently 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, 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, 2005 (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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-4271
FOIL-AO-16187

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October 10, 2006

Mr. William Motovick
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Motovick:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information and Open Meetings Laws to questions you raised at a public meeting of the Hancock Town Board. Specifically, you indicate that you were 'not allowed to ask questions at the monthly Board meeting," that the Town attorney directed Board members not to answer your questions, and that you were required to submit your questions in writing to the Town Attorney. Accordingly, you submitted the following written requests:

> "1. Who is responsible for obtaining floodplain development permits - the landowner or the contractor doing the work?
>
> 2. Why haven't I received my Certificate of Compliance for my pond work? I have met all of the Town's requirements.
>
> 3. Why was a permit issued to Mr. Rubera (#2-02) after the work was done and while I was complaining of property damage?
>
> 4. Myself and two neighbors moved our r.o.w. (a private road) to avoid mud. Only I was ticketed and fined $250. Why weren't my neighbors?
>
> 5. If I see unpermitted and/or non-compliant floodplain work going on that could cause problems during a flood who do I report it to?
>
> 6. Who does the Code Enforcement Officer answer to? Does he communicate with Board members regarding his job at all during the week?"

By return correspondence the Town attorney refused to provide the requested information.

With respect to your questions about speaking at a public meeting, while individuals may have the right to express themselves and to speak, we do not believe that they necessarily have the right to do so at meetings of public bodies. It is noted that there is no constitutional right to attend meetings of public bodies. Those rights are conferred by statute, i.e., by legislative action, in laws enacted in each of the fifty states. In the absence of a statutory grant of authority to attend such meetings, we do not believe that the public would have the right to attend.

In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies, to listen to their deliberations and observe the performance of public officials. However, as you are likely aware, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. As such, it is reiterated that, in our opinion, there is no constitutional right to attend meetings.

Within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which we are aware provides the public with the right to speak during meetings, we do not believe that a public body is required to permit the public to do so during meetings. Certainly a public body may permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed regarding the privilege to speak that are reasonable and that treat members of the public equally. From our perspective, a rule authorizing any person in attendance to speak no longer than a maximum prescribed time on agenda items, and those items only, would be reasonable and valid, so long as it is carried out reasonably and consistently.

Second, and with respect to the written questions which you submitted, we note that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may in many circumstances 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, Town officials in our view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive.

On behalf of the Committee on Open Government we hope this is helpful to you. At your request, a copy of this opinion will be sent to the Town Supervisor and the Town Attorney.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt
cc: Supervisor Sam Rowe
Leonard Sienko

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16188

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 10, 2006

Mr. Jesus Aquilera
82-A-6287
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Aquilera:

I have received your letter in which you appealed a denial of access to records by the Office of the New York County District Attorney to this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. The provision dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

With respect to rights of access, when an autopsy report or other record of an examination of a death is prepared in New York City by the Office of the Chief Medical Examiner, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts those records from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994]. I note that in Mitchell, the court found that the applicant was "not making his request merely as a public citizen"

under the Freedom of Information Law, "But, rather, as someone involved in a criminal action that may be affected by the content of these records and thereby has a substantial interest in them." On the basis of Mitchell, it would appear that your ability to gain access to autopsy reports and related records in question would be dependent upon your capacity to demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

Lastly, if the autopsy report was made available to you or your attorney, unless it can be demonstrated that neither you nor your attorney possess a copy, it has been held that the Office of the District Attorney would not be required to make the report available a second time [see Moore v. Santucci, 151 AD2d 677 (1989)]. In that event, it is suggested that you obtain a copy from your attorney or from the court to which the report was submitted.

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: Patricia J. Bailey

16189

From: Robert Freeman
To: [redacted]
Date: 10/10/2006 10:01:20 AM
Subject: Dear Mr. Sanders:

Dear Mr. Sanders:

I have received your inquiry concerning the scope of "the New York State equivalent of the federal FOIA..."

In the regard, the New York Freedom of Information Law (FOIL) is generally applicable to records maintained by or for any agency of state or local government [see definition of "agency", §86(3)]. That being so, the City of Buffalo is clearly required to comply with FOIL.

I note that each agency is required to designate one or more "records access officers". The records access officer has the duty of coordinating an agency's response to requests for records, and a request should be directed to that person. It is suggested that you contact the office of the Mayor to ascertain the identity of the records access officer.

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-16190

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 10, 2006

Vivian Shevitz, 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 Ms. Shevitz:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to records reflecting the underlying reason for termination of an Assistant Superintendent employed by the Katonah-Lewisboro Board of Education. In brief, the probationary appointment of the Assistant Superintendent was terminated by resolution of the Board without explanation at a public meeting, and questions have arisen as to what information, if any, is required to be released to the public concerning the Board's rationale for making such decision and whether the potential for litigation should impact the determination to release information. In an effort to address the concerns raised by your inquiry, we offer the following comments.

First, it is noted at the outset 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 in many circumstances 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, District officials in our view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive.

Second, the possibility that records sought might be pertinent to or used in litigation is, in our view, largely irrelevant. As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62

NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency or threat of litigation would not, in our opinion, affect either the rights of the public or a litigant 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 (j) of the Law. Particularly relevant to an analysis of rights of access, or conversely, the ability to withhold the records sought, is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of 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 the 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, it is emphasized that in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

Further, you wrote that the Board approved the following resolution: "RESOLVED, that upon the recommendation of the Superintendent of Schools, the Probationary appointment of John Spang and his employment shall be terminated....". Because the Superintendent's recommendation was explicitly relied upon as the basis for termination, in consideration of judicial precedent, if the recommendation exists in writing, we believe that it must be disclosed to comply with the Freedom of Information Law.

In a decision in which an investigator's findings were adopted by the decision maker, the Borough President of Staten Island, the Appellate Division, Second Department, found that the record was public. The Court stated that:

> "FOIL protects inter-agency or intra-agency materials which are not '**** final agency policy or determinations'...The exemption for intra-agency materials does not apply to final agency policy or decisions. Here, Molinari not only had relied on and incorporated the findings of the investigator, he expressly adopted them in explaining his actions. Having done so, he is precluded from claiming that the memoranda are exempt from disclosure" [New York 1 News v. Office of the President of the Borough of Staten Island, 647 NYS2d 270, 271 (1996)].

Similarly, in Miller v. Hewlett-Woodmere Union Free School District (Supreme Court, Nassau County, NYLJ, May 16, 1990), the Court determined that a recommendation that became a decision had to be disclosed, finding that:

> "It is apparent that the Superintendent unreservedly endorsed the recommendation...adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting 'the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers'...but the Court bears an equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intra-agency views, when deliberation has ceased and the consensus arrived at represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of governmental decision making."

Based on the foregoing, if it exists, the record of the Superintendent's recommendation must be made available to the public.

Finally, with respect to questions concerning the propriety of disclosing information acquired during an executive session we not a recent decision by the Commissioner of Education, Application of Nett and Raby (October 24, 2005), in which the Commissioner determined, in brief, that a member of a board of education may be removed from office if s/he discloses information acquired during an executive session.

In our opinion, although we are not suggesting that it be ignored, the Commissioner's decision is erroneous, for matters discussed during executive session would be "confidential" only on rare occasions. While we would not recommend that a member of a school board should knowingly fail to comply with law, attached is an advisory opinion (OML-AO-3449) that describes in detail the rationale for our disagreement with the Commissioner. Most importantly, we do not intend to suggest that such disclosure would by uniformly appropriate or ethical; unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which public

bodies are intended to operate. Nevertheless, unless there is a statutory bar to disclosure, we do not believe that information acquired during an executive session is prohibited from being disclosed.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Bruce Pavolow
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1619

41 State Street, Albany, New York 12231
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October 12, 2006

Mr. Darrell Jones
93-A-1836
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. Jones:

I have received your letter in which it appears that you requested a police voucher from the New York County Office of the District Attorney. That office indicated that there was only one voucher in your file that was previously provided to you. You contend that that is not the voucher of your interest.

In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification. It is suggested, too, that you offer detail or an explanation indicating the reason for which there may be an additional voucher.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 16192

41 State Street, Albany, New York 12231
(518) 474-2518
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October 12, 2006

Mr. Nathaniel Jay
05-A-0151
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. Jay:

I have received your correspondence in which you complained that the Nassau County Police Department withheld or redacted certain records that you requested. You indicated that no justification for the deletions was referenced.

In this regard, I offer the following comments.

Since the issue pertains to the absence of a justification for the deletions, I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the Freedom of Information Law. Section 1401.2 (b)(3) states that an agency's records access officer is responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor." Based on the foregoing, the reasons for a denial of access must be stated in writing. This is not to suggest that any such reasons must be explained in an exhaustive manner. As you may be aware, later in the process of seeking records, if an appeal is denied, §89(4)(a) provides that the reason must be "fully explain[ed] in writing."

I hope that I have been of assistance.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1161

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 12, 2006

Mr. Reshawn Galloway
04-A-4096
Wende Correctional Facility
3040 Wende Road
Alden, NY 14004-1187

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Galloway:

I have received your letter in which you indicated that you appealed a denial of access to your request to the Nassau County Correctional Center and, as of the date of your letter to this office, you had not received a response to 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, 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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16194

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 12, 2006

Mr. DeAndre Williams
99-A-0052
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Williams:

I have received your letter in which you indicated that you were denied access to a copy of a photo of yourself. You appealed the denial, and the ensuing determination stated that "the photographs are attached to records with certain words and identification materials, and therefore, a photocopy of the document could be used as a photo identification, and therefore, is not allowed for security reasons." The determination also stated that the photograph itself cannot be extracted from the document.

In this regard, I offer the following comments.

There are situations in which it is possible or likely that portions of records may be both accessible and deniable, I believe that agency staff must review the records to determine which portions may justifiably be withheld. In Gould v. New York City Police Department 87 NY2d 267 (1996)], the Court of Appeals stated that a categorical denial of access to records in a circumstance of that kind is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that "complaint follow up reports" could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), one of the exceptions cited in the denial of your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275).

As such, I believe that the Department of Correctional Services' contention that the photograph cannot be extracted from the document may be inconsistent with law. With the use of

a photocopy machine and a piece of paper covering the portions of the record that can properly be withheld, it would appear that the photograph might be reproduced without disclosing information that might 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1601 95

41 State Street, Albany, New York 12231
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October 12, 2006

Mr. Steven Rojas
04-A-2725
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. Rojas:

I have received your letter in which you complained that the New York City Police Department acknowledged receipt of your Freedom of Information Law and indicated that it would need an additional three months to render a determination.

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, 2005 (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, you asked how you could obtain a copy of the Department's subject matter list. In this regard, §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."

I note that 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. The records themselves may be accessible or deniable, in whole or in part, under other provisions of the Freedom of Information Law. The subject matter list may be requested from the Department's records access officer.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1616

41 State Street, Albany, New York 12231
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October 12, 2006

Mr. Willard Chandler
94-B-1737
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. Chandler:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records under the Freedom of Information Law from the Buffalo City Court.

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 (i.e., §255 of the Judiciary Law). 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.

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-16197

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 12, 2006

Mr. Matthew Williams
05-A-0135
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. Williams:

I have received your letter in which you complained that you requested records from the Office of the Bronx County District Attorney and that office indicated that a determination would be made in sixty days. You sent numerous follow up letters and have received no responses.

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, 2005, 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: Jason Medina

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16198

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October 12, 2006

Mr. Anthony F. Wise
78-A-3134
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. Wise:

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 response to your request or appeal directed to the Dutchess County District Attorney's Office.

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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16199

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October 12, 2006

Mr. Mark James
96-A-2884
Five Points Correctional Facility
P.O. Box 119
Romulus, NY 14541

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. James:

I have received your correspondence in which you raised a variety of questions concerning the placement of persons in double cells and the removal of personal belongings from cells.

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning access to government information, primarily under the Freedom of Information Law. This office has neither the expertise nor the jurisdiction to answer questions concerning the placement of persons in double cells or provide information concerning the removal of belongings.

You also asked if you could obtain videotapes of incidents at your facility. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

In a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

> "...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution. Moreover, respondents' regulations require disclosure to news media

> description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7 NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff under §87(2)(f).

Further, in another case involving videotapes of events occurring at a correctional facility, in the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. However, other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy and endanger life and safety [see 174 AD2d 212 (1992)].

Lastly, the Freedom of Information Law pertains to existing records. If your facility does not maintain or has not preserved an audio/videotape, the Freedom of Information Law would not apply, and it has consistently been advised that an agency is not required to honor an ongoing or prospective request for records that do not yet exist. Also, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16200

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October 12, 2006

Mr. Joseph Madden
05-B-1272
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Madden:

I have received your letter in which you indicated that you were denied access to "merit board release rates and initial parol board appearances release rate" for the last twelve months by your correctional facility because the request was too broad.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request for information. If no records exist reflective of the release rates, the request would not involve existing records, and the Freedom of Information Law would not apply.

Second, if records do exist concerning release rates, the issue appears to be whether the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. It has been held by the State's highest court that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system.

While I am unfamiliar with the record keeping systems of the facility, 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 your facility 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 facility maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16201

41 State Street, Albany, New York 12231
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October 13, 2006

Mr. Demetrius Williams
05-A-3131
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Williams:

I have received your letter in which you allege that a videotape of an incident that occurred in the Carey Gardens Housing Unit has been altered by the New York City Police Department. You asked how you could obtain a copy of the policies pertaining to video surveillance.

In this regard, I offer the following comments.

First, §89(3) of the Freedom of Information Law states in relevant part that when an agency makes a record available, upon request, the agency shall "certify to the correctness of such copy if so requested." If you consider it worthwhile, you could request such a certification that the copy of videotape is a true copy.

Second, with respect to the policies, the Freedom of Information law pertains to existing records and §89 (3) states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the information sought does not exist in the form of a record or records, the Department would not be obliged to prepare new records to satisfy your request.

Third, to the extent that your request involves existing records, 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 (j) of the Law. From my perspective, three of the grounds for denial are relevant to an analysis of rights of access.

Specifically, §87(2)(g) states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the records sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

A second provision of potential significance is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations of judicial proceedings...
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency

> records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized

> methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

While I am unfamiliar with the records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

Lastly, the remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the records, if they exist, might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary. You may direct your request for the policies to the records access officer at 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11202

41 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 13, 2006

Ms. Georgia Charlton
04-G-0284
Bedford Hills Correctional Facility
P.O. Box 1000
Bedford Hills, NY 10505-2499

The staff of the Committee on 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. Charlton:

I have received your letter in which you indicated that you have encountered difficulty in obtaining an arrest warrant. You also asked how you could obtain medical information released by a hospital pertaining to your child and stated that you wrote to the hospital but, as of the date of your letter to this office, you had not received a response.

In this regard, I officer the following comments.

First, I point out that §120.80(2) of the Criminal Procedure Law states in part that:

> "[U]pon request of the defendant, the police officer must show him the warrant if he has it in his possession. The officer need not have the warrant in his possession, and, if he has not, he must show it to the defendant upon request as soon after the arrest as possible."

As such, it would appear that a warrant should be available to you from either the police department that made the arrest or the court in which the warrant was introduced in a proceeding.

Second, §18 of the Public Health Law deals specifically with access to patient records. In brief, that statute prohibits disclosure of medical records to all but "qualified persons." Subdivision (1)(g) of §18 defines the phrase "qualified person" to mean:

> "any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law,

> or a parent of an infant, a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record pursuant to paragraph (c) of subdivision two of this section, or an attorney representing or acting on behalf of the subject or the subjects estate."

If you are a "qualified person", you would be entitled to obtain the medical information regarding your child. You may obtain additional information by writing to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16203

41 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 13, 2006

Mr. Keith Foster
NYSID 55817553
11-11 Hazen Street
E. Elmhurst, NY 11370

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Foster:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records under the Freedom of Information Law from the Brooklyn Criminal Court.

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 (i.e., §255 of the Judiciary Law). 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.

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-16204

41 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 13, 2006

E-MAIL

TO: Carole Dwyer

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. Dwyer:

I have received your inquiry in which you referred to materials sent by the Lafayette School District's attorney to District officials that are labeled "highly confidential." You asked whether "that means you cannot share the information from his memorandums."

In this regard, as you are likely aware, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) 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, 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.

In my opinion, you, as one member of a Board consisting of seven members, would not have the authority to waive the attorney-client privilege on behalf of the Board unilaterally; only a majority of the Board, in my view, would have the authority to do so. However, I note that not every communication between an attorney and his/her client (in this instance, the Board and District officials) necessarily would fall within the scope of the privilege. It is my understanding that the privilege applies only when communications involve expertise that only an attorney can offer. When an attorney offers an opinion or guidance that is not uniquely the product of legal training and expertise, I do not believe that the attorney-client privilege would apply or, therefore, that, a communication of that nature could be characterized as confidential. In addition, for example, insofar as the nature of legal advice is disclosed by means of discussion occurring during an open meeting of the Board of Education or disclosed to a person other than the client, I believe that the privilege would be waived. In that instance, the material that had been subject to the attorney-client privilege and confidential would no longer be confidential.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1602

41 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 13, 2006

E-MAIL

TO: Hon. David C. McFadden

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 Mayor McFadden:

I have received your letter concerning "guidelines" that might indicate "what should and should not be posted on the Village Website."

In this regard, there are no guidelines or provisions of law of which I am aware that offer direction concerning the kinds of materials that government agencies should post or avoid posting on websites. From my perspective, to be more accessible to the public and reduce the burden on government, records that are clearly public and frequently requested or of significant interest to the public should generally be made available online. When the public obtains records through the internet, no staff time is needed to respond to a written request made under the Freedom of Information Law.

Nevertheless, it has been recommended that agencies be cautious and thoughtful in considering the nature of records made available on their websites, and that particular attention should relate to the protection of privacy. There are innumerable instances in which records or portions of records, such as names and addresses, are and have historically been available to the public. However, the wisdom of placing those items on a website is, in my opinion, questionable. 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.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16206

41 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 13, 2006

Mr. Yato Jenkins
89-A-1903
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. Jenkins:

I have received your letter in which you complained that you requested records from the Kings County Office of the District Attorney and that office informed you that a response could be expected in 180 days. You sent numerous follow up letters, but never 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)].

I 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 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: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16207

41 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 13, 2006

Ms. Veronica Sullivan
94-G-0633
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 information presented in your correspondence.

Dear Ms. Sullivan:

I have received your letter in which you indicated that you have encountered difficulty in obtaining court transcripts.

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 (i.e., §255 of the Judiciary Law). 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.

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-16208

41 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 13, 2006

Michael Melendez
91-A-9649
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Melendez:

I have received your letter and the correspondence attached to it. You requested various records that your believe are maintained in your institutional file, but were informed that they were not in the file. You contend that your request was not processed in compliance with 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." 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-16209

41 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 13, 2006

Mr. Herbert Long
04-A-3956
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. Long:

I have received your letter in which you indicated that you requested records from your facility but were denied access because you had insufficient funds in your account.

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. I point out that there is nothing in that statute pertains to the waiver of fees. Further, in a decision involving a request for a waiver of fees by an inmate who sought records from an office of a district attorney, it was held that an agency may assess a fee in accordance with the Freedom of Information Law, notwithstanding the inmate's status as an indigent person [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)]. Therefore, irrespective of one's status, i.e., as a litigant or a poor person, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with its rules promulgated under §87(1)(b)(iii) of that statute.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

OML-AO-4274
FOIL-AO-10210

From: Robert Freeman
To: [redacted]
Date: 10/13/2006 3:02:23 PM
Subject: I have received your inquiry in which you asked "whether there is any sort of prohibition on town bo

I have received your inquiry in which you asked "whether there is any sort of prohibition on town board members discussing persons by name as examples of persons who may have in the past violated or may currently be violating a town code...."

In short, I do not believe that there is any such prohibition.

When a record indicates that a person has engaged in a violation of the town code or a local law, that record, in my view, is clearly accessible under the Freedom of Information Law. Moreover, it has been held that the Freedom of Information Law is permissive, for it permits agencies to deny access to records in certain circumstances, but it does not require that they do so.

Similarly, the Open Meetings Law permits public bodies, such as town boards, to enter into executive session to discuss certain topics in private. However, there is no requirement that they do so. As you may be aware, before a public body may conduct an executive session, a motion to do so must be made in public, indicating the subject, and approved by a majority vote of the total membership of the body. That being so, if a motion to enter into executive session fails to be approved, a public body may choose to discuss the matter in public.

In sum, again, I know of no law that would prohibit town board members from publicly identifying or discussing persons who have violated or are now in violation of a provision of a town code.

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-16211

41 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 16, 2006

Mr. John Vera Moreno
98-A-0175
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. Moreno:

I have received your letter in which you raised a variety of questions concerning whether violations of law had occurred.

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 does not have the authority to determine whether violations of law occurred; only a court has that authority. I point out, too, that many of the questions raised in your letter have been answered in past advisory opinions. To that extent, this office will not revisit those questions or reiterate the content of previous opinions.

Since your questions address a variety of issues, the following general comments will attempt to answer those questions.

First, several concern the preparation of documents. Here I point out that §89(3) of the Freedom of Information Law provides that an agency is not required to create a record in response to a request.

Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) also provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

It is noted that the Court of Appeals, the state's highest court, held in Rattley v. New York City Police Department [96 NY2d 873 (2001)] that the Freedom of Information Law does not specify the manner in which an agency must certify that records cannot be located, and that a certification need not be prepared by the person conducting a search for records. In short, a written certification that a diligent search was made is sufficient to comply with law.

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).

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-1602

41 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 16, 2006

Mr. Abraham Chico
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Chico:

I have received your letter in which you indicated that you submitted several Freedom of Information Law request to the Dutchess County Jail and, as of the date of your letter to this office, you had not received any responses.

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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16213

41 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 16, 2006

Mr. Taharka Zulu
04-B-1902
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. Zulu:

I have received your correspondence in which you indicated that you have encountered difficulty in obtaining records from the Mid-State Correctional Facility and, as of the date of your letter to this office, you had not received a 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, 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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Charles Youmans

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16214

41 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 16, 2006

Mr. Anthony Brandon
Dutchess County Jail
150 N. Hamilton Street
Poughkeepsie, NY 12602

Dear Mr. Brandon:

I have received your letter and thank you for your kind words.

With respect to your question, there is a federal equivalent to the New York Freedom of Information Law, the federal Freedom of Information Act (5 USC §552). However, since your interest appears to involve gaining access to records maintained by a private employer, I point out that the federal Act is applicable to federal agency records; it does not apply to private companies.

For your information, the headquarters of Walmart is Bentonville, Arkansas.

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-16215

41 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 16, 2006

Mr. Justin Costantino
03-B-0347
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. Costantino:

I have received your letter in which you complained that you have encountered difficulty in obtaining a copy of a transfer order that moved you from one facility to another. You indicated that Mr. Anthony Annucci informed you that there is no transfer order, but you allege that there is such a record.

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.

Even if such a record exists, judicial precedent indicates that significant portions may be withheld. In a 1989 decision, 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 kind of record sought might exist and is analogous records to that described in Rowland D., I believe that it could be withheld.

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-16216

41 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 16, 2006

Mr. Alberto Urena
03-A-4744
Woodbourne Correctional Facility
P.O. Box 1000
Woodbourne, NY 12788-1000

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Urena:

I have received your letter in which you asked whether you could obtain your medical transcripts from the Fishkill Correctional Facility.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records.. 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 (j) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, §18 of the Public Health Law generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records, 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
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16217

41 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 16, 2006

Mr. Frederick Diaz
86-B-2129
Sullivan Correctional Facility
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. Diaz:

I have received your letter in which you indicated that you requested records from your facility but allege that it has a policy of engaging in a blanket denial of access when requested records pertain to grievances. You also indicated that you appealed the denial and, as of the date of your letter to this office, you had not received a response.

In this regard, I offer the following comments.

First, based on judicial decisions, it is likely that a blanket denial of access to the records sought is inconsistent with law. In this regard, I offer the following comments.

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 (j) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the facility has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the Department for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In sum, a blanket denial of a request is generally inconsistent with 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, 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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1(0218

41 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 16, 2006

Mr. Don Juan Britt
96-A-5388
Five Points Correctional Facility
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. Britt:

I have received your letter in which you asked if various forms maintained by your facility would be available to you. You indicated that these forms contain statements supplied by you to prison officials and the recommendations made concerning those statements.

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 (j) of the Law.

The provision that would be most pertinent is §87(2)(g). That provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Based on the foregoing, the forms supplied by you would appear to be accessible. However, opinions or recommendations offered by agency staff could be withheld under §87(2)(g).

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-16219

41 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 16, 2006

Mr. Arthur Green
76-A-3097
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. Green:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from the New York City Police Department. The Department responded to your requests by indicating that the requests are "too broad." You asked how you could identify the records of your interest when you "know none of the police codes or numbers."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request for information. If records sought do not exist, the request would not involve existing records, and the Freedom of Information Law would not apply.

Second, when records do exist, the issue appears to be whether the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. It has been held by the State's highest court that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system.

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 Department 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 facility 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.

Lastly, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). The regulations have the force and effect of 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...
>
> (2) Assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records."

As such, Department staff is obligated to assist you in identifying the records of your interest, if necessary.

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-16220

41 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 16, 2006

E-MAIL

TO: Jack Coughlin

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. Coughlin:

I have received your letter in which you asked whether industrial development agencies are subject to the Freedom of Information Law.

In this regard, that statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Section 856 of the General Municipal Law entitled "Organization of industrial development agencies" states in subdivision (2) that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation." A public benefit corporation is a kind of public corporation (see General Construction Law, §66). Since a public corporation is, as indicated above, an "agency", it is clear that industrial development agencies are subject to and must comply with the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16021

41 State Street, Albany, New York 12231
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October 16, 2006

Mr. Corey D. Kraft
02-A-5448
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. Kraft:

I have received your letter in which you asked if you could file a Freedom of Information Law request to obtain a copy of your and your wife's "401k" plan.

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."

As such, the Freedom of Information Law applies only to entities of state and local government. It would not apply to private entities.

I hope that I have been of assistance.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16222

41 State Street, Albany, New York 12231
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October 16, 2006

Mr. Darrow J. Holmes
03-B-0464
Wende Correctional Facility
P.O. Box 1189
Alden, NY 14004

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Holmes:

I have received your letter in which you indicated that a request for a grievance complaint summary had been denied based on §87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Section 87(2)(g) states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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, insofar as the grievance complaint summary consists of opinions or recommendations offered by agency staff, I believe that it could be withheld under §87(2)(g).

Additionally, to the extent that the record in question may identify others, it is possible that those details may be withheld on the ground that disclosure would result in an "unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

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 16, 2006

E-MAIL

TO: David M. Dubin

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. Dubin:

I have received your correspondence concerning your ability to obtain records from the Lansing School District in the form of email.

As I understand the matter, you requested email communications to and from members of the Board of Education relating to the "Facilities Group." Although the District's business manager granted your request by offering printed copies or the opportunity to read those communications on a district computer screen, he initially contended that he is not required to transmit those communications to you via email. Now, according to your letter, he agreed to forward the email communications to you by means of email, "but at a charge of $.25 each" and "continues to deny [your] request for emails from school board members who refuse to submit them in digital form." You also asked that the District certify that the materials made available to you "are accurate and complete."

In this regard, I offer the following comments.

First and perhaps 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 or with District staff 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.

Second, several judicial decisions indicate, in brief, that if an agency has the ability to make records available with reasonable effort in the medium desired by the applicant, and if the applicant pays the requisite fee for copying, the agency is required to do so [see e.g., Szikszay v. Buelow, 436 NYS2d 558, 107 Misc.2d 886 (1981), Brownstone Publishers, Inc. v. New York City Department of Buildings, 550 NYS2d 564, aff'd 166 AD2d 294 (1990), New York Public Interest Research Group v. Cohen, 729 NYS2d 379, 188 Misc.2d 658 (2001)].

From my perspective, in consideration of the definition of "record" and the direction provided by the courts, when a Board member has the ability to transmit records sought to the District's records access officer because those records have been requested under the Freedom of Information Law, he or she is required to do so. In short, those records, although perhaps stored on a home computer, for reasons described earlier, are, in my view, District records falling within the requirements of that statute.

It is emphasized that amendments to the Freedom of Information Law that will become effective on October 24, next week, will require that, when they have the ability to do so, agencies must transmit records sought, on request, via email. Templates of forms that may be used to request records by email and agencies' responses to requests are available on the Committee's website.

Third, the fees that may be charged by agencies involve the duplication of records. Pursuant to §87(1)(b)(iii), an agency may charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing other records, such as tape or video recordings, computer tapes, etc. When a request involves the disclosure of records via email, the records are transmitted electronically; they are not duplicated. That being so, insofar as records sought are made available by an agency by means of email, in my opinion, no fee may be charged.

Lastly, with respect to the certification to which you referred, §89(3) of the Freedom of Information Law provides in relevant part that "the entity shall provide a copy of such record and certify to the correctness of such copy if requested." I note that a certification is not intended to indicate that the contents of a record are accurate, but rather that a true copy of a record has been made available.

I hope that I have been of assistance.

RJF:tt

cc: Larry Lawrence, Business Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-16224

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October 16, 2006

E-MAIL

TO: Kathryn Burke

FROM: Camille S. 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 Ms. Burke:

We are in receipt of your request for a written advisory opinion concerning application of the Open Meetings Law to various proceedings of the SUNY/Farmingdale Student Government. You included correspondence written to the Vice President of Student Life at Farmingdale University, Mr. Stewart Weinberg, in which you expressed your frustration with a number of items. Chiefly, you are concerned that certain persons are acting in positions of authority without having first been confirmed by the student senate, that meetings held to draft the budget were not in keeping with the provisions of the Open Meetings Law, and that the executive board failed to adhere to the principle of "viewpoint neutrality" when voting on the budget.

While the Committee on Open Government is authorized to issue advisory opinions concerning application of the Freedom of Information and Open Meetings Laws, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. It is our hope that our opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law.

As you know from the March 27, 2006 advisory opinion issued to you with respect to application of the Open Meetings Law, we believe that the provisions of the Open Meetings Law are applicable to the Farmingdale Student Government. Accordingly, we offer the following comments.

First, the Open Meetings Law is clearly intended to open the deliberative process to the public and provide the right to know how public bodies reach their decisions. As stated in §100 of the Law, its Legislative Declaration:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that

> the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Moreover, it is emphasized that the Open Meetings Law has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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.).

It has also been held that "a planned informal conference" or a "briefing session" held by a quorum of a public body would constitute a "meeting" subject to the requirements of the Open Meetings Law [see Goodson Todman v. Kingston, 153 Ad 2d 103, 105 (1990)].

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of executive board members gather at the request of the President to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. Further, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law.

The issue in the context of your inquiry involves application of the Open Meetings Law to a situation in which members of the executive board may have met to conduct public business. If a quorum of the board was not present, the Open Meetings Law would not have applied.

We note that when there is an intent to ensure the presence of less than a quorum at any given time in order to evade the Open Meetings Law, there is a judicial decision that infers that such activity would contravene that statute. As stated in Tri-Village Publishers v. St. Johnsville Board of Education:

> "It has been held that, in order for a gathering of members of a public body to constitute a 'meeting' for purposes of the Open Meetings Law, a quorum must be present (*Matter of Britt v County of Niagara*, 82 AD2d 65, 68-69). In the instant case, there was never a quorum present at any of the private meetings prior to the regular meetings. Thus, none of these constituted a 'meeting' which was required to be conducted in public pursuant to the Open Meetings Law.
>
> "We recognize that a series of less-than-quorum meetings on a particular subject which together involve at least a quorum of the public body could be used by a public body to thwart the purposes of the Open Meetings Law...However, as noted by Special Term, the record in this case contains no evidence to indicate that the members of respondent engaged in any attempt to evade the requirements of the Open Meetings Law" [110 AD 2d 932, 933-934 (1985)].

In Tri-Village, the Court found no evidence indicating an intent to circumvent the Open Meetings Law when a series of meetings were held, each involving less than a quorum of a board of education. Nevertheless, as we interpret the passage quoted above, when there is an intent to evade the Law by ensuring that less than a quorum is present, such an intent would violate the Open Meetings Law. If there is or has been an intent to circumvent the Open Meetings Law in the context of the situation of your concern, a court might find that the Open Meetings Law has been infringed.

Second, in order to constitute a valid meeting, we believe that all of the members of a public body must be given reasonable notice of a meeting. Relevant in our view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. The cited provision states that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, 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 dy. 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 one of the persons or officers disqualified from acting."

Based upon the language quoted above, a public body, such as an executive board, cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. Therefore, if, for example, three of five members of a public body meet without informing the other two, even though the three represent a majority, we do not believe that they could vote or act as or on behalf of the body as a whole; unless all of the members of the body are given reasonable notice of a meeting, the body in our opinion is incapable of performing or exercising its power, authority or duty.

With respect to information that must be recorded as part of the minutes, 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. Most importantly, we believe that minutes must be accurate.

With regard to the enforcement of the Open Meetings Law, §107(1) of the Law states in part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

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".

Finally, and with respect to your last question about the availability of the job description and salary information of Mr. Nick Gordon, who was hired to advise the Farmingdale Student Government, we believe that the records at issue fall within the coverage of the Freedom of Information Law. The scope of the Freedom of Information Law is, in our view, more expansive than the Open Meetings Law, for it pertains to all agency records. Section 86(3) defines "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Whether the organization at issue constitutes an agency is unclear. However, we do not believe that the status of such entities as agencies is determinative in relation to your inquiry.

Most significant in my view is the definition of "record." That term is defined in §86(4) to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved a case concerning documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" (see Westchester Rockland, supra, 581) and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

Because the Farmingdale Student Government operates within the campuses or buildings of a SUNY institution, their documentation would, in our opinion, constitute SUNY/Farmingdale records. In a decision rendered by the Court of Appeals, it was found that materials maintained by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. 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 NY 2d 410. 417 (1995)].

Insofar as records are kept, held, produced or reproduced by extra-curricular organization, because such organization would not exist but for its relationship with a SUNY/Farmingdale institution, we believe that the records would fall within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) 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 a professional adviser, for example, and a student government association or a university must be disclosed under the Freedom of Information Law.

On behalf of the Committee on Open Government, we hope this helpful to you. At your request, a copy of this opinion will be sent to Mr. Gordon and Mr. Weinberg.

CSJ:tt

cc: Nick Gordon
Mr. Weinberg

FOIL-AO-10225

From: Teshanna Tefft
To: Lawrence, Larry
Date: 10/17/2006 9:13:29 AM
Subject: Re: Advisory Opinion prepared by Robert J. Freeman, ExecutiveDirector

Good Morning:

In response to your inquiry concerning the advisory opinion prepared for Mr. Dubin, if your attorney has bills in electronic format, the attorney would be required to send them to you in order to fill a request for electronic copies of legal bills.

With respect to your question regarding emails from board members, you would be required to obtain the electronic emails from the board members; even though they provided paper copies, the request was for electronic "records" that do exist.

Finally, your asked if you have to convert paper files to electronic files in order to fill a request. If they do not exist in electronic format, you would not have to create them in electronic format.

I hope that I have been of assistance.

Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518
Website: http://www.dos.state.ny.us/coog/coogwww.html

>>> "Larry Lawrence" <llawrence@mail.lansingschools.org> 10/16/2006 4:56:12 PM >>>

Thank you for your help in this matter. I will begin sending Mr. Dubin all email records that I have collected under his request,via email, tomorrow, at no charge.

Please clarify further, the following:

Mr. Dubin has requested electronic format copies of bills from district legal counsel. I do not have these bills in electronic format-they were mailed to the District in paper form, and I have shared them in that format with Mr. Dubin. Do I understand that your advisory requires me to demand these records of counsel in electronic format?

Further, is it your position that I MUST demand records held by board members in the format requested by a citizen-that is, even though Board members chose to submit paper records of the individual emails being sought, is it your advisement that I must demand electronic format?

Moreover, if a record or series of records are in paper, must I convert paper to electronic format upon an email request for which an email response is demanded? Thank you for these further clarifications. LLL

---------- Original Message ----------
From: "Teshanna Tefft" <TTefft@dos.state.ny.us>
Date: Mon, 16 Oct 2006 16:25:44 -0400

>
>
> October 16, 2006
>

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16226

41 State Street, Albany, New York 12231
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October 17, 2006

Ms. Annette Vogelfang
03-G-0422
Bedford Hills Correctional Facility
27 Harris Road
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 information presented in your correspondence.

Dear Ms. Vogelfang:

I have received your letter in which you complained that you submitted Freedom of Information Law requests to your facility and, as of the date of your letter to this office, you had not received the records.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: L. Goidel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16227

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 17, 2006

Mr. Reggie Brown
aka Mr. Kenny Taylor
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brown:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records under the Freedom of Information Law from the Bronx Supreme Court.

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 (i.e., §255 of the Judiciary Law). 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.

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 17, 2006

Mr. Clifford L. Williams
Dutchess County Jail
P.O. Box 189
Poughkeepsie, NY 12061

The staff of the Committee on Open 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 you submitted a Freedom of Information Law request and that, as of the date of your letter to this office, six business days had passed and you had not received an acknowledgement. You asked what you may do.

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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16229

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 17, 2006

Mr. Phil Phillips
Schenectady County Jail
320 Veeder Avenue
Schenectady, NY 12307

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Phillips:

I have received your letter in which you indicated that Schenectady County Office of District Attorney has denied your request for a copy of a search warrant and a taped interview of an informant.

In this regard, I offer the following comments.

First, assuming that you are referring to a warrant related to your arrest, I point out that §120.80(2) of the Criminal Procedure Law states in part that:

> "[U]pon request of the defendant, the police officer must show him the warrant if he has it in his possession. The officer need not have the warrant in his possession, and, if he has not, he must show it to the defendant upon request as soon after the arrest as possible."

As such, it would appear that copies of warrants would be available to you from the Office of the District Attorney or the police department that made the arrest .

Second, the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)] appears to be relevant to the matter. In Moore, it was found that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter*

> *of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

Based on the foregoing, insofar as informants' or 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 the statements have not been previously disclosed, three grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

The provision dealing directly with privacy, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by the informant or witness or other records pertaining to them that have already been disclosed. If disclosure of the records that have been denied would not serve to infringe upon her 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).

Also pertinent to the matter is §87(2)(f) which could likely serve as a basis for a denial of your request. That provision authorizes an agency to withhold records when disclosure "could endanger the life or safety of any person."

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 17, 2006

Mr. Michael S. Hazen
01-B-2410
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. Hazen:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records from the Delaware County District Attorney's Office. That office informed you that you or your attorney had previously received these records, and that the records would not be provided to you again.

In this regard, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Since you indicated that your attorney no longer maintains the record, he should prepare an affidavit so stating that can be submitted to the office of the district attorney.

I hope that I have been of assistance.

Sincerely,

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 17, 2006

Mr. Guy Pane
00-B-2721
Five Points Correctional Facility
P.O. Box 119
Romulus, NY 14541

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pane:

I have received your letter in which you indicated that you were denied the right to inspect a misbehavior report and related 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 (j) of the Law.

With respect to records falling within your request, since I am unaware of their contents, I cannot offer unequivocal guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Potentially relevant is a decision by the Court of Appeals concerning records prepared by police officers in which it was held that a blanket 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 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16232

41 State Street, Albany, New York 12231
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October 18, 2006

Mr. Charles Millson
81-D-0019
Mohawk Correctional Facility
P.O. Box 8451
Rome, NY 13442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Millson:

I have received your letter in which you indicated that you were denied access to electronic records by D. Christman of your facility because computer records are not covered by the Freedom of Information Law.

In this regard, §86(4) of the Freedom of Information 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 foregoing, it is clear that records maintained electronically are subject to the Freedom of Information Law.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be forwarded to D. Christman.

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. Christman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 18, 2006

Mr. Albert Morgan
93-A-9742
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Morgan:

I have received your letter in which you complained that you are being charged $10.00 for a copy of an indictment by the Queens County Clerk and asked if the assessment of that fee complies with the Freedom of Information Law.

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...".

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 18, 2006

E-MAIL

TO: Norman Oder

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 facts presented in your correspondence.

Dear Mr. Oder:

As you know, we are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Empire State Development Corporation ("ESDC") for a copy of the "independent economic impact analysis" relied on by ESDC in the General Project Plan, New York State Urban Development Corporation d/b/a Empire State Development Corporation, Atlantic Yards Land Use Improvement and Civic Project, July 18, 2006 ("Project Plan"). In *Section G. Economic Impact* of the Project Plan, ESDC indicated that it "has performed an independent economic impact analysis of the Project" and cited various statistics from the analysis regarding new jobs, direct personal income generated from construction, projected city tax revenues and expected public improvements resulting from the Project.

ESDC denied access to the analysis, and when you repeated your request, the response was as follows:

> "At this time there are no additional documents that are subject to disclosure under the Freedom of Information Law.
>
> It is possible that additional information will be compiled and made available at a later date. If additional information is prepared for release to the public - ESDC will certainly make the same available to you."

It is our position that ESDC is not permitted to deny access to the entire analysis and/or to any statistical documentation which would substantiate the figures presented in *Section G* of the Project Plan. In this regard, we offer the following comments.

First, irrespective of whether ESDC has "prepared" the record "for release to the public", the record is kept by ESDC in its capacity as a governmental entity. Consequently, we believe that any such documents would fall within the scope of the Freedom of Information Law. It is emphasized that the Freedom of Information Law pertains to agency records and that §86(4) of the Law defines the term "record" expansively to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In a case in which an agency contended, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that claim. As stated by the Court of Appeals:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]). Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

Again, because the analysis would not be in the possession of ESDC except in its capacity as a governmental entity, based on the determination provided by the Court of Appeals, it is our opinion that documentation reflective or relating to the statistical figures presented in the report are "records" subject to rights conferred by the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. Particularly relevant to an analysis of rights of access, or conversely, the ability to withhold the records sought, is §87(2)(g), that 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.

Pertinent is a decision rendered by the Court of Appeals in which the Court focused on what constitutes "factual data", stating that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, 463 N.Y.S.2d 122, mod on other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182. 417 N.Y.S.2d 142)" [Gould v. New York City Police Department, 89 NY2d 267, 276, 277 (1996)].

From our perspective, the specific language of §87(2)(g), coupled with the direction offered by the Court of Appeals, provides the basis for reviewing and determining the extent to which the records in question might justifiably be withheld. Reference was made earlier to the thrust of the Freedom of Information Law, and the Court in Gould reiterated its stance taken in previous decisions, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered and held 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 foregoing, ESDC is required to review the records sought in their entirety to determine which portions constitute statistical or factual information or any other material required to be disclosed pursuant to subparagraphs (i), (ii), or (iii) of §87(2)(g).

Finally, and with respect to the ESDC's lack of adherence to the statutory time frames by which it is required to respond to requests and appeals, as noted in the September 29, 2006 article, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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, 2005 (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.

On August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16235

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 18, 2006

Mr. Alvin McLean
93-A-9397
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. McLean:

I have received your letter and the materials attached to it. It appears that you requested records from the Queens County District Attorney's Office and you were informed that the records do not exist.

In this regard, I offer the following comments.

When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) also provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Since you cited Key v. Hynes [205 AD2d 779] in your appeal, I note that that decision was overturned by the Court of Appeals, the state's highest court. The court held in Rattley v. New York City Police Department [96 NY2d 873 (2001)] that the Freedom of Information Law does not specify the manner in which an agency must certify that records cannot be located, and that a certification need not be prepared by the person conducting a search for records. In short, a written certification that a diligent search was made is sufficient to comply with law.

I hope that I have been of assistance.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-16036

From: Robert Freeman
To: [redacted]
Date: 10/19/2006 9:08:23 AM
Subject: Dear Ms. Mattison:

Dear Ms. Mattison:

I have received your letter in which you questioned the propriety of a fee of five dollars imposed by the Department of State for a copy of a certificate of incorporation.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy, unless a different fee is prescribed by a different statute. The Department in this instance charges the fee in question based on a statute, §96 of the Executive Law, which states in subdivision (3) that "...the department of state shall collect the following fees:

"For a copy of any paper or record not required to be certified or otherwise authenticated, fifty cents per page; except that the fee for copy of any paper or record not required to be certified or otherwise authenticated which is furnished by the bureau of corporations of the department of state, shall be five dollars, regardless of the number of pages."

Since certificates of incorporation are maintained by the Bureau of Corporations, I believe that the fee is consistent with law.

I hope that the foregoing serves to clarify the matter and that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16237

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October 19, 2006

Mr. Terry Youmans
96-A-7645
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. Youmans:

I have received your letter in which you indicated that you requested records from the NYS Division of Parole but were informed that no records exist pertaining to your request, except for four pages. You complained that Mr. Terrence Tracy failed to certify that specific documents have been lost or cannot be located.

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." Based on the foregoing, an agency is not required to provide a certification unless an applicant for records seeks 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-16238

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 19, 2006

Mr. Anthony Carty
92-A-9491
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. Carty:

I have received your letter in which you indicated that you were denied access to records indicating the identities and statements of witnesses who did not testify at you trial.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. In my view, three 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).

Lastly, §87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

I hope that I have been of assistance.

Sincerely,

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 19, 2006

Mr. Dennis Cruz
05-R-1344
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. Cruz:

I have received your letter in which you indicated that you requested records from the Kings County Office of the District Attorney and that nine months had passed and you still had not received the records. You were sent an acknowledgement of your request indicating that you should receive a response within six months. After six months, you wrote again to the District Attorney's Office and were told that a response would be sent in approximately forty days.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 compliance with law, a copy of this response will be sent to Trudy Drako.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm
cc: Trudy Drako

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 16240

41 State Street, Albany, New York 12231
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October 19, 2006

Mr. Brian Lorenzo
94-B-1259
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13021

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lorenzo:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records from the Amherst Police Department. You submitted a Freedom of Information Law request the receipt of which was acknowledged, but as of the date of your letter to this office, you still had not received any records.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16041

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
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October 19, 2006

Mr. Yusuf Harris
89-A-2201
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. Harris:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records under the Freedom of Information Law from the Bronx Supreme Court and the New York County Supreme Court.

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 (i.e., §255 of the Judiciary

Law). 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.

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-16242

41 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 19, 2006

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 requested an advisory opinion concerning the denial of your Freedom of Information Law request by the New York City Department of Probation concerning records pertaining to you.

In this regard, I am unaware of any statutory provision that pertains to access to or the confidentiality of probation records, except §390.50 of the Criminal Procedure Law, which deals with pre-sentence reports and related records. That statute generally indicates that pre-sentence reports are confidential and available only at the direction of a court. There are, however, certain provisions of the regulations promulgated by the State Division of Probation pertaining to probation records generally. Section 348.1(b) states that:

> "(b) Cumulative case record is a single case file containing all information with respect to a case from its inception through its conclusion. All records developed and/or received by the probation department and which are related to the carrying out of authorized probation functions and services are considered probation records for the purpose of retention and destruction. Reports and other records material developed by the probation department and transmitted to the courts of other agencies become the responsibility of the court or other agencies as records."

Further, §348.4(k) of the regulations provides that: "Case records shall be accessible, in whole or in part, only to those authorized by law, court order and/or the Division of Probation and Correctional services."

Nevertheless, it is questionable in my view whether regulations can serve as an appropriate basis for withholding records, for it has been held that regulations do not exempt records from disclosure. Section 87(2)(a) of the Freedom of Information Law permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". It has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of an administrative code or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (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, I do not believe that regulations can be considered as a statute that would exempt records from disclosure or that an agency can rely upon regulations as a basis for withholding a record.

As such, it would appear that rights of access would be governed by 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 (j) of the Law.

Perhaps the provision of primary significance in the context of your inquiry is §87(2)(g). Although that provision serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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 Levy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16243

41 State Street, Albany, New York 12231
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October 19, 2006

Mr. David M. Loret
04-B-0947
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. Loret:

I have received your letter in which you asked for assistance in obtaining reports from the Monroe County Public Safety Laboratory and the Cellmark Diagnostic Laboratory.

In this regard, I offer the following comments.

First, §86(4) 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."

Since Cellmark Diagnostic Laboratory is a private company, it is not an "agency" or, therefore, subject to the Freedom of Information Law. However, the records prepared by or for a Monroe County agency are, in my view subject to rights of access conferred by the Freedom of Information Law.

Second, under the regulations promulgated by the Committee on Open Government pursuant to the Freedom of Information Law (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be directed to the records access officer. It is suggested that you direct your request to the records access officer for Monroe County.

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 (j) of the Law.

Reports prepared by of for an agency 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 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).

It seems unlikely that the disclosure of scientific or laboratory test results would in most instances enable potential lawbreakers to evade detection or encourage criminal activity. However, to the extent that those kinds of results could arise by means of disclosure, the records in question could in my opinion be withheld.

Lastly, I point out that in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available. However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to

> demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-16024

From: Robert Freeman
To: [redacted]
Date: 10/20/2006 8:06:26 AM
Subject: Re: need referral

I believe that your assumption is erroneous. The Freedom of Information Law is permissive, stating that an agency *may* withhold information to protect personal privacy, but that it is not required to do so. The Court of Appeals, the state's highest court, confirmed that to be so, indicating that records that may be withheld in accordance with an exception to rights of access may nonetheless be disclosed, with or without identifying details [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

I hope that the foregoing serves to clarify your understanding.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

>>> [redacted] 10/19/2006 7:06:02 PM >>>
Dear Atty. Freeman:

During the summer our town clerk executed a task that I questioned the legality of - this has been discussed at several meetings and my concerns are documented in the minutes. The town board was not familiar with these types of regs so they said nothing. Instead of being cautious she went right ahead and did it with no regard for people's right to privacy (fyi: two years ago she released my credit card number and once again she has released private information on individuals in our town... what she consciously did was release protected information on almost 600 individuals).

I consulted with an advocacy agency, and they said what she did was a violation of section 87 & 89 of public officers law.

Periodically she makes reference to her years of service, she thinks she is immune and can do whatever she wants. This needs to stop, and I need to file complaint to appropriate agency.

So, when an elected official violates public officers law - what are the appropriate steps to file an official complain that I should take and where do I send my documents to?

thank you. Joy Canfield, councilman, town of Broadalbin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16245

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 20, 2006

Mr. Daren Antonio Payne
05-B-0297
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. Payne:

As you are aware, I have received your correspondence in which you asked for assistance in obtaining witness statements and audio/visual tapes concerning an incident at your facility.

First, 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 compel agencies to grant or deny access to records. However, I offer the following comments.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. In my view, three of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

Next, in a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

> "...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution. Moreover, respondents' regulations require disclosure to news media of an inmate's 'name *** city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7 NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff under §87(2)(f).

Further, in another case involving videotapes of events occurring at a correctional facility, in the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. However, other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy and endanger life and safety [see 174 AD2d 212 (1992)].

Lastly, the Freedom of Information Law pertains to existing records. If your facility does not maintain or has not preserved an audio/videotape, the Freedom of Information Law would not apply, and it has consistently been advised that an agency is not required to honor an ongoing or prospective request for records that do not yet exist. Also, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1602/6

41 State Street, Albany, New York 12231
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October 20, 2006

Mr. Tommie L. Jones
03-B-1695
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. Jones:

I have received your letter in which you were denied access to a victim's statement by the Town of Kenmore.

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 a victim or witness 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 a victim or witness statement has not been previously disclosed, three grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As

a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) 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 victims' or 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, §87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

I hope that I have been of assistance.

Sincerely,

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-16247

41 State Street, Albany, New York 12231
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October 20, 2006

Mr. Jonathan Jones
86-B-0998
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jones:

I have received your letter in which you indicated that you were denied access to a copy of a letter that a judge wrote on your behalf to the Parole Board. You appealed the denial but, as the date of your letter to this office, you had not received a response.

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 (j) of the Law. It does not appear that any of the grounds for denial could be asserted to withhold the letter written by the judge. If that is so, it would be accessible under the Freedom of Information Law.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 16248

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 20, 2006

Mr. Michael K. Meehan
BE-3945
1111 Altamont Boulevard
Frackville, PA 17931-2601

Dear Mr. Meehan:

I have received your letter in which you requested a variety of information from this office.

In the regard, the Committee on Open Government is authorized to provide advice concerning public access to government records in New York, primarily in relation to the Freedom of Information Law.

You sought the name and address of a government agency that "keeps track of insurance policies that get paid upon a person's death." I do not believe that there is any agency that carries out that function. You also referred to difficulty in obtaining information from the attorney who represented your deceased mother. A private attorney would not be required to comply with the Freedom of Information Law, because that statute applies only to government agencies.

Although the courts are not subject to the Freedom of Information Law, it is suggested that records concerning wills, probate and related matters typically can be acquired from the Surrogate's Court. If your mother resided and died in Queens, it is suggested that you contact the clerk of the court to determine whether records have been filed and would be available from that source.

Finally, you requested the address and law relating to assessment of real property in Queens. I am unfamiliar with the law that may govern. However, I believe that the New York City Department of Finance is the agency responsible for the assessment of real property. It is suggested that you contact the Department of Finance, Property Division, 66 John Street, 12th Floor, new York NY 10039.

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-16249

41 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 20, 2006

Mr. Omar Ocasio
94-A-6267
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. Ocasio:

I have received your correspondence in which you asked whether you may obtain videotapes of incidents occurring at your facility. You also complained that you submitted requests to the NYS Department of Health and, as of the date of your letter to this office, you had not received any response.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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.

Second, in a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

> "...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution. Moreover, respondents' regulations require disclosure to news media of an inmate's 'name *** city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7

> NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff under §87(2)(f).

Further, in another case involving videotapes of events occurring at a correctional facility, in the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. However, other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy and endanger life and safety [see 174 AD2d 212 (1992)].

Third, the Freedom of Information Law pertains to existing records. If an agency does not maintain or has not preserved an audio/videotape, the Freedom of Information Law would not apply, and it has consistently been advised that an agency is not required to honor an ongoing or prospective request for records that do not yet exist. Also, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

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, 2005 (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.

As requested, enclosed a copy of "Your Right to Know."

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm
Enc.

FOIL-AO-16250

From: Robert Freeman
To: [redacted]
Date: 10/20/2006 11:46:31 AM
Subject: Dear Mr. Vogan:

Dear Mr. Vogan:

I have received your letter in which you asked whether an agency may charge twenty-five cents per photocopy if the actual cost of producing a photocopy is less than that amount.

In short, a careful reading of §87(1)(b)(iii) of the Freedom of Information Law concerning fees indicates that an agency may do so. That provision states that an agency's rules must include reference 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 prescribled by statute."

Based on the foregoing, an agency may charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches, irrespective of the actual cost of preparing a photocopy. The standard involving actual cost pertains to "any other record."

I hope that foregoing serves to clarify your understanding.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16251

41 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 20, 2006

Mr. Homer K. Mathis
04-A-3627
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.

I have received your letter in which you indicated that you have encountered difficulty in obtaining records from the New York County District Attorney's Office. That office informed you that you or your attorney had previously received the records, and that they would not be provided to you again.

In this regard, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Since you indicated that your attorney no longer maintains the record, he should prepare an affidavit so stating that can be submitted to the office of the district attorney.

I hope that I have been of assistance.

Sincerely,

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- 16252

41 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 20, 2006

Mr. Robert Vasquez
95-A-6961
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Vasquez:

I have received your letter in which you complained that you requested disciplinary hearing tapes from the Clinton Correctional Facility but, that as of the date of your letter to this office, 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, 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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16053

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 23, 2006

Mr. Dwayne Gause
01-A-2837
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. Gause:

I have received your letter in which you complained that you have submitted numerous Freedom of Information Law requests to the Suffolk County Police Department but, as of the date of your letter to this office, you had not yet received any responses.

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, 2005 (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.

It is my understanding that the County Attorney is designated to determine appeals.

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

FOIL-AO-10254

From: Robert Freeman
To: [redacted]
Date: 10/23/2006 8:21:07 AM
Subject: Re: need referral

I think that you misunderstand. Again, even when records or portions of records may be withheld, there is generally no obligation to do so imposed by the Freedom of Information Law. Only when a disclosure involves records which, based on a statute (an act of Congress or the State Legislature), cannot be disclosed, would disclosure involve a failure to comply with law.

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] > 10/20/2006 3:40:55 PM >>>
thanks for your response, but I think it was misunderstood. The town clerk chose to release protected information on about 600 individuals, not withold it when I questioned the legality of her doing so.

What route do I take to file a violation about this so it does not happen again. thank you. joy canfield

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16255

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 23, 2006

Mr. Christopher Young
91-B-2542
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. Young:

I have received your letter in which you indicated that you have encountered difficulty in obtaining your verdict sheet. You wrote to the Monroe County Supreme Court and were told that the verdict sheet, if it exists, would have been filed with the Monroe County Clerk. The County Clerk informed you that the verdict sheet was not on file with that office.

In this regard, when a court clerk indicates that he/she does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 255 of the Judiciary Law states that a clerk of a court is required, on request, to "certify that a document or paper, of which the custody legally belongs to him, 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

FOIL-AO-16256

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 23, 2006

Mr. Michael Reid
99-A-5500
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. Reid:

I have received your letter in which you asked for assistance in obtaining copies of grievances maintained by your facility. You indicated that you are indigent and have insufficient funds in which to pay for the copies.

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-16257

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 23, 2006

Mr. Habib Johnson
03-B-1999
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. Johnson:

I have received your letter in which you complained that you have encountered difficulty in obtaining documents from the City of Buffalo Police Department. You submitted a request to the Department but, as of the date of your letter to this office, you had not yet received a response. You also asked what services this office provides.

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning access to government records, primarily under the state's Freedom of Information Law. This office is not empowered to enforce the law or to compel an agency to grant or deny access to records. Enclosed for your review is a copy of "Your Right to Know", an explanatory brochure regarding the Freedom of Information Law.

With respect to your request submitted to the Buffalo Police Department, I point 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, 2005 (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."

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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
Enc.
cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16258

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 23, 2006

E-MAIL

TO: David Perry

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. Perry:

I have received your letter in which you asked whether "a teacher's passing rate/student success rate [can] be foiled." In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if no record exists reflective of passing/rate or student/success rate relating to particular teacher, a school district would not be required to prepare a new record in order to satisfy the request.

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 (j) of the Law.

If the record at issue exists, I believe that it would be accessible, for subparagraph (i) of §87(2)(g) requires that statistical or factual information contained within internal governmental communications must be disclosed, unless a separate exception may properly be asserted.

Even if no statistical or factual compilation exists, other records enabling the recipient to prepare his or her totals would be accessible in relevant part. For instance, a class list of students with their grades would, according to judicial precedent, be accessible, so long as students could not be identified. Relevant under the circumstances is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In this instance, insofar as disclosure of the records in question would or could identify a student or students, I believe that they must be withheld. A statute that exempts records from disclosure is the Family Education Rights and Privacy Act ("FERPA"; 20 U.S.C. section 1232g). In brief, FERPA

applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

In a case dealing with a similar request, the records of test scores were prepared by class, alphabetically. The school district contended that, even if names of students were deleted, because the lists were maintained alphabetically, the identities of some students might be made known. In determining the issue, the Court ordered that names be deleted from the records and that the records be "scrambled" in order to protect against the possible identification of students [Kryston v. East Ramapo School District, 77 AD 2d 896 (1980)]. Stated differently, the grades must be disclosed, but any identifying details pertaining to students must, in my view, be withheld.

Lastly, with respect to a teacher's privacy, pertinent to the issue is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy.' Based upon the 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 the context of your inquiry, the records are relevant not only to the performance of the students in certain classes but also the teachers of those classes. Therefore, in my opinion, again, the teachers' identities must be disclosed.

I hope that I have been of assistance.

RJF:tt

FOIL-AO-16259

From: Robert Freeman
To: Harry Willis
Date: 10/23/2006 8:17:39 AM
Subject: Re: FOIL Question

If the disclosure was made following a request made pursuant to FOIL and was not inadvertent, I believe that the agency would have waived its ability to deny access and that any person would have the right to gain access. On the other hand, if the disclosure was made in conjunction with a law enforcement function to a person in some way associated with that function, or if the disclosure was inadvertent, I do not believe that a public right of access would have been created.

I hope that this will be of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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>>> Harry Willis 10/20/2006 2:00:15 PM >>>
Bob,

I have a FOIL question which I'll pose in the hypothetical.

Assume that access to a record may legitimately be denied on the basis that, if disclosed, it would compromise an ongoing law enforcement investigation. Nonetheless, the law enforcement agency provides access to the record to a requesting party.

Has the agency thus waived its prerogative of denying access to that same record to another party who subsequently requests access?

Harry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 23, 2006

Ms. Mary Lou Picciano
[redacted]

The staff of the Committee on 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. Picciano:

I have received your letter, the materials attached to it, and a video tape of a portion of a meeting of the Auburn City Council. Because we do not have the facilities here to view a videotape, I have not reviewed it. However, on the basis of the other materials, I offer the following comments.

As I understand the matter, you have requested records of or relating to any "complaint filed by a female city department head against a male elected city official during 2005-2006." In response to that request, you were informed that no such record exists. In this regard, the Freedom of Information Law pertains to existing records, and §89(3) states in relevant part that an agency is not required to create a record in response to a request. 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."

Even if the records sought had been prepared, I believe that they could be withheld. One of the grounds for denial of access, §87(2)(b) of the Freedom of Information Law, authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy."

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

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 this instance, as I understand the matter, there was never an admission or finding of misconduct on the part of any "male elected city official during 2005-2006." If that is so, even if such a record had been prepared, I believe that it could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

I hope that the foregoing serves to clarify your understanding 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-16026

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October 23, 2006

E-MAIL

TO: David Mack

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. Mack:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Rochester Police Department for portions of a "central street intelligence database" that contains "street names" of individuals with whom police officers have had contact. You indicated that, on behalf of your client, who was recently convicted of murder in the second degree, you are interested in information regarding two witnesses who were never located and who are identified in discovery material only by their "street names". Although we are unfamiliar with the database to which you refer and the type of information it may contain, we offer the following comments in an effort to be helpful.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 our view, several of the grounds for denial may be pertinent in determining the extent to which the records of your interest must be disclosed.

One such ground for denial might be §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy." It is possible that actual names and home addresses associated with street names could be withheld under the cited provision.

Another ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records or portions thereof which if disclosed "could endanger the life or safety of any person." Prior to 2003, the law provided that an agency may withhold records insofar as disclosure "would endanger the life or safety of any person." Although the courts construed the word "would" to mean "could", some contended that the law warranted clarification to reflect case

law. In 2003, the Legislature passed and the Governor approved legislation, Chapter 403, that included the primary recommendation offered by the Committee in 2002 to change "would" to "could." Accordingly, in the event that disclosure could endanger life or safety, the agency would be permitted to deny access to the record.

On behalf of the Committee on Open Government we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1602

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October 23, 2006

E-MAIL

TO: Bonnie Barkley

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. Barkley:

We are in receipt of your request for an advisory opinion concerning requests for copies of applications for appointment to two teaching positions posted in your school district. In response, the district released "a list of the certifications and educational degrees of the candidates", identifying the candidates by numbers. The district denied access to the candidates' employment histories indicating that release would constitute an unwarranted invasion of personal privacy. The district also indicated that there is nothing in the Freedom of Information Law that requires disclosure of the name of an applicant to public employment. In this regard, it would appear that the district's response is consistent with law, and we offer the following comments.

First, §89(7) of the Freedom of Information Law states that an agency, such as a school district, is not required to disclose the name of an applicant for appointment to public employment. Therefore, although the District could choose disclose the identities of the applicants who were not hired, it would not be obliged to do so.

Second, notwithstanding the foregoing, we believe that many aspects of the resumes or applications submitted regarding those who were not hired, as well as a variety of details regarding the person who was hired, as long as they do not reveal the identity of the applicant, 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 (j) of the Law. As suggested in the district's response, one of the grounds for denial, §87(2)(b), states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

In a case in which an individual wanted to compare his qualifications with the qualifications of others, it was determined that resumes of those others must be disclosed, following the deletion of personally identifying details [see Harris v. City of University of New York, Baruch College, 114 AD 2d 805 (1985)].

With respect to the records pertaining to the incumbent of the position, we note that the judicial interpretation of the Freedom of Information Law indicates 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].

We point out, too, that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Additionally, in a recent judicial decision, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's prior public employment must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means

> by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

> "Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

In short, it is likely that some aspects of the resume of the incumbent must be disclosed, while others could be withheld to protect personal privacy.

With respect to your question concerning the enforceability of the privacy protections offered by the law, we note that the Freedom of Information Law is permissive. In other words, while the District may choose to withhold certain information when disclosure would constitute an unwarranted invasion of personal privacy, it is not prohibited from releasing such information to the public.

The only provision of law in New York State pertaining to a cause of action for the invasion of privacy is §51 of the Civil Rights Law. This provision prohibits the unauthorized use of a name or likeness for advertising purposes, and would not apply in the context of your inquiry.

On behalf of the Committee on Open Government we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16203

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October 24, 2006

Mr. Perry King
82-B-1974
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. King:

I have received your correspondence, and it appears that you requested the names of the persons from the Inspector General's Office who interviewed you at your facility. You were provided with two names, but you contend that they are not the persons who interviewed you. You appealed but, 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.

Since you raised questions and apparently did not request records, the right to appeal under the Freedom of Information Law would not be applicable. That provision would only apply when existing records have been denied under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16264

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October 24, 2006

Mr. Leon F. Henry
#11456-052
F.C.I. Allenwood
P.O. Box 2000
White Deer, PA 17887

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Henry:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records pertaining to you arrest and conviction under the Freedom of Information Law from the Jefferson County Supreme Court.

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 (i.e., §255 of the Judiciary Law). 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.

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-16265

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October 24, 2006

Mr. Robert Serrano, Jr.
00-A-4326
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. Serrano:

I have received your letter in which you indicated that you submitted Freedom of Information Law requests to the Brooklyn Law School, New York City Fire Department, New York City Department of Corrections, Jacobi Medical Center and Chase Manhattan Bank and, as of the date of your letter to this office, you had not received any responses.

In this regard, I offer the following comments.

First, §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, the Freedom of Information Law applies only to entities of state and local government. It would not apply to private entities, such as banks.

Second, with respect to your requests submitted to the others, 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, 2005 (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,

Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-16266

From: Janet Mercer
To: [redacted]
Date: 10/25/2006 11:44:16 AM
Subject: Re: Certificate of Disposition

Dear Mr. [redacted]

I have received your inquiry in which you asked if you could obtain a copy of your divorce certificate of disposition via email. You also asked where to direct your inquiry.

Pursuant to §235 of the Domestic Relations Law, a certificate of disposition should be made available by the county clerk in the county in which the divorce proceeding was conducted.

Please note that the Freedom of Information Law does not apply to courts. Consequently, the provision involving the obligation to transmit records via email is inapplicable. Further, since the divorce was granted in 1982, it is likely that there may be no means of emailing a certificate of disposition.

I hope that I have been of assistance.

Janet Mercer

Committee on Open Government
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Albany, NY 12231
Phone: (518) 474-2518
Website: www.dos.state.ny.us/coog/coogwww.html

>>> "[redacted]" [redacted] 10/25/2006 11:18:34 AM >>>
How can I have a copy of my Divorce Certificate of Disposition from [redacted] in June of 1982 in White Plains, N.Y. emailed to me. Where should I direct my inquiries.
Thank you for your help in this matter
[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16267

41 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 25, 2006

Mr. Ronnie Covington
04-A-3883
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. Covington:

I have received your letter in which you raised questions concerning the waiver of fees for copies of records. You asked whether the Committee on Open Government's regulations (21 NYCRR Part 1401) when read in conjunction with the Freedom of Information Law, authorizes an agency to waive fees.

In this regard, I do not believe that the regulations promulgated by the Committee focus on the waiver of fees. Section 1401.2(b)(4)(i) states that an agency "make a copy available upon payment or offer to pay established fees, if any." The term "if any" does not automatically create or necessarily envision a waiver of fees. As stated in the advisory opinion to which you referred:

> "Notwithstanding the foregoing, there is nothing in the Freedom of Information Law that prohibits an agency from waiving the fee for copies. As such, you could choose to waive the fee. It is also noted that many agencies waive fees as a matter of policy when the request involves a minimal number of copies. Their finding is that it costs more to accomplish the administrative tasks associated with taking in a small amount of money than the amount of the fee."

Based on the foregoing, it is clear that an agency may waive fees but that it is not required to do so by either the Freedom of Information Law or the regulations promulgated by the Committee.

You also sought an opinion concerning "whether or not an agency's claimed non-receipt of a F.O.I.L. request and or appeal can constitute a constructive denial of that F.O.I.L. request or appeal for purposes of exhausting administrative remedies."

From my perspective, if an agency claims that it did not receive a request or an appeal, the agency is neither granting or denying access to records. Therefore, a person requesting records would not, in my view, have exhausted administrative remedies.

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-16268

41 State Street, Albany, New York 12231
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October 25, 2006

Mr. Charlie Jones
00-A-5757
Eastern NY 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. Jones:

I have received your letter in which you requested an advisory opinion concerning whether you are entitled to obtain copies of a log of visitors you received while in jail, court date cards of dates that you went to court and a log of the names of attorneys that visited you on the days you were present in court.

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 (j) of the Law.

Second, if logs or other records of your interest are maintained that pertain only to your visitors or the attorneys, I believe that they would be accessible. If, however, no separate logs are maintained with respect to each inmate, rights of access may be different. For instance, if a visitor or attorneys 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 logs 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 or attorneys log, if such records exist, are kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors or attorneys, 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 or attorneys and each page would have to be reviewed in an effort to identify visitors or attorneys of a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

I hope that I have been of assistance.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16269

41 State Street, Albany, New York 12231
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October 25, 2006

Mr. Frank Marsicoveteri
76-A-3390
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10090-0900

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. Marsicoveteri:

I have received you letter in which you indicated that you have encountered difficulty in obtaining records pertaining to an autopsy from the New York City Chief Medical Examiner.

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 (j) of the Law.

Second, with respect to records prepared in relation to a death by the Medical Examiner, relevant is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute.

When an autopsy report or other record of an examination of a death is prepared in New York City by the Office of the Chief Medical Examiner, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts those records from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994]. I note that in Mitchell, the court found that the applicant was "not making his request merely as a public citizen" under the Freedom of Information Law, "But, rather, as someone involved in a criminal action that may be affected by the content of these records and thereby has a substantial interest in them." On the basis of Mitchell, it would appear that your ability to gain access to autopsy reports and related records in question would be dependent upon your capacity to demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16270

41 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 25, 2006

Mr. Darryl Dickens
97-A-0167
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. Dickens:

I have received your letter in which you indicated that a request for a copy of a memo written by a correction officer submitted to a grievance committee had been denied.

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 (j) of the Law.

Section 87(2)(g) states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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, insofar as the memo consists of opinions or recommendations offered by agency staff, I believe that it could be withheld under §87(2)(g).

Additionally, to the extent that the record in question may identify others, it is possible that those details may be withheld on the ground that disclosure would result in an "unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16271

41 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 25, 2006

Mr. Travis Marshall
03-B-1633
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. Marshall:

I have received your letter in which you asked whether you may obtain videotape of an incident occurring at a correctional facility. You indicated that you submitted a request for a copy of the videotape but, 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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.

Second, in a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

> "...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution. Moreover, respondents' regulations require disclosure to news media of an inmate's 'name *** city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7 NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in

> a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff under §87(2)(f).

Further, in another case involving videotapes of events occurring at a correctional facility, in the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. However, other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy and endanger life and safety [see 174 AD2d 212 (1992)].

Third, the Freedom of Information Law pertains to existing records. If an agency does not maintain or has not preserved an audio/videotape, the Freedom of Information Law would not apply, and it has consistently been advised that an agency is not required to honor an ongoing or prospective request for records that do not yet exist. Also, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

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, 2005 (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."

The person designated to determine appeals by the Department of Correctional Services is Mr. Anthony J. Annucci, Counsel to the Department.

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-16072

41 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 25, 2006

Mr. Mark K. McDermott
03-A-0911
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. McDermott:

I have received your correspondence in which you questioned whether the response by the Oneida County Office of the District Attorney indicating approximately 45 days would be needed to determine which records could be disclosed is consistent with 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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-16023

From: Robert Freeman
To: [redacted]
Date: 10/26/2006 9:30:09 AM
Subject: Dear Mr. Dang:

Dear Mr. Dang:

I have received your letter in which you asked to whom you should direct a request for a a contract between the New York City Health and Hospitals Corporation and a corporation. In this regard, as a general matter, a request should be made to the records access officer at the agency or agencies that you believe would maintain the record sought.

In this instance, a request would properly be made to the records access officer at the Health and Hospitals Corporation, 125 Worth Street, Room 519, New York, NY 10013. According to the Official New York City Directory, the records access officer is Patricial Lockhart, Secretary to the Corporation.

Although there is no state agency that serves as the repository of contracts into which municipal entities enter, I believe the the Office of the New York City Comptroller may maintain records of that nature. If that is so, a request may be made to its records access officer at One Centre Street, Municipal Building, New York, NY 10007.

It is noted that when two or more agencies maintain the same records, each would be obliged to give effect to a request made under the Freedom of Information Law, even if an agency is not the creator or primary custodian of the records.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

16274

From: Robert Freeman
To: [redacted]
Date: 10/26/2006 9:41:19 AM
Subject: Dear Mr. Bachenheimer:

Dear Mr. Bachenheimer:

I have received your letter in which you asked whether "the recent amendment to the Freedom of Information Law (Chapter 182) regarding requesting and obtaining records via e-mail" requires that "a municipality purchase a scanner and scan requested documents so that those documents can be e-mailed to the party requesting same."

In short, in my view, it is clear that there is no requirement that an agency purchase a scanner in order to gain the capacity to transmit records via email. As stated in §89(3)(b) of the Freedom of Information Law: "All entities shall, *provided such entity has reasonable means available*, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail." If an agency does not maintain a scanner, again, I do not believe that it is required to purchase a scanner in order to accommodate an applicant asking that records sought be made available by means of email.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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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-16275

41 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, 2006

Mr. Bryce Colwell
05-A-3997
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 12304

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Colwell:

I have received your letter in which you wrote that you were denied access to a victim's statement by the City of Plattsburgh Police Department on the ground that it constituted "an unwarranted invasion of personal privacy." You also stated that you had previously possessed a copy but that you must have discarded it.

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 a victim or witness 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 a victim or witness statement has not been previously disclosed, three grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As

a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) 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 victims' or witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Second, §87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

Lastly, another aspect of Moore is particularly relevant. Based on that decision, 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 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16276

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 26, 2006

Mr. Michael Meehan
BE3945
1111 Altamont Boulevard
Frackville, PA 17931-2601

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Meehan:

I have received your letter in which you indicated that you are seeking medical records concerning your mother from a nursing home and an assisted living facility and expressed the view that the entities would be subject to of the Freedom of Information Law because they accept medicaid reimbursement.

In this regard, I offer the following comments.

First, §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."

It is noted that the receipt of medicaid reimbursement would not alone indicate that an entity is an "agency." If the entities in question are governmental, they would be "agencies" subject to the Freedom of Information Law. However, if they are private facilities, the Freedom of Information Law would not be applicable. I point out that many private organizations (i.e., private hospitals) receive state funds (such as medicaid reimbursement) and again, the receipt of those funds does not render them subject to the Freedom of Information Law.

Second, another provision of law, §18 of the Public Health Law deals specifically with access to patient records. In brief, that statute prohibits disclosure of medical records to all but "qualified persons." Subdivision (1)(g) of §18 defines the phrase "qualified person" to mean:

> "any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law, or a parent of an infant, a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record pursuant to paragraph (c) of subdivision two of this section, or an attorney representing or acting on behalf of the subject or the subjects estate."

If you are not a "qualified person", I believe that the medical records of your interest would be exempt from disclosure. To obtain additional information regarding access to patient information, it is suggested that you contact Mr. Peter Farr, NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

Lastly, enclosed as requested are materials pertaining to the Personal Privacy Protection Law. Also, the agency that most likely maintains or prepares statistical date regarding crimes is the Division of Criminal Justice Services, 4 Tower Place, Stuyvesant Plaza, NY 12203-3764.

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

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 26, 2006

E-MAIL

TO: Duane Corbo

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. Corbo:

I have received your letter in which you expressed the belief that "a FOIL request for generic statistics readily available from DOT did not require a FOIL request."

In this regard, the Freedom of Information Law includes all agency records within its coverage, and §89(3) states in part that an agency may require that a request for records be made in writing. Therefore, although an agency, such as DOT, may choose to make records available informally and without a written request, it may choose to require that requests be made in writing.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16278

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 26, 2006

E-MAIL

TO: Don Hughes

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. Hughes:

I have received your letter in which you complained that the City of White Plains "has systematically denied [your] FOIL requests by ignoring them as well as the appeals." You have sought guidance on the matter.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

In the context of the matter that you described, an Article 78 proceeding would be commenced in Supreme Court, Westchester County. This office does not have the expertise or jurisdiction to provide detailed information concerning the initiation of such a proceeding, and if you desire to pursue the matter, it is suggested that materials for your review are likely available in the Supreme Court library.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16279

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 26, 2006

E-MAIL

TO: David Bachenheimer

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. Bachenheimer:

With respect to scanning records in order to transmit them via email, it is our view that if the agency has the ability to do so and when doing so will not involve any effort additional to an alternative method of responding, it would be required to scan the records. For example, when copy machines are equipped with scanning technology that can create electronic copies of records as easily as paper copies, and the agency would not be required to perform any additional task in order to create an electronic record as opposed to a paper copy, we believe that the agency is required to do so. Further, it appears in that instance that transferring a paper record into electronic format would diminish the amount of work imposed upon the agency in consideration of the absence of any need to collect and account for money owed or paid for preparing paper copies, and the availability of the record in electronic format for future use.

In sum, it is our opinion that if the agency has the technology to scan a record without an effort additional to responding to a request in a different manner, and a request is made to supply the record via email, the agency must do so to comply with the Freedom of Information Law.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16280

41 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, 2006

E-Mail

TO: Ms. Jeanne Mitchell

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. Mitchell:

I have received your letter in which you asked whether the Freedom of Information Law "applies to requesting the current bid price for lawn care for the NY State Fair."

In this regard, the Freedom of Information Law is applicable to records maintained by government agencies, and if a record exists indicating "the current bid price for lawn care for the NY State Fair", any such record would be subject to rights of access.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Assuming that a contract has been awarded and that a price has been fixed, I believe that the contract would be accessible, for none of the grounds for denial of access could properly be asserted.

Lastly, to seek records, a request should be made to the "records access officer" at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16028

41 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, 2006

Mr. Eladio Silverio
95-A-3384
Woodbourne Correctional Facility
P.O. Box 1000
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Silverio:

I have received your letter in which you indicated that you requested a copy of a "firearm trace" from the New York City Police Department. The Department stated that it does not possess such a document.

In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of assistance.

Sincerely,

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-16282

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, 2006

Mr. John Johnson
95-A-4645
Eastern NY 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. Johnson:

I have received your letter in which you requested an advisory opinion concerning whether you are entitled to obtain copies of a log of visitors you received while in jail, court date cards of dates that you went to court and a log of the names of attorneys that visited you on the days you were present in court.

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 (j) of the Law.

Second, if logs or other records of your interest are maintained that pertain only to your visitors or the attorneys, I believe that they would be accessible. If, however, no separate logs are maintained with respect to each inmate, rights of access may be different. For instance, if a visitor or attorneys 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 logs 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 or attorneys log, if such records exist, are kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors or attorneys, 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 or attorneys and each page would have to be reviewed in an effort to identify visitors or attorneys of a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

I hope that I have been of assistance.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16283

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, 2006

Mr. Daniel Callahan
05-A-1754
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. Callahan:

I have received your letter in which you complained that you had submitted Freedom of Information Law requests to the Greene County Attorney's office and, that as of the date of your letter to this office, you had not received any responses. In your letter you mentioned a disposable camera, but it is unclear if that is what you requested.

In this regard, I offer the following comments.

First, from my perspective, the issue of substance is whether your request involves a "record" that falls within the scope of the Freedom of Information Law as opposed to an item of physical evidence. The Freedom of Information Law is applicable to agency records, and §86(4) of the Law defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

I point out that it has been held that items of physical evidence (i.e., tools and clothing) do not constitute records and are beyond the coverage of the Freedom of Information Law [Allen v. Stroynowski, 129 AD 2d 700; mot. for leave to appeal denied, 70 NY 2d 871 (1989)]. As such, if your request was for a disposable camera, the camera, in my opinion, would not constitute a "record" subject to the Freedom of Information Law.

Second, if your request involved records as defined by §86(4), 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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16284

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 30, 2006

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:

I have received your letter concerning a request for a copy of certain blueprints maintained by the Harrison Central School District. Although you were informed that you may inspect the blueprints, you wrote that they are large, and the District indicated that it "does not have the necessary equipment to reproduce a blueprint." You have asked whether you may, "if [you] pay for them, have copies made of the plans."

In this regard, when records are accessible to the public under the Freedom of Information Law, §87(2) requires that they made available for inspection and copying. Further, §89(3)(a) states that an agency, such as a school district, is required to make copies of records upon payment of the appropriate fee.

As the law pertains to fees, §87(1)(b)(iii) of the Freedom of Information Law contains essentially two standards under which agency may impose fees for copying records. First, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches; and second, for copies of all other records, an agency may charge based on the "actual cost" of reproduction. Those standards apply, unless a different fee is prescribed by statute, and no other statute would be pertinent in this instance.

The records that you requested are apparently larger than nine by fourteen inches and can not be reproduced by means of the District's photocopying equipment. In order to reproduce the blueprints, it appears that doing so would involve transferring the blueprints to an entity that has the capacity to make copies, such as a private copying service or perhaps a BOCES. In either case, the actual cost of reproduction would involve whatever costs must be borne by the District in order have copies made, such those incurred to pay a private service, postage, and the like. From my perspective, the District is required to make such an arrangement, so long as the blueprints in question are not in constant use by its personnel and you pay the actual cost incurred by the District.

In the alternative, it has been suggested that members of the public or their representatives may photograph large records and print them in the size of their choice. For instance, you or your representative may use a digital or other camera and simply photograph the blueprints and print the images as you see fit. In that instance, since the District would not be preparing a copy, I do not believe that it could charge a fee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Gene George

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16285

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 30, 2006

Mr. Graham A. Kerby
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kerby:

I have received your latest letter and the materials attached to it. You referred to an element of the opinion sent to you on August 21 that was not, in your view, fully addressed.

Specifically, one aspect of your request to SUNY Stony Brook involved remedial courses taken by its students, and I conjectured that the University did not have the ability to extract data on that subject and that honoring your request would necessitate the creation of new records, which the University is not required to do. You wrote, however, that the University denied the request on the basis of the Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). You have asked that I address the issue in consideration of 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.

From my perspective, if the data of your interest exists in the form of a record or records, it must be disclosed, except to the extent that it contains personally identifying information relating to a student or students. If those portions of the data containing personally identifying information relating to students and can be segregated electronically with reasonable effort in a manner consistent with the direction offered in the opinion of August 21, I believe that SUNY would be required to do so. If that cannot be accomplished electronically with reasonable effort, personally identifying details may be manually deleted.

Lastly, as suggested in the earlier opinion, if the data of your interest does not exist, SUNY would not be required to prepare new data on your behalf in order to satisfy your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Karol K. Gray
Stacey Hengsterman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16286

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 30, 2006

Mr. Ronald Thompson
97-A-5948
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Thompson:

I have received your letter in which you referred to a "policy in not allowing prisoners to have in their possession a 'birth certificate'" and asked whether you may obtain "the file numbers on the front & back of [your] birth certificate."

In this regard, I am unfamiliar with the policy to which you referred. However, assuming that a birth certificate pertains to you, I believe that any portion, including the file numbers, should be available to you.

When such a record is maintained by your facility, in my opinion, the Freedom of Information Law would govern 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. While a request for a birth certificate sought by persons other than yourself might be denied on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)], I do not believe that you could engage in an invasion of your own privacy. I note, too, that the subjects of birth certificates may obtain copies, upon proof of identity, from the clerk of the city or town of birth, or the State Department of Health.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 30, 2006

E-MAIL

TO: Bruce Sanders

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. Sanders:

I have received your letter in which you indicated that a request for records made to the City of Buffalo nearly three weeks ago has not been answered. You asked how long the City has to do so.

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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

I hope that I have been of assistance.

RJF:tt

cc: Records Access Officer, City of Buffalo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16288

41 State Street, Albany, New York 12231
(518) 474-2518
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October 30, 2006

Ms. Elsa Gonzalez
04-G-1073
Albion Correctional Facility
3595 State School Road
Albion, 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 facts presented in your correspondence.

Dear Ms. Gonzalez:

I have received your letter concerning a request for a "computerized sheet of Court Appearances....posted outside the courtrooms...in the Hall of Justice" in Monroe County.

In this regard, 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."

Although the courts fall beyond the coverage of the Freedom of Information Law, other provisions of law (see e.g., Judiciary 255) often provide broad rights of access to court records. It is suggested that you resubmit your request, citing an applicable provision of law as the basis for the request.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16289

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 2, 2006

Mr. Houston Douglas
06-A-2860
Five Points Correctional Facility
State Route 96, P.O. Box 119
Romulus, NY 14541

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Douglas:

We have received your letter in which you are attempting to obtain records from the Supreme Court of the State of New York, Criminal Term Correspondence Unit.

In this regard, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the Freedom of Information Law does not pertain to the courts or court records. This is not to suggest that court records are confidential; on the contrary, court records in many instances must be made available by the court or court clerk (see e.g., Judiciary Law, §255).

It is suggested that a request be submitted to the clerk of the court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16290

41 State Street, Albany, New York 12231
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November 2, 2006

Ms. Marnie Eisenstadt
Reporter
The Post-Standard
Clinton Square
P.O. Box 4915
Syracuse, NY 13221

The staff of the Committee on 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. Eisenstadt:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Onondaga County Department of Law for copies of "visitor logs reflecting visitors to Timothy Ginochetti from August 24 to September 14, 2006." Based on information you provided, that "the logbook is kept on the reception desk and visitors informed you that they have looked through the logbook," the County granted your request, "insofar as the Sheriff's office is able to identify Mr. Ginochetti's visitors in the logbook for the period [described] ... and that all other inmates and their visitor names are redacted."

The County based its response on an advisory opinion from the Committee on Open Government indicating that 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, we 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 our opinion that those portions of the log pertaining to persons other than oneself could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

In addition, the County indicated that "prior to disclosure, the Sheriff's Office will provide Mr. Ginochetti and his attorney with a copy of your original FOIL request, the Sheriff's Office response, your appeal, this appeal decision and a copy of the proposed redacted, logbook page(s) to be disclosed. Mr Ginochetti will be given an opportunity to object to the disclosure." In this regard, we offer the following comments.

First, in conjunction with the definitions of "agency" and "record" appearing respectively in subdivisions (3) and (4) of §86 of the Freedom of Information Law, any documentation maintained

by the County would constitute an agency record subject to rights of access, and it is our view that the County is required to disclose its records to the extent required by the Freedom of Information Law. Certainly representatives of the County may consult or confer with other persons or entities in order to seek advice or guidance prior to granting or denying access to records. Nevertheless, we believe that it is the County's responsibility to grant or deny access to its records and that it would be inappropriate to condition disclosure on the consent of the subject of the record in this instance.

We emphasize that whether a person prefers to authorize or preclude disclosure is irrelevant here. In a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their preference concerning the agency's disclosure of the incident to the news media, the Appellate Division found that, as a matter of law, the agency could not withhold the record based upon the "preference" of the person who reported the offense. Specifically, in Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985), it was found that:

> "There is no question that the 'releasable copies' of reports of offenses prepared and maintained by the Genesee County Sheriff's office on the forms currently in use are governmental records under the provisions of the Freedom of Information Law (Public Officers Law art 6) subject, however, to the provisions establishing exemptions (see, Public Officers Law section 87[2]). We reject the contrary contention of respondents and declare that disclosure of a 'releasable copy' of an offense report may not be denied, as a matter of law, pursuant to Public Officers Law section 87(2)(b) as constituting an 'unwarranted invasion of personal privacy' solely because the person reporting the offense initials a box on the form indicating his preference that 'the incident not be released to the media, except for police investigative purposes or following arrest'."

Moreover, although the issue did not involve law enforcement, the Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available [see Washington Post v. New York State Insurance Department, 61 NY 2d 557, 567 (1984)]. This is not to suggest that records or portions of records might not justifiably be withheld, but rather that a claim or promise of confidentiality in our opinion is irrelevant to an analysis of rights of access to records.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of

> the approximate date, 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, 2005 (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.

Further, on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Christine M. Pezzulo

From: Robert Freeman
To: [redacted]
Date: 11/6/2006 9:35:37 AM
Subject: Dear Ms. Coyne:

Dear Ms. Coyne:

I have received your inquiry concerning the source of "information on a person who went to trial in New York State."

In this regard, first, the primary source of records relating to a trial would be the court in which the proceeding was conducted.

Second, the courts are not subject to the Freedom of Information Law. However, court records are generally available pursuant to other laws (see e.g., Judiciary Law, §255). When seeking court records, a request should be made to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

Lastly, when a person is charged with a criminal offense and the charge is dismissed in favor of the accused, the records relating to the event generally are sealed pursuant to §160.50 of the Criminal Procedure 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

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 6, 2006

E-MAIL

TO: Gary French

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. French:

I have received your letter in which you asked what the consequences may be when a person is guilty of preventing public inspection of a record by willfully concealing or destroying the record.

In this regard, §89(8) of the Freedom of Information Law and §240.65 of the Penal Law include essentially the same language. Specifically, the latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record that must be maintained.

That statute indicates that unlawful prevention of public access to records is a violation. The term "violation" is defined in §10.00(3) of the Penal Law to mean "an offense, other than a 'traffic infraction', for which a sentence to a term in excess of fifteen days cannot be imposed." Additionally, §80.05(4) of the Penal Law states that: "A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding two hundred fifty dollars." Based

on the foregoing, it appears that a person found guilty of a violation may serve up to fifteen days in jail and/or be fined up to $250.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16293

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 6, 2006

E-MAIL

TO: Paul and Lisa Mulford

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. and Mrs. Mulford:

I have received your letter in which you referred to requests made pursuant to the Freedom of Information Law in September and October. You asked when you "should expect to receive a reply."

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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16294

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 6, 2006

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 request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Village of Horseheads, and the materials attached to it.

Recently you requested an advisory opinion regarding, in part, the accessibility of copies of traffic tickets issued by the Village during a certain time period. By correspondence dated July 27, 2006, the Committee on Open Government issued an advisory opinion to you that set forth the legal basis for our opinion with respect to the availability of a large number of records that are not maintained electronically, and that, at least in part, may be sealed and exempt from public disclosure pursuant to Criminal Procedure Law §160.50. Accordingly, we will refrain from addressing that issue again here.

With respect to your query as to the availability of "calibrations", we note the response from the Village that such records are not maintained in electronic form. When records are maintained in paper format only, in our opinion that they are not required to be made available in electronic format.

On behalf of the Committee on Open Government 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-16295

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November 6, 2006

E-MAIL

TO: Kathryn J. Eiseman

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. Eiseman:

Your inquiry concerning rights of access to a report prepared by a municipality has been forwarded to this office. The Committee on Open Government, a unit of the Department of State, is authorized by the Freedom of Information Law to render advisory opinions concerning that statute. Based on the information that you provided, 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 an entity of local government. Specifically, §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 foregoing, reports prepared by a consultant for an agency clearly constitute agency records subject to the Freedom of Information Law.

Second, as a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Perhaps the provision of primary significance in the context of the inquiry is §87(2)(g). Although that provision serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals, the State's highest court, stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty

> Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)]."

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][I], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I note that in a 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 brief, that records are "draft" or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access..

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation" (id., 276-277)."

Additionally, to the extent that records are constructively disclosed at one or more open meetings, from my perspective, the disclosure serves as a waiver of the ability to withhold records containing information imparted to the public. In short, insofar as the content of a consultant's report that may otherwise be withheld under the Freedom of Information Law is disclosed by means of public discussion during one or more meetings conducted open to the public, I believe that the agency loses its authority to deny access.

I hope that I have been of assistance.

RJF:tt

cc: Larry Weintraub

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16296

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 7, 2006

E-MAIL

TO: Kevin Gorman

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. Gorman:

I have received your letter in which you indicated that the City of Yonkers has a mayor and a city council, and asked, for purposes of appealing a denial of access to records, whether you may "appeal to one or the other."

From my perspective, the rules and regulations required to have been adopted must indicate the identity of the appeals person or body. In this regard, I offer the following comments.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the City Council, 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. Further, §1401.7(a) of the regulations promulgated by the Committee states that: "The governing body of a public corporation or the head, chief executive or governing body of other agencies shall determine appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of

Information Law." Because a city is a public corporation, I believe that an appeal may be made to the City Council or a person or body designated by the City Council to determine appeals.

It is suggested that you contact either the City Clerk or the office of the corporation counsel to ascertain the identity of the person or body designated to determine appeals.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16297

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 7, 2006

Mr. Donald Walsh
93-A-8496
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Walsh:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law. In particular, you inquire as follows:

> "1. Does law provide for legally made requests for public records access to be referred to a separate and unrelated agency for purposes of such an investigation, and what is that law?
>
> 2. Do the reasons why a particular record is requested have any relevance by law to the accessibility of that record, and what is that law?"

With respect to your first question, we know of no provision of law that requires an agency to refer requests for records to other agencies for investigation purposes. On the other hand, in our opinion, requests for records are not confidential or protected from disclosure in most cases. 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 (j) of the Law. From our perspective, with the exception of portions of certain kinds of requests, copies of requests for records 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).

In sum, while there is no provision of law that would require an agency to forward a request for investigation purposes, there is also nothing that would prohibit an agency from doing so.

With respect to your second question, we note that the reason a person makes a request for a particular record is not relevant to the accessibility of the record. 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)].

As stated previously, an agency could deny access to the extent that the record or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. However, there is no provision of law of which we are aware that would prohibit an agency from forwarding a request to a law enforcement agency for investigation.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

FOIL-AO-16298

From: Robert Freeman
To: HEGEDUS, HEATHER
Date: 11/8/2006 4:15:32 PM
Subject: Re: Foil Question

Hi - -

You should assume that the agency has the email. From there, it has 5 business days to respond by granting access, denying access in writing or acknowledging the receipt of the request and providing an approximate date within twenty business days that indicates when the request will granted in whole or in part. A failure to do so within five business days of the receipt of the request constitutes a denial of the request that may be appealed. The person or body designated to determine appeals then has ten business days to either grant access to the records or fully explain in writing the reasons for further denial.

My suggestion is to contact the agency, ask whether the records sought are in the mail, and if they are not, ask for the name of the person to whom an appeal may be addressed.

For a detailed explanation of an agency's duty to respond in a timely manner, take a look at the website and click on to "What's New".

If I can be of additional assistance, please don't hesitate to get in touch.

Bob

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

>>> "HEGEDUS, HEATHER" <HEATHERHEGEDUS@clearchannel.com> 11/8/2006 4:03:36 PM >>>
Hi Bob,
Yet another FOIL question (I'm really using my spot on the committee for some great access to you, huh!?)

About three weeks ago, I sent an email to the paralegal at the Syracuse City's Corporation Counsel's office requesting the police overtime records I spoke with you about. I never heard back.

Unfortunately, the email seems to have been automatically deleted from my sent mail box.

The law says they have to acknowledge receipt of my request - they did not. How many days do they have to do so - five, right?

Since the electronic FOIL requests law is new, I know there's a grace period, but are there penalties for not responding within the amount of time? Is there anything I can do about it since I don't have the original email?

Thanks for your advice,

Heather

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 16299

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November 8, 2006

Mr. Peter DeFelice
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DeFelice:

I have received your letter and the materials attached to it. You referred to three unanswered requests made to the Eastchester Fire District.

In this regard, I offer the following comments.

First, having reviewed your requests, I point out that the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Similarly, an agency, such as a fire district, may choose to supply information in response to questions, but it is not required to do so. For instance, in one request, you asked: "Are all hydrants in working condition." That, in my view, is not a request for records, and the Fire District would not be obliged to offer information in response to your question. In the future, it is suggested that you request records, i.e., records indicating the working condition of hydrants.

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 (j) of the 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, 2005 (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 note that on August 16, 2006, effective immediately, legislation became effective that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16300

41 State Street, Albany, New York 12231
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November 8, 2006

Hon. Kevin T. McCarrick
Brookhaven Town Councilman
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, unless otherwise indicated.

Dear Council Member McCarrick:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Town of Brookhaven. Specifically, you requested the assistance of this office in obtaining "reports regarding the financial information from the Town Department of Finance" in order to fulfill your fiduciary duty to the residents of Brookhaven, as a member of the Brookhaven Town Council.

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. It is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law.

We are unaware of any statute that deals specifically with requests by council members for town records or any unique authority that council members enjoy, individually, concerning their capacity to obtain copies of town records.

With respect to the Freedom of Information Law, that statute is, in our view, intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a board rule or policy to the contrary, we believe that a member of a public body

should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

Subsequent to your request, we received a copy of correspondence from Town Supervisor Foley to you, enclosing "a year to date budget report, which is an updated version of the one originally provided to you in August 2006, reformatted as per your latest request." It would appear, therefore, that the requested records were provided to you. However, in an effort to address the issues that you raised, we offer the following comments.

First, the Freedom of Information Law pertains to agency records and that §86(4) of the Law defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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 our 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 our opinion, be the equivalent of creating a new record. Since §89(3) does not require an agency to create a record, we 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)].

Based on the description of the records you have requested, specifically revenue and expenditure reports broken down by division and fund, in our opinion is it likely that such information exists and can be generated without significant reprogramming.

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 (j) of the Law. 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. Accordingly, it is likely that all of the information requested from the Department of Finance would be required to be made available to you.

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, 2005 (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.

On August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt
cc: Hon. Brian X. Foley
Robert Quinlan
Kim G. Brandeau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16301

41 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 9, 2006

E-MAIL

TO: David VanPelt

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. Van Pelt:

I have received your letter concerning rights of access to crime scene photos relating to murder convictions occurring in New York City in the 1950's.

In this regard, first, the Freedom of Information Law includes all agency records within its coverage. Section 86(4) defines the term "record" to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, insofar as the photos of your interest continue to exist and are maintained by an agency, such as the New York City Police Department, I believe that they clearly constitute agency records falling within the scope of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. From my perspective, the only possible basis for denial of access would be §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." That provision would be applicable in my view only if the photos are especially graphic and disclosure would be highly offensive to families of the victims.

Third, notwithstanding the foregoing, when records have been disclosed in a public judicial proceeding, it has been held that they are accessible from an agency that maintains them and that the exceptions in the Freedom of Information Law do not apply [see Moore v. Santucci, 151 AD2d 677 (1989)].

Lastly, although the courts are not subject to the Freedom of Information Law, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). Therefore, if the photos of your interest are maintained as part of the file concerning a judicial proceeding, I believe they would be available from the court in which the proceeding was conducted. Should you request 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.

I hope that I have been of assistance.

RJF:tt

FOIL-AO-16302

From: Robert Freeman
To: DSchuck@yorktownny.org
Date: 11/21/2006 9:09:42 AM
Subject: Dear Lt. Schuck:

Dear Lt. Schuck:

I have received your letter concerning email evidence which if disclosed might constitute an unwarranted invasion of privacy. Since "these records were originally created by some one else and not Yorktown Police Department", you asked whether they are "out of the definition of records."

In my view, email maintained by or for an agency, irrespective of its origin or function, would constitute a "record" as that term is defined in §86(4) of the Freedom of Information Law. However, as in the case of any other record, its content and effect of disclosure serve as the key factors in determining rights of access. In short, the content of email would be treated in the same manner as a paper record. If the information appearing on paper could be withheld as an unwarranted invasion of privacy, the equivalent information appearing in email could be withheld for the same reason.

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-16303

From: Robert Freeman
To: lpelleti@mail.keuka.edu
Date: 11/21/2006 3:53:43 PM
Subject: Dear Mr. Pelletier:

Dear Mr. Pelletier:

I have received your letter and offer the following comments.

First, the Freedom of Information Law pertains to existing records. Therefore, if, for example, no records have been prepared indicating per pupil expenditures, a school district would not be required to create new records on your behalf containing the information sought.

Second, insofar as the information of your interest exists in the form of a record or records, they would clearly be accessible under FOIL, so long as they do not include identifying details pertaining to specific students. In short, none of the exceptions to rights of access could justifiably be asserted to withhold the records in question, so long as students cannot be identified. In the event that the records include students' names appearing alphabetically, it has been held that identifying details should be deleted and that the records be "scrambled" so that there is no possibility of identifying any particular student.

It is suggested that you submit a FOIL request to the district and suggest that its staff contact this office if there are questions.

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-16304

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 27, 2006

Mr. James Brem
Buffalo Apartment Screening Service, LLC
636 Statler Towers
107 Delaware Avenue
Buffalo, NY 14202

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brem:

I have received your correspondence in which you appealed a denial of your request for the City of Buffalo's assessment roll to this office. The City cited §89(2)(b)(iii) of the Freedom of Information Law as the basis for the denial.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency, such as the City of Buffalo, 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."

As indicated in the response to your request, it is suggested that you appeal to the City's Corporation Counsel, Alisa A. Lukasiewicz.

Second, with respect to the reason for the denial, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

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].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be sent to City officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruna Michaux, Commissioner
Alisa A. Lukasiewicz, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16305

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 27, 2006

Mr. Richard Isasi
98-A-1899
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

Dear Mr. Isasi:

I have received your letter in which you appealed a denial of access to records by Attica Correctional Facility.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records.

The provision pertaining to the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16306

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 27, 2006

Mr. Clarence Vetovick
04-A-5090
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Dear Mr. Vetovick:

I have received your letter in which you asked that this office "intervene on your behalf" in relation to an answered request made to the clerk of a court pursuant to the Freedom of Information Law and §255 of the Judiciary Law.

In this regard, this office is not authorized to "intervene" in the context of the matter that you described. The advisory jurisdiction of the Committee on Open Government pertains to the Freedom of Information Law, and the courts are not subject to that statute.

The Freedom of Information Law is applicable to agencies, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, again, the courts are beyond the coverage of the Freedom of Information Law.

This is not intended to suggest that court records are not accessible, for other provisions of law, notably the statute to which you referred, §255 of the Judiciary Law, generally requires clerks of courts to disclose records in their possession. However, that provision includes no reference to

a time limit for response, the right to appeal a denial of access, nor does it contain the procedural requirements appearing in the Freedom of Information Law.

In short, I regret that I cannot be of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-16307

From: Janet Mercer
To: mweinbe@lirr.org
Date: 11/30/2006 1:54:43 PM
Subject: Camille Jobin-Davis

Mark,

As per our conversation, attached is AO#15835 issued February 28, 2006, regarding the Boni case that was previously faxed to you.

With respect to our conversation yesterday and our discussion earlier today, it is my opinion that redacting names and addresses from the injury/accident reports, and leaving the narrative description would be in keeping with the Freedom of Information Law. Release of identifying information, coupled with the narrative, I believe would result in an unwarranted invasion of personal privacy. My apologies for the confusion.

Once I have had a chance to discern whether we have already issued a written opinion precisely on point, I will contact you.

Camille Jobin-Davis
Assistant Director

Committee on Open Government
41 State Street
Albany, NY 12231
Phone: (518) 474-2518
Website: www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16308

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 30, 2006

Mr. Gary McNeill
06-A-3188
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. McNeill:

I have received your letter in which you asked whether there is a prescribed time period in the Freedom of Information Law within which agencies must respond to requests.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 16309

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December 1, 2006

E-Mail

TO: Mr. Leonard Asaro

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. Asaro:

I have received your letter in which you indicated that your request directed to the Town of Cairo Code Enforcement Officer pursuant to the Freedom of Information Law has not been answered.

In this regard, first, the regulations promulgated by the Committee on Open Government 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. In most towns, the town clerk is the records access officer. It is suggested that you contact the clerk in an effort to ascertain the status of your request.

I note, too, that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

I hope that I have been of assistance.

RJF:jm
cc: Hon. Tara Rumph
Code Enforcement Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16310

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December 1, 2006

Mr. James Murray
95-A-4417
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. Murray:

I have received your letter and, as requested, enclosed is a copy of the home page of the Committee on Open Government website which describes the Committee's mission, its publications and other materials that it produces.

You also sought advice concerning "depictions recorded on memory bank of surveillance system for approx. two weeks before it erases itself..." You indicated that the "depiction is forever lost so the officers violate our rights..." In this regard, as you have been informed, the Freedom of Information Law pertains to existing records. If the depictions to which you referred are erased and no longer exist, the Freedom of Information Law does not apply. Further, that law does not address or include provisions concerning the retention of records. Because that is so, I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4292
FOIL-AO-16311

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December 6, 2006

Ms. Nicole Pilcher
[redacted]

The staff of the Committee on 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. Pilcher:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to various proceedings of the Town of Vienna, and the Freedom of Information Law to certain requests for records. Please accept my apologies for the delay in responding. You raised a number of issues in your request, all of which we will attempt to address with the following comments.

First, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body, such as the Town Board, does not want to answer questions or permit the public to speak or otherwise participate at its meetings, we do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, we believe that it should do so based upon reasonable rules that treat members of the public equally.

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Town Law, §63 and Education Law, §1709), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in our view, would be unreasonable.

There are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited. It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

> "In a traditional public forum, like a street or park, the government may enforce a content-based exclusion only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n., 460 U.S. at 45. A designated or 'limited' public forum is public property 'that the state has opened for use by the public as a place for expressive activity.' Id. So long as the government retains the facility open for speech, it is bound by the same standards that apply to a traditional public forum. Thus, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 46."

In the context of the specific issues that you raised, we believe that a court would determine that the Town Board may limit the amount of time allotted to person who wishes to speak at a meeting, so long as the limitation is reasonable. Similarly, it is our view that the Town Board may limit comments to matters involving Town business or the operation of Town government and require a brief written summary of the subject intended to be discussed by a person wishing to address the Board. Requiring that a person anticipate and articulate all questions exactly, prior to the meeting, in our opinion seems excessive.

However, from our perspective, while the Supervisor presides over Town Board meetings, it is questionable whether he may validly determine unilaterally whether the subject matter of comment proposed by a person desiring to speak involves Town business. He is but one member of the Town Board and we believe that the Town Board, if necessary, should determine by means of a majority vote of its total members if there is a question or disagreement regarding whether a subject relates to Town business. We believe that the Town Board in that circumstance should determine whether the subject may be raised, rather than the Supervisor reaching a determination alone. It is also noted that §63 of the Town Law states in part that "Every act, motion or resolution shall require for its adoption the affirmative vote of all the members of the town board."

Second, with respect to the issue of turning off the clerk's tape recorder and directing the clerk to discontinue taking minutes while a majority of the Town Board remains gathered and continues to discuss public business, in our opinion such actions are contrary to several provisions of the Open Meetings Law.

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)].

We point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, or remains gathered to continue to discuss public business, any such gathering, in our opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law.

Since a gathering to discuss public business held by a majority of a public body is a "meeting", regardless of whether it is characterized as "off the record", 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.

With respect to preparation of meeting minutes, 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 we do not believe that minutes must be prepared.

With respect to the question of proper notice, several provisions of law may be pertinent to an analysis of the matter. As you may be aware, two statutes involve notice. 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."

The provision quoted above pertain to notice given to members of a town board, and the requirements imposed by §62 are separate from those contained in the Open Meetings Law.

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. In our opinion, changing the start time of a meeting on the day of a meeting without the necessity to do so would be equally unreasonable.

With respect to your questions about executive sessions, as you may be aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in our 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 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.

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)]

Now, with respect to the Freedom of Information Law, in your correspondence, you relayed a discussion about the availability of bank statements, and the role of the Town Clerk as records access officer with regard to providing access to records pursuant to the Freedom of Information Law. In this regard, the functions of a "records access officer" is not generally a full-time position; that position is not a civil service title, and there is generally no restriction on who may carry out those functions.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation (i.e., a county, city, town, village, school district, etc.) to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public form continuing from doing so."

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

In short, the records access officer must "coordinate" an agency's response to requests. Frequently the records access officer is an agency officer or employee who has familiarity with an agency's records. For example, the town clerk is designated as records access in the great majority of towns, for he or she, is also the records management officer and the legal custodian of town records, pursuant to §30(1) of the Town Law.

When an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

In consideration of the foregoing, it is clear that a town board, for example, is authorized to determine appeals, or that the head or governing body of an agency may designate a person or body to carry out that function.

Further, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The pertinent exception with respect to bank account numbers indicated on bank statements in our view is §87(2)(i). For several years, that provision authorized an agency to withhold "computer access codes." Based on its legislative history, that provision was intended to permit agencies to withhold access codes which if disclosed would provide the recipient of a code with the ability to gain unauthorized access to information. Insofar as disclosure would enable a person with an access code to gain access to information without the authority to do so, or to shift, add, delete or alter information, i.e., to make electronic transfers, we believe that a bank account or ID number could justifiably be withheld. Section 87(2)(i) was amended in recognition of the need to guarantee that government agencies have the ability to ensure the security of their information and information systems. That provision states that an agency may withhold records or portions of records which "if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." If disclosure of a bank account number could enable a person to gain access to or in any way alter or adversely affect an agency's electronic information or electronic information systems, we believe that it may justifiably be withheld.

In light of the number of issues that you raised, you may find our website helpful (http://www.dos.state.ny.us/coog/coogwww.html). On it there are many advisory opinions that address a wide variety of topics, organized by subject and searchable by key terms.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille Jobin-Davis
Assistant Director

CSJ:jm

cc: Town Board
Hon. Michael Piper, Supervisor
Hon. Nicol L. Baker, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16312

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December 6, 2006

E-Mail

TO: Mr. Tom McGinty

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 information presented in your correspondence, except as otherwise indicated.

Dear Mr. McGinty:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request made for a "lookup table of Originating Agency Identifier (ORI) codes for law enforcement agencies in New York." Based on your description of this record, it is our opinion that it should be made available to you.

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 (j) of the Law. In our opinion, the contents of the record in question are most relevant in considering the extent to which the record may be withheld or must be disclosed.

Records prepared by and for an agency would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Based on your description of its content, the record you have requested is a key or a reference that identifies code numbers associated with each law enforcement agency is New York. This type of information is factual in nature, and in our opinion, therefore, is required to be disclosed unless another exception to the law applies.

As you indicated in our telephone conversation, you have been denied access to the record based on §87(2)(i), which permits an agency to deny access to records that "if disclosed, would jeopardize the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." Unlike security codes or a list of passwords utilized to gain access to a particular database, this list would enable a person to identify a law enforcement agency based on a number. Based on our understanding of this record, disclosure would not jeopardize the security of information technology assets. Accordingly, it is our opinion that the agency cannot justifiably rely on this exception to withhold the record.

On behalf of the Committee on Open Government we hope this is helpful to you.

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16313

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December 7, 2006

Mr. and Mrs. Paul C. Mulford
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. and Mrs. Mulford:

I have received your letter and the materials attached to it. You have requested an advisory opinion concerning the deletion by the Town of Islip of portions of records identifying a person who made a complaint pertaining to you. You added that there is no indication that complainant asked that his/her identity be withheld or that any legal proceeding has been initiated.

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 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.

Second, that there has been no request for confidentiality by the complainant or initiation of a judicial proceeding is, in my view, irrelevant in considering rights of access or the ability of an agency to deny access to records or portions of records.

In short, I do not believe that the Town is required to disclose portions of records identifiable to the complainant.

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: Michele Remsen
Richard Hoffman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16314

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December 7, 2006

Mr. Norman Schachter
02-A-3134
Woodbourne Correctional Facility
Riverside Drive
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Schachter:

As you requested, enclosed is a copy of "Your Right to Know."

You questioned your right to obtain a copy of the affidavit presented to a grand jury that served as the basis for your indictment.

In this regard, first, I point out that the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts 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.

Second, even if the Freedom of Information Law applied, 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. In my view, any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 7, 2006

Ms. Joan Eustace-Reeverts
AAECC Grievance Chair
c/o Erie Community College
6205 Main Street
Williamsville, NY 14221

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Eustace-Reeverts:

I have received your letter and apologize for the delay in response.

You referred to a request made to the office of the President of Erie Community College seeking minutes of meetings of "the Auxiliary Services Corporation (ASC) and the ECC Foundations", as well as other records. In response, you were informed by the President that those entities "are separate 501(c)(3) organizations" and that requests should be made directly to them. You did so and were informed that "[t]he Federal FOI Act does not apply..." You asked whether the two organizations are subject to the New York Freedom of Information Law.

From my perspective, although the federal Freedom of Information Act, which pertains to federal agencies, is inapplicable, the records of both organizations fall within the coverage of the New York Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term"agency " to 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 that a community college, such as ECC, is an "agency" required to comply with the Freedom of Information Law.

Further, §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 at SUNY/Farmingdale, a not-for-profit corporation providing services for a branch of the State University, were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxillary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)]. Therefore, if a document is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency. In the context of the situation that you described, irrespective of whether ASC is an "agency", its records would be maintained for the University at Albany and would, based on Encore, constitute agency records subject to the Freedom of Information Law.

Second, while profit or not-for-profit corporations would not in most instances be subject to the Freedom of Information Law because they are not governmental entities, there are several judicial determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are "agencies" that fall within the scope of the Freedom of Information Law.

In the first decision in which it was held that a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law, [Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the State's highest court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and

> therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

In Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

In conjunction with the foregoing, judicial precedent indicates that a foundation associated with a community college is an "agency" whose records are subject to the Freedom of Information Law.

Analogous to the situation described is a decision in which it was held that a community college foundation associated with a CUNY institution was subject to the Freedom of Information Law, despite its status as a not-for-profit corporation. In so holding, it was stated that:

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> "The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Verified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:
>
> > '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.
>
> "Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

As in the case of the foundation in Eisenberg, that entity, and, in this instance, the ASC and the ECC Foundation, would not exist but for their relationships with ECC.

In short, based on the language of the Freedom of Information Law and judicial precedent, it is clear in my view that the records of both the ASC and the ECC Foundation fall within the coverage of the Freedom of Information Law.

In an effort to enhance their understanding of and compliance with the Freedom of Information Law, copies of this opinion will be forwarded to ECC, the ESC Foundation and ASC.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William J. Mariani
Susan M. Marchione
Susan Holdaway

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-16316

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December 7, 2006

Ms. Kimberly Kennedy
[redacted]

The staff of the Committee 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. Kennedy:

As you are aware, I have received your correspondence concerning requests for records of the Village of Patchogue.

According to your letter, you submitted a request on June 19, and "thirteen days later", you were informed that "the documents were ready." Upon review of the records, however, "it was evident that all of the documents requested were not made available." Despite both written and telephone contacts, the records have not yet been made available. Additionally, you indicated in a telephone conversation on December 1 that you have received no response to a request for minutes of a Village board meeting held in October.

In this regard, first, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

Second, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, again, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Third, when an applicant requests to inspect records, no fee may be charged when the records are accessible under the law. The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Hon. Paul Pontieri, Jr.
Patricia Seal, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16317

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December 7, 2006

E-MAIL

TO: Monica Moshenko

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. Moshenko:

I have received your letter concerning a request made on November 2nd to the records access officer at Suny/Buffalo. She acknowledged the receipt of your request that same day, indicating that "the process of identifying the availability of any records" would be commenced. On November 30th, you were informed that §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought and that SUNY "would be better able to process your request if your letter could be reworded to clarify the records requested." Your request involves all records that "contain or reference [your] name" from January, 2002 to the present.

In this regard, first, while I believe that the records access officer should have contacted you more promptly, I agree that a primary issue pertains to the requirement that requested records be "reasonably described." 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 or the extent to which 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 SUNY, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. Further, in the context of the request, a real question involves, very simply, where SUNY staff officials might begin to look for records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units, and that those units maintain their records by means of different filing and retrieval methods.

When records can be retrieved by means of a name, it may be that in the context of your request, some can be found with reasonable effort. However, if records are maintained chronologically or perhaps by subject area, locating those records that include your name might involve the equivalent of searching for the needle in the haystack. When that is so, I do not believe that the request would meet the requirement of records reasonably describing records.

Next, insofar as a request reasonably describes 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, 2005 (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

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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December 7, 2006

E-MAIL

TO: Benjamin L. Anderson

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. Anderson:

I have received your letter and hope that you will accept my apologies for the delay in response. You asked whether it "is possible to obtain copies of the Articles of Organization for a New York State LLC."

Having researched the matter, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, in general, an "agency" is an entity of state or local government in New York. A limited liability company, a private entity, would not, in my view, be obliged to give effect to the Freedom of Information Law.

Second, however, the articles of organization of a limited liability company must be filed with the Department of State. Here I point out that the documents kept by or for an agency fall within the coverage of the Freedom of Information Law, irrespective of their function or origin, for §86(4) defines "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever

> including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Third, §209 of the Limited Liability Company Law states that:

> "A signed articles of organization and any signed certificate of amendment or other certificates filed pursuant to this chapter or of any judicial decree of amendment or cancellation shall be delivered to the department of state. If the instrument that is delivered to the department of state for filing complies as to form with the requirements of law and the filing fee required by any statute of this state in connection therewith has been paid, the instrument shall be filed and indexed by the department of state. The department of state shall not review such articles or certificates for legal sufficiency; its review shall be limited to determining that the form has been completed."

Because a limited liability company's articles of organization must be "delivered" to the Department of State, as soon as delivery is accomplished, such documents constitute agency records accessible under the Freedom of Information Law.

Having made an inquiry on your behalf, I was informed that they articles of organization may be obtained from the Department's Division of Corporations.

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 7, 2006

E-MAIL

TO: Joan K. Harris

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. Harris:

I have received your letter in which you referred to a request made pursuant to the Freedom of Information Law for a "transcript from an administrative hearing which was tape recorded." You indicated, however, that the City of Rome "does not prepare or maintain written records of these hearings." You questioned whether the City would be required to prepare a written transcript to comply with the Freedom of Information Law.

In this regard, as you suggested, §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record which does not already exist. In my view, preparing a transcript of a tape recording would constitute the creation of a new record, and, therefore, that the City is not obliged to do so. Rather, the City would be required, if so requested, to provide a copy of the tape recording upon payment or offer to pay the cost of reproducing the tape.

In sum, it is my view that the City need not prepare a written transcript of the tape.

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 7, 2006

E-Mail

TO: Susan Edelman, New York Post

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. Edelman:

As you are aware, I have received your letter and a variety of materials relating to it. You have requested an advisory opinion concerning the status of the World Trade Center Captive Insurance Company, Inc. (hereafter "Captive") under the Freedom of Information and the Open Meetings Laws. Based on the analysis offered in the following commentary, I believe that Captive is subject to and required to comply with both of those statutes.

By way of background, a captive insurance company is a company that only insures all or part of the risks of its parent. Captive was required to be created pursuant to a grant agreement executed in November of 2004 and signed by Michael D. Brown, Under Secretary for Emergency Preparedness and Response at the U.S. Department of Homeland Security, and James W. Duffy, Governor Pataki's Authorized Representative. The Agreement identifies the State Emergency Management Office ("SEMO") as the Grantee and New York City as the Sub-Grantee. Article I, paragraph 2 of the Agreement provides that:

> "The Grantee through its Sub-Grant Agreement with the City attached hereto and incorporated by reference (Attachment A) shall ensure that the City will establish and incorporate a captive insurance company to be known as the WTC Captive Insurance Company, Inc. in the State of New York pursuant to the Certificate of Incorporation, the By-Laws, and the Liability Insurance Policy (attached hereto and incorporated herein as Attachments B, C, and D, respectively) to

> insure the City and its debris removal contractors, subcontractors and consultants at every tier, for claims arising from debris removal at the WTC site from September 11, 2001 (post collapse) through August 30, 2002."

A Sub-Grant Agreement was also executed in November 2004 and signed by the Governor's Authorized Representative and Mark Page, the City's Director of the Office of Management and Budget. That agreement states that Captive "would insure the City and the contractors for claims arising from the debris removal project, including for any environmental or professional liability."

Most significantly, its Certificate of Incorporation indicates that Captive is a not-for-profit corporation and that the Mayor of New York City appoints the members of and has control over the Captive's Board of Directors. Specifically, Paragraph Fifth provides that:

> "(a) The Board of Directors shall consist of five directors. All directors of the Company shall be appointed annually by the Mayor of the City of New York prior to the Company's annual meeting; provided, however, that one of such directors shall be appointed by the Mayor upon nomination of a person, which person shall be acceptable to the Mayor, in his sole discretion, by the Representative of the Contractors (as selected in accordance with paragraph (d) of this Article FIFTH); provided, further, that in event a nominee is not acceptable to the Mayor, the Representative, on behalf of the Contractors, shall have the right to select additional nominees until a nominee is deemed acceptable to the Mayor. Each year, immediately following the beginning of the Company's fiscal year, the Mayor shall be notified in writing by the President of the Company of the requirement to make the annual appointments to the Board of Directors of the Company. Directors shall succeed to office at the next annual meeting of the Board of Directors following their appointment.
>
> "(b) Each director shall be an employee, former employee or employee-on-leave of the City of New York or a person experienced in the insurance, construction, financial, professional, or other business or governmental communities of the City of New York. Each director shall be at least eighteen years of age and a citizen of the United States. At least two (2) of the directors shall be residents of New York State.
>
> "(c) The Mayor may appoint an alternate for each director, which alternate, upon written notice to the Secretary, may attend meetings and exercise therein all the rights, powers, and privileges of the absent director; provided that in the event an alternate for the director nominated on behalf of the Contractors is nominated by the

> Representative thereof, such alternate, if acceptable to the Mayor in his sole discretion, shall be appointed by the Mayor; provided, further, that in the event of such nominee is not acceptable to the Mayor, the Representative of the Contractors shall have the right to select additional nominees until a nominee is deemed acceptable to the Mayor."

In consideration of the control of Captive exercised by the Mayor and judicial decisions rendered by the Court of Appeals, the state's highest court, regarding the application of the Freedom of Information and Open Meetings Laws, again, I believe that Captive's records and meetings fall within the coverage of those statutes.

The Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In consideration of the foregoing, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York.

Although not-for-profit corporations typically are not governmental entities and, therefore, fall beyond the scope of the Freedom of Information and Open Meetings Laws, the courts have found that the incorporation status of those entities is, alone, not determinative of their status under the statutes in question. Rather, they have considered the extent to which there is governmental control over those corporations in determining whether they fall within the coverage of those statutes.

In the first such decision, Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the issue involved access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and

> therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In another decision rendered by the Court of Appeals, Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court found that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

In the context of your inquiry, again, based on Captive's Certificate of Incorporation, each member of its Board of Directors is appointed by or "acceptable to" the Mayor.

Most recently, in a case involving a not-for-profit corporation, the "CRDC", the court found that:

> "...the CRDC was admittedly formed for the purpose of financing the cost of and arranging for the construction and management of the Roseland Waterpark project. The bonds for the project were issued on behalf of the City and the City has pledged $395,000 to finance capital improvements associated with the park. The CRDC denies the City has a controlling interest in the corporation. Presently the Board has eleven members, all of whom were appointed by the City (see Resolution #99-083). The Board is empowered to fill any vacancies of six members not reserved for City appointment. Of those reserved to the City, two are paid City employees and the other three include the City mayor and council members. Formerly the Canandaigua City Manager was president of the CRDC. Additionally, the number of members may be reduced to nine by a board vote (see Amended Certificate of Incorporation Article V(a)). Thus the CRDC's claim that the City lacks control is at best questionable.
>
> "Most importantly, the City has a potential interest in the property in that it maintains an option to purchase the property at any time while the bonds are outstanding and will ultimately take a fee title to the property financed by the bonds, including any additions thereto, upon payment of the bonds in full. Further, under the Certificate of Incorporation, title to any real or personal property of the corporation will pass to the City without consideration upon dissolution of the corporation. As in Matter of Buffalo News, supra, the CRDC's intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law..." (Canandaigua Messenger, Inc. V. Wharmby, Supreme Court, Ontario County, May 11, 2001).

I note that the Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing [aff'd 739 NYS 2d 509, 292 AD2d 835 (2002)].

Even if Captive is not itself an "agency", I believe that its records would fall within the scope of the Freedom of Information Law due to its relationship with the State and the City of New York. As indicated at the outset, that statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions folders, files, books, manuals, pamphlets,

> forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

The Court of Appeals has construed the definition as broadly as its specific language suggests. An early decision that dealt squarely with the scope of the term "record" involved a case cited previously concerning documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" (see Westchester Rockland, supra, 581) and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there appears to be "considerable crossover" in the activities of City officials and Captive.

Perhaps most pertinent is a determination rendered by the Court of Appeals in which it was found that materials received by a corporation providing services by contract for a branch of the State University were "kept" on behalf of the University, and, therefore, constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)]. Therefore, if a document is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency.

The foregoing is not intended to suggest that all Captive records must be disclosed. However, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Lastly, 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."

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.

In Smith v. City University of New York, the Court of Appeals held that:

> "in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" [92 NYS2d 707, 714 (1998)].

A review of the by-laws of Captive clearly indicates that the government exercises substantial if not total control over the corporation and its Board of Directors. That being so, I believe that the Board constitutes a "public body" required to comply with the Open Meetings Law.

In a manner analogous to the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness requiring that meetings of public bodies be conducted open to the public, except to the extent that an executive session may be held in accordance with paragraphs (a) through (h) of §105(1).

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

RJF:jm

cc: David R. Biester

STATE OF NEW YORK
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December 7, 2006

E-Mail

TO: Mr. Bruce Pavalow

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. Pavalow:

I have received your letter and apologize for the delay in response. Your inquiries focus on the notion of "confidentiality."

You referred initially to:

> "...groundrules...where the Superintendent's weekly letter to all board members is considered confidential. This letter consists of the Superintendent's statements, opinions, recommendations and comments. Last year I took issue with his letter to belittle myself and other board and community members. Is using a confidential letter to belittle people legal?"

In this regard, first, many judicial decisions have focused on access to and the ability to disclose records, and this office has considered the New York Freedom of Information Law and the federal Freedom of Information Act in its analyses of what may be "confidential." To be confidential under the Freedom of Information Law, I believe that records must be "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a).

Both the state's highest court, the Court of Appeals, and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

In like manner, in construing the equivalent exception to rights of access in the federal Act, it has been found that:

> "Exemption 3 excludes from its coverage only matters that are:
>
> > *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
>
> "5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

In short, to be "exempted from disclosure by statute", both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records.

In contrast, when records are not exempted from disclosure by a separate statute, both the Freedom of Information Law and its federal counterpart are permissive. Although an agency *may* withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals held that the agency is not obliged to do so and may choose to disclose, stating that:

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" (Capital Newspapers, supra, 567).

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose. Stated differently, there is nothing inherently confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).

From my perspective, the Superintendent's weekly letter would not be "confidential" or exempted from disclosure pursuant to a statute that forbids disclosure. Rather, it is likely that some aspects of the letters may be withheld; others would likely be public.

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 (j) of the Law. In my opinion, the contents of the records in question serve as the factors relevant to an analysis of the extent to which the records may be withheld or must be disclosed, and several of the grounds for denial may be relevant to such an analysis in relation to the records in question.

Records prepared by the Superintendent and forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Moreover, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][I], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, as indicated earlier, and as you suggested, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Items within the letters might in some instances fall within that exception.

Again, it is emphasized that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Consequently, even if it is determined that a record may be withheld under §87(2)(g), for example, an agency would have the authority to disclose the record.

It is also emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and vice versa. For instance, if an administrator transmits a memorandum to the Board suggesting a change in policy, that record could be withheld. It would consist of intra-agency material reflective of an opinion or recommendation. Nevertheless, when the Board discusses the recommendation at a meeting, there would be no basis for conducting an executive session. Consequently, there may be no reason for withholding the record even though the Freedom of Information Law would so permit.

In short, while there may be a valid legal reason for withholding some elements of the records at issue, frequently their contents are fully discussed at open meetings, thereby diminishing the need or rationale for withholding.

In your second area of inquiry, you questioned whether:

> "...if a board member were to make a motion to go into executive session to discuss an issue and the board majority refused, would it be permissible for the board member to begin discussing the issue in public?"

Here I point out that even when there is a basis for entry into executive session, there is no obligation to convene in private. Section 105(1) prescribes a procedure that must be accomplished in public before an executive session may be held. That provision states that:

> " Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

If no motion is made to enter into executive session, or if a motion to conduct an executive session is not approved, a public body is generally free to discuss issues in public.

As in the case of the Freedom of Information Law, the only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential. When a public body has the discretionary authority to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential."

Since a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not ordinarily "confidential." To be confidential, again, a statute must prohibit disclosure and leave no discretion to an agency or official regarding the ability to disclose.

By means of example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality.

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-16332

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 11, 2006

Mr. Trevor Brown
04-A-6757
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. Brown:

I have received your letter in which you appealed an apparent denial of access to records by the New York City Department of Corrections.

In this regard, the primary function of the Committee on Open Government involves providing and opinions concerning the Freedom of Information Law. The Committee is not authorized to determine appeals, nor is it empowered to compel an agency to grant or deny access to records. The provision dealing with the right to appeal, §89(4)(a) of that statute states in relevant part that:

> "...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 consideration of the foregoing, an appeal may be made to the Commissioner of the Department or the person designated by the Commissioner to determine appeals.

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-16323

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 7, 2006

Ms. Lorraine Weiser
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Weiser:

I have received your correspondence concerning an unanswered request made to the North Collins Central School District for records pertaining to your son.

From my perspective, the law generally requires that the records of your interest be made available to you. In this regard, I offer the following comments.

First, although the New York Freedom of Information Law ordinarily governs with respect to rights of access to records of a school district, in this instance, I believe that the governing statute in the context of the situation that you described is a federal law. Specifically, most pertinent is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "FERPA". In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions.

A focal point of the Act is the protection of privacy of students and access to records by parents of students.. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

"(a) The student's name;

(b) The name of the student's parents or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld from the public in order to comply with federal law. Concurrently, and most importantly in relation to this matter, if a parent of a student under the age of eighteen requests records identifiable to his or her child, the parent ordinarily will have rights of access to those portions of records that are personally identifiable to his or her child.

The regulations promulgated by the United States Department of Education (34 CFR Part 99) provide direction which, in my view, is contrary to the response offered by the District in denying your request. Section 99.10 provides a parent of a minor student with the right to inspect and review the education records pertaining to his or her child, "except as limited under §99.12." The limitations in §99.12 relate to education records maintained by "postsecondary institutions", such as colleges and universities, rather than elementary, middle or high schools. Section 99.3 defines the phrase "education records" and states, in its entirety, that

"(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of §99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(iii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Record on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used on in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, 'treatment' does not include the remedial educational activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution."

In my opinion, when none of the exclusions listed in subdivision (b) would apply or serve to remove the records at issue from the scope of "education records", to comply with federal law, I believe that the records must be made available to you. I point out, too, that §99.20 and the ensuing related provisions provide a parent of a minor child with right to seek to amend education records that are "inaccurate, misleading, or in violation of the student's rights of privacy."

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting 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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable

attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

In an effort to enhance compliance with and understanding of applicable 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:jm

cc: Benjamin A. Halsey

From: Robert Freeman
To: [redacted]
Date: 12/8/2006 9:05:59 AM
Subject: Dear Mr. Hayes:

Dear Mr. Hayes:

Pursuant to §87(1)(b)(iii) of the Freedom of Information Law, an agency may ordinarily charge up to 25 cents per photocopy up to 9 by 14 inches, or the actual cost of reproducing other records (those that cannot be photocopied, such as tape recordings, electronic information, etc.). No fee may charged for 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

FOIL-AO-16325

From: Robert Freeman
To: [redacted]
Date: 12/8/2006 9:21:29 AM
Subject: Dear Mr. Kidwell:

Dear Mr. Kidwell:

I have received your letter in which you referred to a meeting of the Ogdensburg City Council that was adjourned but followed by a gathering of 4 members of the Council and the Mayor with the City Manager "behind closed doors, allegedly to express displeasure with him about an ongoing building project."

In this regard, it has consistently been held that any gathering of a majority of a public body, such as a city council, for the purpose of conducting public business constitutes a "meeting" that falls within the coverage of the Open Meetings Law. Therefore, if the gathering to which you referred included a majority of the membership of the City Council, it appears that it would have been a meeting that should have been held in accordance with the Open Meetings Law.

I hope that I have been of assistance.

cc: City Council

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: 12/8/2006 9:02:49 AM
Subject: http://www.dos.state.ny.us/coog/ftext/f14270.htm

http://www.dos.state.ny.us/coog/ftext/f14270.htm

Dear Ms. Benczkowski:

I have received your letter concerning a denial of access to itemized invoices from your school district's attorneys. For reasons expressed in detail in the attached advisory opinion, portions of the invoices must be disclosed, such as general descriptions of services rendered, as well as the dates of service. Insofar as the invoices include descriptions of legal advice or litigation strategy, those portions might properly be withheld based on the assertion of the attorney-client privilege. In short, a blanket denial of access to the invoices would, in my view, be inconsistent with law.

When a request is made under the FOIL and denied, the denial may be appealed pursuant to §89(4)(a) to the governing body of the agency, i.e., a board of education in a school district, or to a person designated by that body.

A publication available on our website, "Your Right to Know", includes sample letters of request and appeal. The website also includes thousands of advisory opinions, many of which may be of value to you.

I hope that I have been of assistance.

Robert J. Freeman
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FOIL-AO-16327

From: Robert Freeman
To: Harry Hammitt
Date: 12/8/2006 8:46:31 AM
Subject: Re: [FOI-L] Quick question....

Hi Harry - -

In general, FOIL is an apple, and discovery is an orange. Rights granted by FOIL are conferred upon the general public, while discovery is based on the right of a litigant to obtain materials relevant and necessary to litigation. Further, it has been held that one's status as a litigant neither enhances nor diminishes his/her rights as a member of the public who seeks records under FOIL.

The issue presented, it seems to me, involves whether or the extent to which materials made available in discovery either come into the possession of an agency required to comply with FOIL, in which case they would be subject to whatever rights of access exist, or a court, in which case they are generally available pursuant to statutes dealing with access to court records.

I hope that this helps.
Bob
>>> Harry Hammitt <hhammitt@ACCESSREPORTS.COM> 12/8/2006 8:37:18 AM >>>
Bob:

I had just glanced at Charles' question about the availability of discovery yesterday without giving it much thought, but reading your response reminds me of a handful of cases at least that started coming out in the latter '80s in which the court allowed public access to discovery materials in litigation of particular public interest, the Agent Orange litigation being the main case. Did that line of interpretation wither on the vine or is that still being followed in some circumstances?

Harry Hammitt

-----Original Message-----
From: State and Local Freedom of Information Issues [mailto:FOI-L@LISTSERV.SYR.EDU] On Behalf Of Robert S. Becker
Sent: Thursday, December 07, 2006 11:12 PM
To: FOI-L@LISTSERV.SYR.EDU
Subject: Re: [FOI-L] Quick question....

Charles

I am going to partially disagree with the answers you got from others about discovery in federal cases. There is no rule requiring that discovery be filed in the case file, which in most cases would make it public. However, practice varies from one jurisdiction to another, and in some jurisdictions at least some discovery is filed. For example, in a major case, i.e. a large drug conspiracy, the prosecutor may file some forensic reports. Although the actual discovery is not filed, the prosecutor may file letters of transmittal enumerating what documents, etc. have been turned over in compliance with Criminal rule 16, the discovery rule. If there is Brady material, exculpatory evidence, the prosecutor may file that because s/he wants to avoid a claim that the government did not fulfill its obligation to disclose such material.

The bottom line is that, despite the absence of a criminal rule

requiring the filing of discovery, some discovery may be available to the public in the case file.

It should be noted that there is a civil rule that requires filing of discovery, Rule 5(d). However, many federal districts have local rules saying that discovery does not have to be filed. The courts' concern is that they don't want to have to store all of the discovery. Because most, if not all, federal district courts have moved to electronic case filing there is no need to store all that paper. There is also legislative history indicating that Congress intended that the public have access to discovery in civil cases. Therefore, I think an argument can be made that the local rules cannot preclude requests for access from the media and public to civil discovery.

Bob

Charles Davis wrote:
> Hi FOI-L:
>
> Is discovery in federal criminal cases open for public inspection? If so, is
> there a citation we could use to quickly debunk a PR guy for the U.S.
> Attorney's Office who says that it is not a public record?
>
> CD
>
>
>
> -- Charles N. Davis. Ph.D.
> Executive Director, National Freedom of Information Coalition
> Associate Professor, University of Missouri School of Journalism
> 179B Gannett Hall
> Columbia, MO 65211
> (573) 882-5736
>
>

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Robert S. Becker
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medialawyer@mindspring.com <mailto:>

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& Civil and Criminal Appellate Litigation

Robert J. Freeman
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NYS Committee on Open Government
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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-16328

From: Robert Freeman
To: Georgia Palmieri
Date: 12/8/2006 8:22:13 AM
Subject: Re: welcome back - with a 2 quick questions

Good morning - -

In my opinion, first, names and addresses of hotels and restaurants that appear on travel vouchers are clearly public. It must be assumed that an employee has expended or seeks to reimbursed for expenses incurred in the performance of his or her duties. That being so, disclosure would result in a permissible, not an unwarranted invasion of personal privacy. Further, there would be no privacy implications relating to business entities, such as hotels or restaurants.

Second, it has been advised that agency credit card numbers and similar materials may be withheld, for they could be used by others to make improper purchases or interfere with an agency's functions.

I hope that I have been of assistance.
>>> "Georgia Palmieri" <GPalmieri@dhcr.state.ny.us> 12/7/2006 5:18:02 PM >>>
Hello Bob:

Re this FOIL from a former employee:
1. Are the names & addresses of hotels & restaurants which might appear
on travel vouchers exempt
from disclosure under FOIL -under personal privacy provisions of
various state laws?
2. Are NYS DHCR credit card numbers exempt?

Thank you for all your help.
GMP

Georgia Palmieri
Office of Legal Affairs
D.H.C.R.
25 Beaver St.
New York 10004

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-16329

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 8, 2006

E-MAIL

TO: Jeff Branch

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. Branch:

I have received your letter in which you complained of delays by the Department of Correctional Services in responding to your request for records.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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

FOIL-AO- 16330

From: Robert Freeman
To: mkelly9@pride.hofstra.edu
Date: 12/11/2006 12:09:18 PM
Subject: Dear Mr. Kelly:

Dear Mr. Kelly:

I have received your letter in which requested that this office send the 2006 Town of Hempstead budget to you.

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions concerning the Freedom of Information Law. The Committee does not have possession or control of records generally, and we do not have a copy of the Town of Hempstead budget.

When seeking records under the Freedom of Information Law, requests should be directed to the agency that maintains the records of your interest. Further, the regulations promulgated by this office, which have the force and effect of law, require that each agency, such as the Town, designate one or more persons as "records access officer". The records access officer has the duty of coordinating an agency's response to requests, and your request should be made to that person. Before doing so, however, it is suggested that you attempt to locate the budget on the Town's website, or that you phone the Town Clerk to learn whether the budget is available without making a formal request.

When a record is accessible under the Freedom of Information Law, it is available for inspection at no charge. When photocopies are requested, an agency may charge up to 25 cents per photocopy. And under a new provision, when an agency has the ability to transmit a record via email, it is required to do so, and there can be no charge in that instance.

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

FOIL-AO- 16331

From: Robert Freeman
To: monica@disabilitynewsradio.com
Date: 12/11/2006 10:45:06 AM
Subject: Dear Moshenko:

Dear Moshenko:

I have received your recent correspondence concerning your request to SUNY/Buffalo. You indicated that the records access officer denied the request on the ground that you did not reasonably describe the records.

In this regard, it is noted that the Committee on Open Government has promulgated regulations concerning the procedural implementation of the Freedom of Information Law that have the force and effect of law (see 21 NYCRR Part 1401). Section 1401.2(b) of the regulations pertains to the duties of an agency's records access officer and states in part that the "records access officer is responsible for assuring that agency personnel...Assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records."

It is suggested that you contact the records access officer, Ms. Lidano, in an effort to learn of the manner in which the records of your interest are maintained in order to enhance your ability to reasonably describe the records of your interest.

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-16332

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 11, 2006

Mr. Trevor Brown
04-A-6757
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. Brown:

I have received your letter in which you appealed an apparent denial of access to records by the New York City Department of Corrections.

In this regard, the primary function of the Committee on Open Government involves providing and opinions concerning the Freedom of Information Law. The Committee is not authorized to determine appeals, nor is it empowered to compel an agency to grant or deny access to records. The provision dealing with the right to appeal, §89(4)(a) of that statute states in relevant part that:

> "...any person denied access to ays appeal
> in writing such denial to th ing body
> of the entity, or the person d, chief
> executive, or governing body lays of
> the receipt of such appeal fu erson
> requesting the record the reason ovide access
> to the record sought."

In consideration of the foregoing, an appeal may be made to the Commissioner of the Department or the person designated by the Commissioner to determine appeals.

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-16333

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 12, 2006

Mr. Fernando L. Rivera
05-A-1517
Bare Hill Correctional Facility
Caller Box 20, 181 Brand Road
Malone, NY 12953

Dear Mr. Rivera:

I have received your letter in which you complained concerning a delay in response to your request for records of the Office of Children and Family Services.

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, 2005 (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-16334

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 12, 2006

Mr. Charles Roda
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Roda:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request made to the State Education Department. You indicated that you have not received a response to your request dated August 11, 2006, for statistical information relative to students classified as "special education" or diagnosed with "ADD or ADHD." In this regard, we offer the following comments.

First, we note that you addressed your request to the" Department of Education", and used a mailing address for the State University of New York. Please note that the State Education Department and the State University of New York (SUNY) are separate agencies. We recommend that you contact the office to which you intended to direct your request, and confirm the mailing address of the records access officer for that office. The records access officer is responsible for coordinating the response to your request. Having reviewed your request, insofar as records of your interest exist, it is likely that they would be maintained by the State Education Department, which is located at 89 Washington Avenue, Room 121, Albany, NY 12234. The records access officer for the Department is Ms. Nellie Perez, who can be reached at (518) 474-5836.

Second, and with respect to your question about how this office can help you access records regarding the data you have requested, please note that the Committee on Open Government is authorized to offer advice and opinions with respect to the Freedom of Information Law. This office does not have the authority to enforce the law, or compel an agency to comply with the law.

Third, 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. If the figures or statistics you seek do not exist in the form of a record or records, the Department would not be required to prepare new records on your behalf.

Lastly, when a proper request is made, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

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 our 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 our opinion, be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, we 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, in our opinion, an agency would not be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest.

On behalf of the Committee on Open Government, 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-16335

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 12, 2006

Ms. Mary Lou Hilow
[redacted]

The staff of the Committee on 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. Hilow:

We are in receipt of your request for a written advisory opinion concerning application of the Freedom of Information Law to various requests made to the Rome School District. In the materials you attached, you indicated that your initial request was denied because the District could not understand what records you sought. When you resubmitted your request, you indicated that the District informed you that your request was "too voluminous". If we understand the material you provided correctly, your current request is for "minutes of school board meetings... the EEO/Affirmative Action Plan ... and the Character City Values Plan", and to date you have received no response. 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..."

It is noted that new language was added to that provision on May 3, 2005 (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.

You asked what the Committee on Open Government can do to compel the District to publicize the issues that have affected you. Please know that while this office is empowered to render advisory opinions, it is not empowered to enforce the Freedom of Information Law or compel disclosure of records. Should you have difficulty obtaining a particular record or portions thereof, we could offer an opinion regarding rights of access to the records at issue.

On behalf of the Committee on Open Government, 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-16336

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 12, 2006

Ms. Mariam L. Stewart
[redacted]

Dear Ms. Stewart:

I have received your letter in which you appealed a denial of your request for records of the Ithaca Housing Authority.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office is not empowered to determine appeals or compel an agency, such as the Authority to grant or deny access to records. The provision concerning the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Based on the foregoing, I believe that an appeal may be made to the Authority's governing body or a person designated by that body.

Your request involves records pertaining to employees of the Authority, and many, in my view, should 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 short, insofar as records pertaining to public employees are relevant to the performance of their duties, they are accessible to the public in most instances.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brenda Westfall

FOIL-AO-16337

From: Robert Freeman
To: [redacted]
Date: 12/13/2006 9:26:30 AM
Subject: Dear Mr. White:

Dear Mr. White:

I have received your request for a "salary list of all employees at SUNY Stony Brook". In this regard, please note that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office does not have possession or control over records generally. A request should be made to the records access officer at the agency that maintains of your interest, in this instance, SUNY/Stony Brook.

It is also noted that §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". That being so, I believe that the records access officer at SUNY/Stony Brook is required to disclose the record of your interest. Further, as you are likely aware, if that record can be emailed to you, SUNY would be obliged 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-16338

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 13, 2006

Mr. Eugene Herbert
03-A-5831
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

Dear Mr. Herbert:

I have received your letter in which you requested from this office "the names, titles and salaries of every officer or employee of Upstate Correctional Facility."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have possession or control of records generally, and we do not maintain the record of your interest.

When seeking records, a request should be made to the records access officer at the agency that maintains the records. In this instance, the records would be maintained by either the Department of Correctional Services or the facility, or both. To request records from the Department's central offices in Albany, a request should be made to the Deputy Commissioner for Administrative Services. To seek records from your facility, a request may be made to the Superintendent, and it is suggested that your request be made to him.

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-16339

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 13, 2006

Ms. Sarah C. Protigal
[redacted]

Dear Ms. Protigal:

I have received a variety of correspondence from you, and although the nature of the services that you seek is unclear, I offer the following remarks.

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. Second, the same provision indicates that an agency may require that a request for a record be made in writing. It appears on the basis of your correspondence that some of your requests were made by leaving telephone messages. Third, 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 for records should be directed to that person.

Enclosed for your review is "Your Right to Know", which summarizes the Freedom of Information Law and includes a sample letter of request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16340

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 14, 2006

Mr. Chris Penalver
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Penalver:

I have received your correspondence and apologize for the delay in response. You referred to requests for records relating to a speeding ticket that were made to both the Albany County Sheriff's Department and the Division of State Police. Although the County granted access to the records sought, the State Police denied your request in its entirety. Following an initial denial of your request, you appealed, and the determination by the State Police appeals officer stated that:

> "...we are unable to conduct a search of our files for some of the records you seek based on the information provided. The remaining records you seek are either not maintained on file by this agency or are records that were compiled for law enforcement purposes and which, if disclosed, would interfere with judicial proceedings."

In this regard, I offer the following comments.

First, the portion of the response indicating that a search could not be made for some of the records based on the information that you provided appears to relate to §89(3) of the Freedom of Information Law, which requires that an applicant "reasonably describe" the records sought. In short, whether or the extent to which a request reasonably describes records often is dependent on the nature of an agency's filing or recordkeeping system. If, for example, records are filed alphabetically by name, and a request is made for records pertaining to a particular person, the request would likely reasonably describe the records. However, if the same records are requested by means of dates, the records might not be retrievable without searching, in essence, for the needle in the haystack, and the request in that instance would not reasonably describe the records.

Notwithstanding the foregoing, the response by the State Police does not indicate in any way which among the records could not be located based on the terms of your request. Here I point out that the regulations promulgated by the Committee on Open Government, which have the force of law, state that an agency's records access officer has the duty of assuring that agency personnel:

> "Assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records" [21 NYCRR §1401.2(b)(2)].

It does not appear that an effort was made by the Division of State Police to assist you in reasonably describing the records of your interest.

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, insofar as the State Police maintain and can locate records equivalent or analogous to those made available by Albany County, I believe that there would be an equal obligation to disclose them. Further, based on a judicial decision that dealt with similar or perhaps the same records that involved the Division of State Police, Capruso v. New York State Police (Supreme Court, New York County, NYLJ, July 11, 2001), I believe that the records in question must be disclosed in great measure, if not in their entirety. In this regard, I offer the following comments.

Perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The state's highest court, the Court of Appeals, reiterated and expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor*

> *Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In Capruso, supra, the request involved the "operator's manual for any radar speed detection device used" by the New York State Police and the New York City Police Department. The Division of State Police contended that disclosure would interfere with the ability to effectively enforce the law concerning speeding. Nevertheless, following an *in camera* inspection of the records, a private review by the judge, it was found that the Division could not meet it burden of proving that the harmful effects of disclosure appearing in the exceptions to rights of access would in fact arise.

In its attempt to deny access to the records, the Division relied upon §87(2)(e)(i) and (iv) of the Freedom of Information Law as a means of justifying its denial. Those provisions permit an agency to withhold records that are "compiled for law enforcement purposes" to the extent that disclosure would "i. interfere with law enforcement investigations or judicial proceedings" or "iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

From my perspective, records prepared by manufacturer of a radar device could not be characterized as having been "compiled for law enforcement purposes. If my contention is accurate, §87 (2)(e) would not be applicable as a means of withholding those records.

Even if that provision is applicable, the court in Capruso determined that a denial of access would not be sustained. The leading decision dealing with law enforcement manuals and similar records detailing investigative techniques and procedures is Fink v. Lefkowitz [47 NY2d 567 (1979)], which was cited in Gould, supra, and] involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate.

In consideration the direction given by the state's highest court in Fink, the court in Capruso rejected the contentions offered by the law enforcement agencies and determined that:

> "These arguments fail to establish a casual link as to how release of the information in the manufacturers' operational manual would enable a speeding driver to avoid detection. Similarly, absent from the affidavits is an explanation as to how the knowledge of the testing procedures used by the police to ensure the device is functioning properly would enable such driver to escape detection. Furthermore, the affidavits lack proof as to how the information in the manual would enable the use of a jamming device which could not otherwise be used. Thus, the claim that the release of these manuals would result in drivers engaging in dangerous behavior solely to avoid detection is speculative.
>
> The State also objects to the release of the State Police Radar and Aerial Speed Enforcement Training Manuals as they contain 'operational and legal considerations.' However, as the Court of Appeals stated in Fink v. Lefkowitz, supra at 571, 'To be distinguished from agency records compiled for law enforcement

> purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement.' The Court explained, the question is 'whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel,' (citations omitted) Id.
>
> Thus, after an in camera review, the City and State have failed to establish that the release of these manuals would allow motorists who are violating traffic laws to tailor their conduct to evade detection."

Based on the foregoing, I believe that the records in question must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William J. Callahan
Captain Laurie Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16311

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December 14, 2006

Ms. AnneMarie Evensen
[redacted]

The staff of the Committee 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. Evensen:

I have received your letter and the correspondence attached to it. You have questioned the adequacy of the responses to your initial request for records made to the State Police and your appeal.

You requested police reports prepared in June, 2005 relating to an investigation of "pot growing" behind a certain address in Granville. In response to your request and appeal, you were informed that disclosure would constitute an unwarranted invasion of personal privacy, and that "disclosure of these records, which were compiled for law enforcement purposes, would interfere with a law enforcement investigation and/or any judicial proceedings", because "the statute of limitations for this type of criminal investigation has not expired." Both responses expressed the same grounds and even the same words to deny access.

In this regard, I offer the following comments.

First, while the regulations promulgated by the Committee on Open Government require that an agency provide a reason for an initial denial of access to records [see 21 NYCRR §1401.2(b)(4)(ii)], §89(4)(a) of the Freedom of Information Law requires that the determination of an appeal must "fully explain" the reasons for further denial. From my perspective, in consideration of the repetition, without more, of the reasons for denial of the appeal, the State Police did not "fully explain" its reasons for denying the appeal.

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, the State's highest Court, confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a blanket 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), an exception different 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 State Police engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by that agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

The denial of your request and appeal refer to two of the exceptions to rights of access. Section 87(2)(b) authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted invasion of personal privacy. Often, as you suggested, identifying details may be deleted from records in order that a person or persons named cannot be ascertained. In this instance, if the deletion of names or other details would serve to protect against an unwarranted invasion of privacy, I believe that the State Police would be required to do so.

The other ground for denial, §87(2)(e)(i), pertains to the ability to withhold records that "are compiled for law enforcement purposes and which, if disclosed, would...interfere with law enforcement investigations or judicial proceedings..." The fact that "the statute of limitations for this type of criminal investigation has not expired" is not, in my view, determinative of the authority to deny access to records. The critical concern involves the extent to which disclosure would "interfere" with an investigation or judicial proceeding. Only in that instance may records or portions of records be withheld under the cited provision.

In short, to comply with the Freedom of Information Law, I believe that the State Police should have reviewed the records sought in their entirety to determine the extent to which the exceptions to which reference was made could properly have been asserted. If only portions of the records could justifiably have been withheld, the remainder of the records should have been made available to you.

In an effort to encourage the State Police to reconsider its determination, a copy of this response will be sent to that agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: William J. Callahan
Captain Laurie M. Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16342

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December 14, 2006

Mr. Al Fogel
05-A-5333
P.O. Box 500
Elmira, NY 14902

Dear Mr. Fogel:

I have received your letter in which you complained that your requests for records have not been answered in a timely manner, and appealed the constructive denials of access to this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to comply with law.

The provision pertaining to the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I hope that 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-1634

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 14, 2006

E-MAIL

TO: Lisa Rooney

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. Rooney:

I have received your inquiry in which you sought clarification concerning whether "the FOIL request timeline starts when each agency receives the request."

In my view, based on the direction provided in §89(3)(a) of the Freedom of Information Law, it is clear that the time within which an agency must in some manner respond to a request begins upon receipt of a request by an agency.

The introductory phrase in §89(3)(a) states that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available..."

In consideration of the language quoted above, I believe that the "timeline" begins to run when an entity is in "receipt" of a request. As you are likely aware, the regulations promulgated by the Committee on Open Government require that each agency must designate one or more persons as "records access officer" and that a records access officer has the duty of coordinating an agency's response to requests (see 21 NYCRR §1401.2). It has been contended that the time for responding does not begin until a request is in possession of a records access officer. That contention, however, is, in my view, contrary to the language of the law and could result in unreasonable delays in considering requests for records. From my perspective, the term "receipt" is intended to refer to the time when a request comes into the possession of an agency. Further, an element of the records access officer's duty to "coordinate" an agency's response to requests, in my opinion, includes insuring that requests are directed to proper persons when a request is received, or to use the term in the law, when the agency is in "receipt" of a written request.

I note that the initial phrase in the cited provision refers to "Each entity", and I believe that is so because the definition of "agency" appearing in §86(3) excludes the State Legislature. Section 88, however, which is part of the Freedom of Information Law, pertains specifically to the State Legislature. For that reason, §89, entitled "General provisions relating to access to records", refers to "Each entity", rather than "each agency" in order to ensure that the general provisions of the law apply to the State Legislature, as well as agencies.

I hope that the foregoing offers the clarification that you seek and that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16344

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 15, 2006

Mr. Tom Robbins
The Village Voice
36 Cooper Square
New York, NY 10003

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Robbins:

I have received your letter in which you sought an opinion concerning the propriety of redactions by the New York City Campaign Finance Board of portions of records that were "non-responsive" to your requests made under the Freedom of Information Law.

In an effort to learn more of the matter, I spoke with a representative the Board and was told that the documentation made available to you fully satisfied your request, and that the redactions involved material that fell outside the scope of your request. If that is so, I believe that the Board would have complied with law. Further, in my experience, responses of that nature are not uncommon. Situations frequently arise in which material requested is included within a large report or volume, and it is clear that the person seeking access has not sought and is not interested in receiving the entirety of the document.

It is my understanding that you appealed due to the redactions. Because the redactions involved material that you did not request and, therefore, did not result in a denial of access to any information initially sought, I suggested that the appeal be treated as a new request. Based on your letter, the remainder of the records, i.e., the portions that were redacted, were made available.

In short, it appears that the Campaign Finance Board acted in a manner consistent with law. If I have misinterpreted the facts, 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

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December 15, 2006

Mr. Steve Dombert
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dombert:

I have received your letter and the correspondence relating to it. The matter involves billing statements prepared by David Pullen, attorney for the Town of Hartsville. Although portions of those records were disclosed, it is your view that more information was redacted than the law permits. Consequently, you asked whether this office or some other independent entity could review the documents in order to ascertain rights of access and the correctness of Mr. Pullen's contentions.

From my perspective, only a court, following the initiation of a proceeding challenging a denial of access to records, would have the authority to engage in a private or *in camera* inspection. This office is not a court, I am not a judge, and disclosure by the Town to this office, would, in my view, constitute a waiver of the attorney-client privilege, insofar as the privilege might properly be asserted.

Without knowing more of the contents of the records, I cannot provide specific conclusions. However, in consideration of the law and its judicial construction, 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, 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 legal advice or litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

In the context of your request and the deletions made by the Town, I believe that names of private citizens, for example, might be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Similarly, insofar as the records include information in the nature of a description of legal advice, legal strategy or similar information reflective of communications falling within the scope of the attorney-client privilege, I believe that deletions would have been proper.

In an effort to encourage the Town to reconsider the propriety of the deletions from the materials made available to you, a copies of this response will be sent to the Town Board and Mr. Pullen.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
David Pullen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16346

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December 15, 2006

E-MAIL

TO: John Doe

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. Doe:

As you are aware, I have received your correspondence in which you asked whether "a school board member's personnel file/school board member file [is] subject to FOIL."

In this regard, I offer the following comments.

First, typically reference to personnel files pertains to records relating to employees. Members of boards of education are not employees. Nevertheless, all records maintained by or for an agency, such as a school district, fall within the scope of the Freedom of Information Law. Section 86(4) defines the term "record" to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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.

Third, 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.

Next, 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 or similar 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.

The other exception that is frequently applicable to the kinds of records to which you referred pertains to communications between and among government officers and employees. Specifically, §87(2)(g) permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

RJF:tt

FOIL-AO-16317

From: Robert Freeman
To: Info Account
Date: 12/18/2006 11:15:08 AM
Subject: Re: denials of FOI requesats

According to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), an initial denial must include the reason in writing, as well as the name of the person or body to whom an appeal may be made. The regulations also specify that the records access officer and the appeals officer cannot be the same person. Further, §89(4)(a) of the Freedom of Information Law requires that agencies send copies of appeals and the determinations that follow to the Committee. Copies of initial denials of access are not required to be transmitted to this office.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

>>> Info Account <info@mackandassociates.net> 12/17/2006 8:38:08 AM >>>
Pie ChartsGov. Freeman,
Please correct me if I'm wrong but all denials must provide a person to appeal the denial to and that person cannot be the person issuing the denial? Also, all denials must be sent to the NYS Committee on Open Government correct? Thanks again.

Dave

David Mack and Associates
Investigative and Research Services
Litigation-Fraud-Claims Investigation
PO Box 24633 Rochester NY 14624
P 585-225-6970 F 585-225-3119
Member ACFE NALI NCISS ALDONYS
www.mackandassociates.net

FOIL-AO-16348

From: Robert Freeman
To: Monica Moshenko
Date: 12/18/2006 11:39:44 AM
Subject: Re: FW: FOIL request

I believe that your understanding is accurate. Section 89(3) of the Freedom of Information Law requires that the acknowledgement of the receipt of a request requires that the agency include an approximate date, in most instances not to exceed twenty business days, indicating when it believes that it will grant the request in whole or in part.

In unusual circumstances, those involving voluminous or complex requests that will require more than twenty business to grant the request in whole or in part, the agency's acknowledgement must include an explanation for the delay and a "date certain" by which it guarantees that it will grant the request in whole or in part.

Section 89(3) also states that the estimated date of up to twenty business days or the date certain must be reasonable in consideration of the circumstances of the request.

I hope that I have been of assistance.
>>> "Monica Moshenko" <monica@disabilitynewsradio.com> 12/18/2006 10:24:02 AM >>>
Since this email is an acknowledge of my request, Isn't the agency legally
responsible to include the approximate date when the request will be granted
or denied?

Monica

From: Lidano, Elizabeth [mailto:lidano@buffalo.edu]
Sent: Thursday, November 02, 2006 11:55 AM
To: Monica Moshenko
Subject: RE: FOIL request

Dear Ms. Moshenko,

We are in receipt of your request via email. We will start the process of identifying the availability of any records.

Sincerely,

Elizabeth A. Lidano

Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16349

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December 18, 2006

Mr. Adam Riley 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 information presented in your correspondence.

Dear Mr. Gorman:

I have received your letter concerning a request for records of the Brighton School District relating to requests for transcripts pertaining to you made by attorneys or others. Because you received no response to your initial request, you appealed to the then Superintendent, who wrote that "communications with our school attorney are privileged communications and not subject to the freedom of information law requests." You questioned the accuracy of that response and suggested that it did not deal with communications involving person's other than the District's attorney.

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, 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, any documentation maintained by or for the District falling within the scope of your request would constitute a record that falls within the coverage of the Freedom of Information Law.

Second, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. From my perspective, three of the grounds for denial are pertinent in considering rights of access.

First, §87(2)(b) authorizes an agency to deny access to records insofar as disclosure would result in "an unwarranted invasion of personal privacy." You could not invade your own privacy. With respect to the privacy of others, i.e., government officers or employees, representatives of educational institutions or others acting a business or professional capacity, requests for a transcript or other communications would not, in my view, involve personal information. As stated by the Court of Appeals, the state's highest court, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)].

Second, if, for instance, a notation or similar entry is made by the District when a transcript is requested or disclosed, that kind of record would fall within §87(2)(g). That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. I believe that the kind of entry described earlier would constitute factual information available under subparagraph (i) of §87(2)(g).

Lastly, the statement offered by the former superintendent regarding the attorney-client privilege is, in my opinion, far broader than the law indicates. By way of background, §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, when 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.

Unless a record falling within the scope of your request involves a request for legal advice by a District official, or the rendition of legal advice given by the District's attorney to a District official, I do not believe it would be subject to the attorney-client privilege. Stated differently, a notation or entry indicating that a transcript has been requested by or disclosed to the District's attorney would not, by itself, in my opinion, constitute a privileged communication.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Christopher B. Manaseri

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16350

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December 18, 2006

E-Mail

TO: Ms. Janean Sylvester

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. Sylvester:

I have received your letter in which you referred to a request made to a county on November 28 that has not yet 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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16351

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December 19, 2006

Mr. Craig Steven Pettiford
05-A-1425
Auburn Correctional Facility
135 State Street
Auburn, NY 13024

Dear Mr. Pettiford:

I have received your letter in which you appealed a denial of access to records by the inmate records department at your facility.

In this regard, the Committee on Open Government is authorized to provide advice and assistance concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision 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. 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, I believe that the person designated to determine appeals at the Department of Correctional Services is Anthony J. Annucci, the Department's General Counsel.

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-4307
FOIL-AO-16352

41 State Street, Albany, New York 12231
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December 19, 2006

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 letter in which you referred to a request for resumes of those who sought to fill a vacancy on the Town Board. You indicated that the Board did not take action to fill the vacancy "since two of the applicants were running for election to the office in November."

In this regard, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. The only ground for denial of significance in my view would be §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." The Court of Appeals, the state's highest court, held that the intent of the exception is to permit agencies to protect against disclosure of "intimate details" of persons' lives, and that the standard should consider the reasonable person of ordinary sensibilities [Hanig v. State Department of Motor Vehicles, 79 NY 2d 106 (1992)]. From my perspective, the fact that a person has applied to fill a vacancy in what ordinarily is an elective office would not represent a disclosure of an intimate personal detail or would, therefore, constitute an unwarranted invasion of personal privacy.

Similar considerations would be pertinent in determining rights of access to resumes or applications. I note, too, that §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy. Based on those examples, a person's employment history, other than public employment, may be withheld; medical information may be withheld; other details, such as a social security number, may also be withheld in my view. However, some details within the records would not in my opinion rise to the level of an unwarranted invasion of personal privacy if disclosed. For instance, it has been held that one's general educational background must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS2d 411, 218 AD2d 494(1996)].

I note in a related vein that, like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. In a manner analogous to the Freedom of Information Law, meetings of public bodies must be conducted in public except to the extent that an executive session may appropriately be held. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

In my opinion, the only provision pertinent to the matter that you raised is §105(1)(f) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. In determining that an executive session could not properly have been held, the court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994), modified on other grounds, 207 AD 2d 55 (1994)].

Based on the foregoing, notwithstanding its language, the court in Gordon held that §105(1)(f) could not be asserted to conduct an executive session. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above.

In consideration of the foregoing, again, it would appear that the resumes or applications would be available, except to the extent that they include the kinds of intimate personal information to which allusion was made earlier.

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 19, 2006

E-MAIL

TO: Brenda Gears

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. Gears:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. You have sought guidance concerning access to witness statements attached to police reports, including motor vehicle accident reports.

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 (j) of the Law.

Second, §89(6) states that if records are available under some other provision of law or by means of judicial interpretation, the grounds for denial appearing in §87(2) cannot be asserted. Insofar as the witness statements are part of motor vehicle accident reports, it is likely that they must be disclosed in their entirety in most instances.

Of potential relevance to the matter is §66-a of the Public Officers Law, which was enacted in 1941 and states that:

> "Notwithstanding any inconsistent provisions of law, general, special of local or any limitation contained in the provision of any city charter, all reports and records of any accident, kept or maintained by the state police or by the police department or force of any county, city, town, village or other district of the state, shall be open to the inspection of any person having an interest therein, or of such person's attorney or agent, even though the state or a municipal corporation or other subdivision thereof may have been involved in the accident; except that the authorities having custody of such

> reports or records may prescribe reasonable rules and regulations in regard to the time and manner of such inspection, and may withhold from inspection any reports or records the disclosure of which would interfere with the investigation or involved in or connected with the accident."

The Freedom of Information Law is consistent with the language quoted above, for while accident reports are generally available, §87(2)(e)(i) of that statute states in relevant part that records compiled for law enforcement purposes may be withheld to the extent that disclosure would "interfere with law enforcement investigations or judicial proceedings." Therefore, unless disclosure would interfere with a criminal investigation, an accident report would be available to any person, including one who had no involvement in an accident.

If the witness statements are separate from accident reports, I believe that the Freedom of Information Law would govern rights of access. If the only basis for withholding the statements involves a finding that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)], personally identifying details could be deleted, and the remainder of those records would be accessible [see §89(2)(b)]. Insofar as the statements relate to an ongoing criminal investigation, §87(2)(e) may be pertinent, for that provision authorizes an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

From my perspective, only those portions of the statements which if disclosed would result in the harmful effects described in subparagraphs (i) through (iv) would the Department have the authority to deny access; the remainder of the records would be accessible.

Of possible relevance, depending on the facts and circumstances, is §87(2)(f). That exception authorizes an agency to deny access insofar as disclosure could "endanger the life or safety of any person."

The remaining exception of significance would be §87(2)(g). Although that provision potentially serves as a means of withholding records, due to its structure, it may require substantial disclosure. Specifically, §87(2)(g) enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

One of the contentions offered by the New York City Police Department in a decision involving that provision was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The state's highest court, the Court of Appeals, rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will]

> be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation" (id., 276-277)

The Court in Gould also emphasized that §87(2)(g) is intended to pertain to communications between and among government officers or employees and that, therefore, a statement by a witness, even if it is an opinion, would not be deniable under that provision because the witness would not be a representative of government.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 19, 2006

Mr. Norman H. Gross
Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
5010 Campuswood Drive
East Syracuse, NY 13057

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gross:

I have received your letter and apologize for the delay in response. You have sought written confirmation of our discussions concerning the ability of school districts to "redact personally identifiable information" pertaining to persons who transmit complaints relating to "personnel, curriculum, reading lists, and other issues."

In this regard, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. I note that the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that there may be instances in which a single record includes both accessible and deniable information, and that an agency is required to review a record that has been requested to determine which portions, if any, may properly be withheld.

The exception to rights of access of primary significance, in my view, pertains to the protection of privacy, and §87(2)(b) permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." It has generally been advised that those portions of a complaint or other record which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party

> and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my opinion, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of a member of the person who made the complaint is often irrelevant to the work of the agency, and in most circumstances, I believe that identifying details may be deleted.

If the identity of the complainant is known, the complaint might properly be withheld in its entirety if indeed, due to its contents, disclosure would constitute an unwarranted invasion of personal privacy. In that situation, for obvious reasons, the deletion of a name or other identifying details would not serve to protect privacy.

Also of potential significance, particularly in the context of complaints directed to school districts, is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), 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 his/her children.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16355

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December 19, 2006

E-MAIL

TO: Robert O'Gorman

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. O'Gorman:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. You referred to an agreement between the Village of Lawrence and the FAA concerning air traffic in the area. However, having requested documents concerning the agreement, you were informed by the FAA that "We have no documents relating to this matter." You asked how you might proceed.

In this regard, it is noted that the Committee on Open Government is authorized to provide advice and opinions concerning the New York Freedom of Information Law, which is applicable to entities of state and local government. The FAA is a federal agency subject to a different statute, the federal Freedom of Information Act. While this office has neither the jurisdiction nor the expertise to provide guidance concerning the federal Act or the FAA's response, I offer the following comments relating to the responsibilities of the Village of Lawrence under the New York Freedom of Information Law.

First, that statute pertains to all records of an agency, such as the Village, and §86(4) defines the term "record" expansively to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, any records maintained by or for the Village, including those that might have emanated from a federal agency, would fall within the scope of the Freedom of Information Law.

Second, when seeking records, a request should be made to the Village's "records access officer." The records access officer has the duty of coordinating the Village's response to requests. I note that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, you should include sufficient detail to enable Village staff to locate and identify the records of your interest.

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 (j) of the Law.

From my perspective, contracts and similar records reflective of agreements to which a government agency is a party are typically available, for none of the grounds for denial would ordinarily be applicable.

Lastly, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 19, 2006

Mr. Jasimudin Noornabi
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Noornabi:

I have received your letter in which you indicated that a request for records made to a particular officer at the 122nd precinct in Staten Island had not been answered. You added that "some attorney in the Staten Island Court stated...that the Staten Island Precinct Police is exempted from FOIL."

In this regard, first, assuming that the 122nd precinct is part of the New York City Police Department, its records clearly fall within the coverage of the Freedom of Information Law.

Second, the regulations promulgated by the Committee on Open Government require that each agency, such as the Police Department, designate one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records. Although I believe that the recipient of your request should have responded directly or forwarded your request to the records access officer, it is suggested that you resubmit the request and send it to the Records Access Officer, New York City Police Department, Room 110 C, 1 Police Plaza, New York, NY 10038.

When making a request, the applicant is required to "reasonably describe" the records sought. Therefore, your request should include sufficient detail to enable Department staff to locate and identify the records of your interest.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 note that on August 16, 2006, effective immediately, legislation became effective that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

Lastly, in consideration of the nature of the records sought, attached are copies of advisory opinions dealing with rights of access to similar records that may be useful to you, as well as "Your Right to Know", a guide to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Encs.

FOIL-AO-16357

From: Robert Freeman
To: lidano@buffalo.edu
Date: 12/21/2006 8:52:12 AM
Subject: Dear Ms. Lidano:

Dear Ms. Lidano:

I received a copy of your response to Ms. Moshenko, and I believe that it is your responsibility to ensure that your staff informs her of the manner in which records are kept so that she might request them in a way that enables staff to locate particular records. I would conjecture, however, that in some instances locating records that include her name might involve a search of hundreds or perhaps thousands of records individually. In those situations, I do not believe that the request would meet the standard that records be "reasonably described" or that staff would be required to engage in that degree of effort.

If you would like to discuss the matter, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16358

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 21, 2006

Ms. Sarah C. Protigal
[redacted]

Dear Ms. Protigal:

I have received your letter in which you requested records from this office concerning the ownership of 767 Fifth Avenue in New York City.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office does not have possession or control of records generally, and we maintain none concerning the matter of your interest.

A request should be directed to the records access officer at the agency that maintains the records in question. The records access officer has the duty of coordinating an agency's response to requests. In this instance, I believe that the records indicating ownership of real property in New York City are maintained by the New York City Department of Finance.

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

December 21, 2006

Mr. William Secrest
95-A-6527
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. Secrest:

I have received your correspondence concerning an unanswered request for records directed to the Police Commissioner of the City of Buffalo.

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, 2005 (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: Rocco Dinna, Police Commissioner

FOIL-AO-16360

From: Robert Freeman
To: [redacted]
Date: 12/21/2006 3:59:06 PM
Subject: There is no provision that requires that responses to or denials of requests address each aspect of

There is no provision that requires that responses to or denials of requests address each aspect of a request. However, the regulations promulgated by this office, which have the force of law, require the designation of a records access officer and describe his/her duties.

With regard to the matter to which you referred, 21 NYCRR §1401.2(b)(2) requires that the "records access officer is responsible for assuring that agency personnel....Assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records."

It is suggested that you might contact the records access officer in order to attempt to ascertain the manner in which the information of your interest is maintained, thereby perhaps enabling you submit a request consistent with the requirements relating to 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
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COMMITTEE ON OPEN GOVERNMENT

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December 21, 2006

Mr. Eliot Kleinberg
Palm Beach Post
2915-H S. Congress Avenue
Delray Beach, FL 33445-7338

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Kleinberg:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Office of the State Comptroller and the New York City Police Pension Fund. You requested "a copy of a database that lists the name, and whatever other personal information is releasable, for every local or state employee who is currently listed as being in partial or full disability and/or receiving disability payments from the state of New York." Both the Comptroller and the Pension Fund denied your request. It is our opinion that such information should be made available to you insofar as those agencies have the ability to generate it. In this regard, we offer the following comments.

By way of background, the Freedom of Information Law pertains to agency records and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than twenty years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would in many instances tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, we believe that an agency must do so.

Most pertinent in our opinion is a decision concerning a request for records, data and reports maintained by the New York City Department of Health regarding "childhood blood-level screening levels" (New York Public Interest Research Group v. Cohen and the New York City Department of Health, Supreme Court, New York County, July 16, 2001; hereafter "NYPIRG"). The agency maintained much of the information in its "LeadQuest" database. In that case, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'
>
> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2D 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the

> redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

When requests involve similar considerations, in 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 short, if the Comptroller or the Pension Fund have the ability to generate or extract the data of your interest with reasonable effort, based on NYPIRG, we believe that they are obliged to do so. In our opinion, therefore, the Comptroller's assertion, that your request "would require extensive reprogramming of our computer system" would not necessarily constitute a reasonable response to your request that is consistent with law.

The Comptroller also asserts that "the Retirement System does not maintain a database that lists every local or state employee who is currently described as being on partial or full disability and/or receiving disability payments from New York State." While the Comptroller may not maintain a separate database, or a separate list of persons receiving disability payments, based on my telephone conversation with you, any information maintained by the Retirement System with respect to a former employee's disability status may serve your needs, and in our opinion should be made available to you.

In that regard, we note 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 state agency 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, and when requests are accepted via email, an email address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (2) Assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records....
>
> (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 must "coordinate" an agency's response to requests. Therefore, he or she has the duty to ascertain how records sought may be extracted or generated and ensure that agency staff give effect to the Freedom of Information Law.

Much of the preceding commentary also applies to the response given by the Pension Fund. To the extent that the Pension Fund maintains a database containing information indicating whether a person is retired from the New York City Police Department, whether or not s/he may have a disability, and what payments are being made to them, such records would be public.

The Pension Fund denied access to any such information on the ground that it "does not keep records according to name, but by Tax Registry Number. Accordingly, there is no such database that would provide the names of all retired members of the NYPD." In our opinion, this response is not consistent with the provisions of the 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.

It is emphasized that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals twenty years ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd

> 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Your request clearly involves those public portions of the database maintained by the Pension Fund that indicate a former employee's disability and retirement status, and any corresponding payments made to them. An attempt to deny access to public portions of the entire database based on the failure to provide an individual registration number is, in our opinion, disingenuous.

Lastly, since reference is not made in either correspondence to the ability to appeal, it is questionable whether the responses by the Comptroller or the Pension Fund are considered by those agencies to constitute denials of access. Nevertheless, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 our opinion, in addition to contacting the records access officers to discuss, realistically, what can be made available to you, we recommend you appeal the constructive denials of your requests to the designated appeals officer in each agency.

Finally, we note that on August 16, 2006, effective immediately, legislation became effective that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

cc: Shelly Brown, Records Access Officer, Office of the State Comptroller
Rhonda Cavagnaro, General Counsel, New York City Police Pension Fund

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16362

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December 26, 2006

Mr. Peter Henner
Attorney and Counselor at Law
P.O. Box 326
Clarksville, NY 12041-0326

Mr. Michael Weisberg
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
677 Broadway
Albany, NY 12207-2996

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Messrs. Henner and Weisberg:

I have received correspondence from both of you relating to the application of §50-a of the Civil Rights Law. The matter arose in connection with requests by Mr. Henner's client, the New York Civil Liberties Union, for records maintained by various police departments for records pertaining to the use of "conducted energy devices (CEDs), a.k.a. stun guns or Tasers..." Mr. Weisberg's client, the Village of Catskill, granted access to many of the records falling within the scope of the request, but denied access to certain others, stating that: "...individual police officers' examination results as well as the Catskill Police Department's Taser Use Reports and Use of Force Reports relating to the use of Tasers are personnel records encompassed by section 50-a of the Civil Rights Law."

Mr. Henner has sought an advisory opinion containing "a clear statement as to whether § 50-a of the Civil Rights Law applies to records of this nature." He also expressed the belief that "it has been clearly decided that records pertaining to police department operations, such as the use of tasers, are not subject to the exemption of § 50-a unless the police department can show that these records are actually utilized to evaluate the performance of police officers", citing McBride v. City of Rochester [17 AD3d 1065 (2005)].

Mr. Weisberg contends that the Village fully complied with law and offered proper justification for the assertion of §50-a and referred to the Police Department's directive entitled "Use

of Force/Taser." He made specific reference a requirement in the directive to prepare reports, one of which provides that: "The Chief of Police, or his designee, is to evaluate the Taser use to determine if the Taser use is in compliance with the provisions of this Directive and Department training" (§8.3). He added that it was confirmed by the Village's public information officer that "the sole purpose of the Use of Force Reports is to allow the Chief of Police to evaluate job performance of the police force members involved in an incident", and apparently contended that the "policy reflects this purpose, and does not provide for use of these documents for any other purpose.

In this regard, I cannot offer an unequivocal statement concerning the application of §50-a of the Civil Rights Law in relation to the kinds of records at issue. Similarly, in consideration of the language of the Village Police Department's directive concerning the use of a taser, I cannot advise that all of the records falling within the scope of Mr. Henner's request necessarily fall within the scope of §50-a as suggested by the Village's public information officer.

Section 50-a, in the context of the correspondence, makes confidential "personnel records, used to evaluate performance toward continued employment or promotion" pertaining to police officers. Records falling within the coverage of §50-a cannot be disclosed unless a police officer who is the subject of the records consents to disclosure, or unless a court orders disclosure. Those records would be beyond rights of access conferred by the Freedom of Information Law, for the first exception to rights of access, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." The question in my view involves the extent to which the records are used to evaluate performance toward continued employment or promotion, thereby triggering the application of both §50-a and §87(2)(a).

There may be other rules, policies or directives that apply to Village police officers, and I am unaware of the penalties or consequences of non-compliance or failures to engage in complete compliance with them. That being so, I cannot conjecture as to the applicability of §50-a to the directive at issue. Further, based on a review of the directive and particular focus on §8.3, there are several aspects of the directive that do not likely involve the evaluation of performance toward continued employment or promotion. To the extent that is so, §50-a would not apply.

In short, before this office could advise or a court could determine whether §50-a bars disclosure, it must first be ascertained whether or the extent to which the records at issue are clearly "used to evaluate performance toward continued employment or promotion." Therefore, neither a blanket acceptance nor a rejection of the applicability of that statute can be offered.

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-16363

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December 26, 2006

Ms. Judith Hall
[redacted]

The staff of the Committee on 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. Hall:

I have received your letter and apologize for the delay in response. Your remarks focus on a proposed wind power project in the Town of Cohocton, and the issues that you raised relate to both the Open Meetings Law and the Freedom of Information Law.

You focused on a special meeting of the Town Board that was preceded by notice indicating that the topic to be considered would be "the discussion of the PILOT plan with the director of the Steuben County IDA", Mr. James Sherron. Soon after the meeting began, the Board entered into executive session to discuss collective negotiations and "litigations against the town and possible future litigations..." Nevertheless, as you "watched from a window, Mr. Sherron was the person doing all the talking at the session."

In this regard, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, the Law requires that meetings of public bodies be conducted in public, except to the extent that a closed or executive session may properly be held. Paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may be considered in an executive session, and it is clear in my view that those provisions are generally intended to enable public bodies to exclude the public from their meetings only to the extent that public discussion would result in some sort of harm, perhaps to an individual in terms of the protection of his or her privacy, or to a government in terms of its ability to perform its duties in the best interests of the public.

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 the instant situation, in my view, only to the extent that the Board discussed its litigation strategy would an executive session have properly been held.

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

In sum, it is questionable whether there would have been a proper basis for discussing the wind project in executive session.

Next, having requested documents from the Town Clerk relating to the project, you were informed that they involve a "confidential disclosure" or that the Clerk does not have access to them. The records sought included recommendations from a consultant to the Planning Board and recommendations prepared by a law firm "to determine the parameters of the windmill law being written and passed by the town."

First, 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.

Second, I believe that any record maintained by or for the Town 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."

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.

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 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.

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, if, for example, a consultant 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 consultant to disclose the records in a manner consistent with law, or acquire the records from the consultant in order that he can review the records for the purpose of determining rights of access.

With respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

One of the grounds for denial,§87(2)(g), potentially serves as one of the grounds for denial of access to records. However, 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.

Lastly, when an attorney or law firm is retained by an agency, I believe that recommendations consisting of legal advice may be withheld pursuant to the attorney-client privilege. 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 an attorney retained by a municipality may engage in a privileged relationship with a client, the Town Board or the Planning Board, 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.

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.

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-16364

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December 26, 2006

Mr. Daniel Riley
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Riley:

I have received your letter in which you referred to a delay in responding to "a FOIL request with the City of Cohoes Court Clerk..."

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 (see e.g., Judiciary Law, §255). Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable. In the future, when seeking court records, it is suggested that you do so by 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

cc: Janet Lebaue

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-333
FOIL-AO-16365

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December 26, 2006

E-Mail

TO: Mr. Jonathan Wilburn

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. Wilburn:

I have received your letter and apologize for the delay in response. You wrote that you were interviewed by two county agencies and expressed the belief that the Freedom of Information Law, but not the Personal Privacy Protection Law, would apply in the context of a request for your "pre-employment records." You asked, however, if your rights would be different if you "interviewed with a state agency."

In this regard, it is possible that you would have greater rights of access to records maintained by state agency than a local government agency.

I agree with your belief that the Freedom of Information Law would govern rights of access. That statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. In my view, two of the grounds for denial may be pertinent.

Section 87(2)(g) authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Therefore, if a county agency employee prepared a recommendation for review by a supervisor to hire you or to reject your application, I believe that a record of that nature could be withheld under §87(2)(g).

Also potentially 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." While you could not invade your own privacy, the cited provision might be asserted to withhold records or portions thereof identifying others. For example, if neighbors, friends or former employees were contacted, identifying details pertaining to those persons could, in my opinion, be withheld.

The Personal Privacy Protection Law pertains to a class of records, those that include personal information that can be retrieved by means of an individual's name or other personal identifier. In brief, that statute generally requires that state agencies disclose records about data subjects to those persons. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)].

Under §95 of the Personal Privacy Protection Law, a data subject has the right to obtain from a state agency records pertaining to him or her, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of that section. I point out that none of those exceptions is comparable to §87(2)(g) of the Freedom of Information Law concerning inter-agency and intra-agency materials. Consequently, the Personal Privacy Protection Law may provide the subject of records with rights of access that exceed rights conferred by the Freedom of Information Law. Notwithstanding the foregoing, I believe that an agency may withhold those aspects of records which if disclosed would result in an unwarranted invasion of privacy with respect to persons other than your client.

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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December 26, 2006

Mr. Charles Ferry
20 Park Street
Wappingers Falls, NY 12590

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ferry:

I have received your letter and the materials attached to it. I hope that you will accept my apologies for the delay in response.

You questioned the propriety of the designation of the Wappingers Falls Village Attorney as the Village's records access officer, as well a fee for copies of records that you asked to inspect. In this regard, I offer the following comments.

First, as you suggested, the functions of a "records access" or "FOIL officer" or that of appeals officer are not generally full time positions; those positions are not civil service titles, and there is generally no restriction on who may carry out those functions.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation (i.e., a county, city, town, village, school district, etc.) to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access officers

> shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public form continuing from doing so."

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

In short, the records access officer must "coordinate" an agency's response to requests. Frequently the records access officer is an agency officer or employee who has familiarity with an agency's records. For example, the village clerk is designated as records access in the great majority of villages, for he or she, by law, is also the records management officer and the custodian of village records. Again, however, I know of no provision that would prohibit the Village Board of Trustees from designating a person other than a village clerk as its records access officer.

Second, the language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee, which have the force and effect of law, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Louis J. Viglotti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 26, 2006

Mr. Leonard I. Morgenbesser
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Morgenbesser:

I have received your correspondence and hope that you will accept my apologies for the delay in response. As I understand the matter, a local television station aired information in the nature of statistics concerning the number of violent crimes involving the use of firearms in the City of Albany. Your request for equivalent information had not been acknowledged by the Division of Criminal Justice Services when you sent your initial letter to this office; its receipt had been acknowledged, however, prior to transmitting a second letter.

In this regard, I offer the following comments.

First, although I am unfamiliar with the information aired on television, I note that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency need not create a record in response to a request. Therefore, insofar as the statistics of your interest exist, I believe that the Freedom of Information Law would confer rights of access. On the other hand, when an agency has not prepared statistics or other information that may be requested, an agency is not required to create new records in order to satisfy a request.

Second, it is your belief that records made available to the news media should be available to you or any member of the public. I agree. The Freedom of Information Law does not distinguish applicants for records, and members of the news media have no special or unique rights under that statute. I note that it was held thirty years ago that when records are accessible under the Freedom of Information Law, they should be made equally available to any person, without regard to one's status or interest [Burke v. Yudelson, 51 AD2d 673 (1976)].

Lastly, for future reference, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

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: Valerie Friedlander

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 26, 2006

Ms. Celia Fishman
[redacted]

The staff of the Committee 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. Fishman:

I have received your letter and the materials attached to it. You have sought an advisory opinion concerning the status of the Chappaqua Volunteer Ambulance Corps under the Freedom of Information Law. A letter addressed to you by the Ambulance Corps suggests some familiarity with the issue and infers that it is not "funded by tax dollars" and does not maintain a relationship with a municipality analogous that of volunteer fire companies and municipalities.

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally pertains to records maintained by entities of state and local governments.

However, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, the state's highest court found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "...the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an

> obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included."

Another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

In consideration of the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

In the only case of which I am aware involving a volunteer ambulance company, the Appellate Division, Second Department, held that a volunteer ambulance corporation performing its duties for an ambulance district is subject to the Freedom of Information Law. In so holding, the decision stated that:

> "The Court of Appeals has rejected any distinction between a volunteer organization on which a local government relies for the performance of an essential public service and an organic arm of government (*see, Matter of Westchester Rockland Newspapers v. Kimball,* 50 N.Y.2d 575, 579, 430 N.Y.S.2d 574, 408 N.E.2d 904).
>
> "The appellant performs a governmental function, and it performs that function solely for the Mastic Ambulance District, a municipal entity and a municipal subdivision of the Town of Brookhaven (hereinafter the Town). The appellant submits a budget to and receives all of its funding from the Town, and the allocation of its funds is scrutinized by the Town. Thus, the appellant clearly falls within the definition of an agency and is subject to the requirements of FOIL" [Ryan v. Mastic Ambulance Company, 212 AD 2d 716, 622 NYS 2d 795, 796 (1995)].

It is emphasized that the decision cited above pertained to an ambulance company performing its duties for an ambulance district, which is itself a public corporation. There appears to be no ambulance district in this instance. Further, having reviewed the Town of New Castle website, the address and leadership of the volunteer fire company and the Ambulance Corps are different. The nature of the relationship between the Ambulance Corps and the Town is, on the basis of the material I was able locate, unclear. If the Ambulance Corps is not under the substantial control of the Town or other municipality, it appears that it would not constitute an "agency" required to comply with the Freedom of Information Law. If you can supply additional information concerning any such relationship, I would be pleased to revisit the matter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gail Oestreicher, Captain

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 26, 2006

Mr. Harold R. Vosburg
06-B-2403
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-9199

Dear Mr. Vosburg:

I have received your letter in which you requested "intervention" concerning a request for records from the Steuben County Sheriff that had not been answered.

Having reviewed the correspondence attached to your letter, you did not refer to the Freedom of Information Law when seeking records. While I do not believe that you are required to do so, it is suggested that you resubmit your letter, citing the Freedom of Information Law, and direct it to the "records access officer." The records access officer has the duty of coordinating an agency's response to requests.

I note, too, that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16370

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December 26, 2006

Mr. Charls Miloro
02-A-0260
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Miloro:

I have received your letter in which you appealed a denial of access to records by the Assistant District Attorney of Queens County.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records.

The provision pertaining to the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I hope that 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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December 26, 2006

Mr. Donald Hunt
01-B-2147
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

Dear Mr. Hunt:

I have received your letter in which you requested a variety of records from this office.

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions relating to the Freedom of Information Law. This office does not maintain possession or control of records generally, and we de not maintain any of the records that you requested.

When seeking records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that maintains the records. The records access officer has the duty of coordinating an agency's response to requests. Based upon the regulations promulgated by the Department of Correctional Services, I believe that a request for records maintained at the facility should be directed to the facility's superintendent.

You also requested a recommendation regarding an attorney to assist you in a civil suit. Again, we have no information concerning attorneys who might do so.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2006

E-Mail

TO: Mr. James Calantjis

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. Calantjis:

As you are aware, I have received your letter concerning requests for records made to the New York City Department of Education involving the Chancellor's Office of Special Investigations' consideration of "non-compliance of NYC public schools to state law concerning school based budgeting and school leadership teams." You referred to a denial of access "due to 'attorney-client privileges'" and asked whether you may "insist that [Ms. Holtzman, an attorney for the Department] identify these documents...without disclosing the content."

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 (j) of the Law. Two of the grounds for denial are pertinent to an analysis of rights of access.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of

Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101(c) of the Civil Practice Law and Rules. In my view, there need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that records consist of legal advice or opinion provided by counsel to the client, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

The other ground for denial of potential significance, §87(2)(g), permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or

determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Lastly, with respect to an index of documents within a file or index of those withheld, there is nothing in the Freedom of Information Law or judicial decision construing that statute that would require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each document. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index.

Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

RJF:jm

cc: Susan Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 27, 2006

Ms. Susan Okon
[redacted]

Mr. Andrew Kime
[redacted]

The staff of the Committee on 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. Okon and Mr. Kime:

I have received your letter in which you expressed frustration concerning a failure to comply with the Freedom of Information Law by the Gordon Heights Fire District. You asked whether there is any person or agency that might assist you in enforcing that statute.

In this regard, as you are aware, the functions of the Committee on Open Government are advisory; this office is not empowered compel an agency to comply with law or to grant or deny access to records. If it is believed that an agency has failed to comply with the Freedom of Information Law, and if an opinion rendered by this office has not resulted in compliance, an aggrieved person may seek judicial review of the agency's actions by initiating a judicial proceeding under Article 78 of the Civil Practice Law and Rules. As indicated in the earlier opinion addressed to you, when an agency initially denies access to a record either in writing or by means of a failure to respond within the requisite time, the person denied access has the right to appeal to the head or governing body of the agency, or a person designated by the head or governing body to determine appeals. If an appeal is denied, the person denied access may initiate a judicial proceeding to seek review of the denial within four months of the agency's determination. It is unclear on the basis of your correspondence whether you appealed or the Fire District responded in any way.

I note that the Freedom of Information Law was amended in August to provide courts greater flexibility in awarding attorney's fees. A court may do so now when an applicant for records substantially prevails and it is determined that the agency had no reasonable basis for denying access or when the agency failed to comply with the new provisions enacted last year requiring timely responses to requests and appeals.

I hope that the foregoing will be of use 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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December 27, 2006

Mr. Kenneth Warren
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Warren:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the New York State Department of Health. Specifically, you requested our opinion with respect to the following three issues:

> "[W]hether I am entitled to a copy of any denials or approvals for information from the New York state Department of Health where the agency claims that records were sent and I have never received the records.
>
> [W]hether I am entitled to information regarding an asset owned or leased by the new York state Department of Health and an expenditure of money by the agency. The specific asset is the mailroom equipment and the expenditure of money is postage used to mail items.
>
> [W]hether I am entitled to an electronic copy of any correspondence from the New York State Department of Health, to me, and if I can ask that the information be certified as not having been altered after the fact."

In response, we offer the following comments.

In our view, you may request copies of correspondence and records previously transmitted to you. In our opinion, you would be required to pay up to $.25 per page, and the agency would not be required to respond to such request multiple times, as per our previous correspondence to you regarding the State Education Department

You may request copies of records indicating ownership and/or a lease arrangement for mailroom equipment, as well as records indicating expenditures for postage. As you are likely aware, however, the Freedom of Information Law pertains to existing records. Section 89(3) states in part that an agency is not required to create a record in response to a request. And, again, as previously advised, your request must "reasonably describe" records maintained by the agency. If records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or perhaps thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, in our opinion, the request would not meet the standard of reasonably describing records.

In response to your third question, the Freedom of Information Law requires that records be made available, irrespective of the "truth" or accuracy of their contents. If a record requested under the Freedom of Information Law indicates that two plus two equals five, it must be disclosed, unless there is an exception to rights of access that may properly be asserted [see §87(2)]. If a person seeks a certification under the Freedom of Information Law when a copy is made available, the certification merely indicates that the agency has made a true copy of its record; the certification made under that law has no connection or relevance to the accuracy of the content of the record.

Finally, in our opinion, requesting a copy of a denial that was previously issued would not revive an issue for appeal for which the statute of limitations has already passed. As previously advised, from our perspective, if a request has been made and denied, and if an applicant's appeal has also been denied, we do not believe that an agency would be obliged to respond to a second request for the same records if circumstances have not changed.

In a recent decision involving a similar question, the court found that:

> "The material sought by the petitioner in his 2003 FOIL request is identical to the material previously sought in his 2001 FOIL request. After exhausting administrative remedies with respect to the 2001 request the petitioner, as noted previously, commenced a proceeding for judgment pursuant to Article 78 of the CPLR challenging the denial of the request. Petitioner's Article 78 proceeding, however, was dismissed as time-barred. Under these circumstances, the Court finds that this proceeding challenging the denial of an identical 2003 FOIL request represents a belated attempt to obtain judicial review of the denial of petitioner's 2001 FOIL request. *See VanSteenburg v. Thomas*, 242 AD2d 802 *lv den* 91 NY2d 803. This proceeding, therefore, must be also dismissed as time-barred" (Martin v. Travis, Supreme Court, Franklin County, August 23, 2004).

In an earlier decision, it was held by the Appellate Division that a proceeding was barred by the statute of limitations in a situation in which a request involved a challenge to a second denial of access on the basis of the same grounds as the first, and in which there was no apparent change in circumstances [Corbin v. Ward, 153 AD2d 515, leave to appeal denied by Court of Appeals, 72 NY2d 707 (1990)].

On behalf of the Committee on Open Government, we hope this serves to clarify your understanding.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16325

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December 27, 2006

E-MAIL

TO: Heidi Reichel

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. Reichel:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. You referred to a "procedural safeguards notice" sent to parents of students receiving special education which indicates restrictions on disclosure of information pertaining to your child without your consent. You wrote that "[s]chool districts seem to routinely consider this disclosure limitation to be confined to the students' official CSE file (housed in the special education office) and cumulative record folder (given to the classroom teacher at the beginning of the school year or housed in the main office)." You have asked whether that practice is consistent with law. In addition, you asked whether consultants employed by a school district may gain access to personally identifiable information pertaining to a student without a parent's consent or notification, and what penalties there may be for non-compliance.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all 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).

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 (j) of the Law.

Third 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 child 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, irrespective of where they are kept or the file designation under which they are stored. 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, for example, 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.

Next, the federal regulations to which reference was made earlier include provisions in §99.31 delineating the conditions in which prior consent is not required to disclose personally identifiable information regarding a student. The only exception, in my opinion, that might authorize disclosure to a consultant appears in subdivision (a)(1), which authorizes disclosure "to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests." I am unaware of whether a consultant may be characterized as a school official.

I believe that the penalty for failure to comply with FERPA, although rarely imposed, involves the removal of federal funding from the educational agency or institution. To obtain additional information or seek to compel compliance, you may contact the Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, DC 20202-5920. A variety of information, including the full text of the FERPA regulations, may be obtained by googling "family policy compliance office."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16376

tee Members

hue
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December 27, 2006

Ms. Lenore Cernitz
[redacted]

The staff of the Committee on 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. Cernitz:

We are in receipt of your request for a written advisory opinion concerning application of the Freedom of Information Law to certain requests that you have made to the Town of Smithtown, specifically, for records pertaining to an expert retained in conjunction with defense of a lawsuit. Based on the materials you submitted, the lawsuit is ongoing and has not yet gone to trial. The Town has denied your request for these records on the grounds that they consist of materials prepared in anticipation of litigation and are protected from disclosure "as part of attorney/client work product in preparation for trial." In this regard, we offer the following comments.

First, 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 (j) 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, although §3101(c) and (d) of the CPLR authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation, those kinds of records remain confidential in 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.

Section 3101 pertains to disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of

§3101, which describe narrow limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable." The other provision at issue pertains to material prepared for litigation, and §3101(d)(2) states in relevant part that:

> "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

The thrust of case law concerning material prepared for litigation is consistent with the preceding analysis, in that §3101(d) may properly be asserted as a means of shielding such material from an adversary.

In our view, insofar as the identity of the expert and the substance of the expert's testimony has been communicated between the Town and its adversary or have been filed with a court, any claim of privilege or its equivalent would be effectively waived. Once records in the nature of attorney work product or material prepared for litigation are transmitted to an adversary, i.e., from the Town to its adversary and *vice versa*, 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.

In a similar fashion, records reflecting the nature of the retainer agreement between an expert who is retained by the Town's attorney for defense purposes, in our opinion, would be accessible either when the matter has been finally resolved or when any claim of confidentiality or its equivalent is effectively waived.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Yvonne Lieffrig

STATE OF NEW YORK
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December 28, 2006

Mr. Stan Spielman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Spielman:

I have received your letter in which you offered a variety of criticisms concerning the implementation of the Freedom of Information Law by the Village of Manorhaven. In consideration of your remarks, I offer the following comments.

First, §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 Village Board of Trustees, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name

> or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Enclosed for your review are copies of the Committee's official regulations, as well as model regulations designed to assist government agencies in achieving procedural compliance with the Freedom of Information Law. Copies of those materials will also be sent to Village officials.

Second, in a case involving a village in Nassau County determined by the Appellate Division, one of the issues involved the validity of a limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating in part that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2e 101 (1994), 210 AD 2d 411].

Based on the foregoing, the Village, in my view, cannot limit your ability to inspect records to a period less than its regular business hours.

I do not believe, however, that a member of the public may designate the date or dates on which he or she seeks to review records. If, for instance, records will be in use by staff on a particular date or during a particular period of time, an agency would not, in my view, be required to alter its schedule or work plan. In that instance, the agency could offer a series of dates to the person seeking to inspect the records in order that he or she could choose a date suitable to both parties. Similarly, if a request involves a variety of items, while the applicant may ask that certain records be made available sooner than others, I do not believe that he or she can require an agency to make records available in a certain order.

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, 2005 (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 note that on August 16, 2006, legislation became effective that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

Next, based on an amendment that became effective in October, when an agency has the ability to accept requests and to transmit requested records via email, it is required to do so. Model request and response forms are available on our website.

Next, as a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. An exception to that rule relates to one of the subjects of your correspondence. 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 College. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

Lastly, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Uniform Justice court Act, §2019-a; Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information

Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

When you seek records from a justice court, it is suggested that a request for records be made to the clerk of the court, citing §2019-a of the Uniform Justice Court Act as the basis for the request.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be sent to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Encs.

cc: Board of Trustees
Carolyn A. Weber

STATE OF NEW YORK
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December 28, 2006

E-Mail

TO: Hon. Vincent C. Martello, Supervisor

FROM: Robert J. Freeman, Executive Director

Dear Supervisor Martello:

Thank you for sending a copy of the proposed local law concerning the procedural implementation of the Freedom of Information Law by the Town of Marbletown. Having reviewed the proposal, I offer the following brief comments and suggestions.

First, it is suggested that the procedures need not be adopted as a local law. If a local law is approved, any alteration would involve the enactment of a new law, including the attendant requirements associated with that process. For instance, if the Freedom of Information Law is amended in a manner that necessitates a change in existing procedures, a local law would have to be amended. Easier, and certainly easier to amend if necessary would be the adoption of the rules or policy by resolution.

Second, and I am not inferring that the proposal is faulty, you and the Town Clerk would serve as records access officers. Unless you expect to be a full time Supervisor, I believe that it may be more appropriate to have one or more records access officers designated who serve full time. In most towns, there is one records access officer, the town clerk.

Third, and in a related vein, the proposal states that the records access officers are responsible for maintaining the subject matter list. In this regard, I point out that the Arts and Cultural Affairs Law, Article 57-A, the "Local Government Records Law", specifies that the town clerk is the "records management officer" in towns. As you may be aware, §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)].

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 and adopted as the subject matter list. I would conjecture that the Town Clerk would have the retention schedule readily available.

Next, I recognize that there have been difficulties involving a certain person or persons seeking records. However, it is my view that a requirement that all requests be made in writing, irrespective of how routine the request might be, would be unnecessarily inflexible. If a person requests of minutes of last month's meeting, there may be no good reason for requiring a written request. Similarly when residents consider challenging their assessments, assessment records are usually made readily available for inspection without resort to a written request. I might add a sentence at the end of section 5(a) indicating that a records access officer may in his or her discretion waive the requirement that a request be made in writing when it would be efficient or appropriate to do so.

Lastly, the proposal would designate the Town Board to determine appeals. Certainly that would be consistent with law. However, §89(4)(a) of the Freedom of Information Law requires that an appeal be determined within ten business days of its receipt by granting access to the records sought or fully explaining in writing the reasons for further denial. In some instances, it may be difficult for the full board to meet to carry out those functions within ten business days. Compliance may be easier to achieve by designating one person as appeals officer.

It is emphasized that the proposal is not, in my view, inconsistent with law. I offer the preceding suggestions in an effort to enhance the Town's ability to comply with law and hope that I have been of assistance.

RJF:jm

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December 28, 2006

Mr. William H. Bormann
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bormann:

I have received your correspondence and a variety of materials relating to it and the Town of Stony Creek. Please note that the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. Therefore, although you have raised numerous issues, the following remarks will be limited to matters involving that statute.

First, with respect to the ability to learn of Town revenues and expenditures, §29 of the Town Law pertains to the powers and duties of town supervisors, and subdivision (4) states that a town supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

From my perspective, a crucial word in §29(4) is "reasonable", and I do not believe that "reasonable" can be equated with "immediate." If, for example, the records sought are in use by the supervisor or other town officials, it would be reasonable in my view to delay disclosure; if there is insufficient staff to supervise the inspection of records at a particular time, I do not believe that a town would be required to disclose the records immediately. Similarly, although the Freedom of Information Law permits an agency to take up to five business days to respond to a request, the five business day period is in my opinion intended to represent a maximum limitation; when records are readily retrievable and can be disclosed quickly, compliance with the Law, particularly in terms of its spirit

and intent, would in my view require disclosure as soon as practicable and in fewer than five business days.

Second, an aspect of your correspondence deals with Town officers' or employees' salaries, total compensation and benefits. 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 (j) 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..."

Therefore, if information that is requested does not exist in the form of a record or records, an agency would not be required to prepare a record on behalf of an applicant. However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed for the following reasons.

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)]. 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 operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available. I note, too, that it has been held that the portion of a W-2 form indicating a public employee's gross wages is accessible under the Freedom of Information Law (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 2002).

Often benefits are referenced in collective bargaining or similar agreements. Those records and others indicating an agency's costs per employee, or by the category of the benefit conferred, would in my opinion be available, for none of the grounds for denial could in my view be asserted to withhold such records. With specific regard to health benefits, I believe that a disclosure indicating that a public officer or employee is covered by a health insurance plan at public expense would not represent or reveal an intimate detail of one's life that could be withheld as an unwarranted invasion of personal privacy. However, if a disclosure of the cost of coverage for a particular employee indicates which plan that person has chosen or whether his or her plan involves individual or dependent coverage, such a disclosure in my view may potentially result in the revelation of a number of details of a person's life and an unwarranted invasion of personal privacy. For instance, an indication of cost relative to a particular employee might reveal whether the coverage involves medical treatment routinely provided by a clinic, as opposed to a primary care physician; it also may indicate the nature of coverage, i.e., whether coverage is basic or includes catastrophic care. The cost may also reveal whether coverage is for an employee alone or for that person's family or dependents. More appropriate in my opinion would be a disclosure of costs by category, rather than by naming individuals, in terms of plans that are offered or available to officers or employees.

Lastly, the state's highest court has determined that a volunteer fire company is required to comply with 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."

In consideration of the language quoted above, an agency generally is an entity of state or 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 found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In short, based on the foregoing, it is clear that a volunteer fire company is required to give effect to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Stony Creek Volunteer Fire Department

STATE OF NEW YORK
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December 28, 2006

Mr. Roger D. Joslyn
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Joslyn:

As you are aware, I have received your letter and the materials attached to it. You have sought an advisory opinion concerning the propriety of "the non-permission...received from Orange County Clerk Donna L. Benson for publication of some nineteenth-century indentures."

By way of background, correspondence relating to the matter indicates that you prepared information derived from apprenticeship indenture contracts executed by the superintendent of the poor in Orange County early in the nineteenth century. Those records are maintained by and were obtained from the County Clerk's office, where they are accessible to the general public. In a letter refusing to "permit the publishing of ancient indenture information you acquired" from her office, the County Clerk wrote that:

> "Although the agreements are over 100 years old, the subjects of those agreements are children, presumably who were wards of the County at that time, making those records analogous with adoption records. According to Social Services Law Section 372(3) and (6), 'records and reports pertaining to the placing out, adoption or boarding out of a child' shall be kept confidential."

From my perspective, there is no basis for prohibiting you from publishing or using in any way the records that were legally obtained. In this regard, I offer the following comments.

First, as indicated in a letter addressed to you by Dr. James Folts, Head of Reference Services at the State Archives, the records at issue had been public when they were prepared and for many years thereafter. Moreover, the statutes to which the County Clerk referred and preceding provisions

from which they were derived were not enacted until or applicable until the twentieth century. That being so, I do not believe that those statutes serve as a bar to disclosure or publication of the records at issue.

Second, viewing the matter from a different perspective, I believe that the documents in question are subject to rights conferred by the Freedom of Information Law. That statute is expansive in its coverage, for it 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."

In consideration of the foregoing, despite their age or function, I believe that the documents constitute "records" falling with the scope of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." For reasons described earlier, I do not believe that any applicable statute would serve to exempt the records at issue from disclosure. Further, although §87(2)(b) authorizes and agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy," the subjects of the records have been deceased for many decades and likely in most instances for more than a century. That being so, I do not believe the exception to rights of access involving "unwarranted" invasions of personal privacy could be justified.

Lastly, based on its language and judicial precedent, a person seeking records under the Freedom of Information Law from an agency, such as a county, cannot be compelled, as a condition precedent to disclosure, to indicate the purpose of a request or the intended use of the records, or to promise or agree that the records will not be duplicated, disseminated, or perhaps placed on the internet. As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not

> confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant. In short, once records are made available under the Freedom of Information Law, I believe that the recipient may do with the records as he or she sees fit.

I note that in a decision rendered in 2001, the Life Insurance Council of New York attempted to bolster a denial of access to certain records maintained by the State Department of Insurance that had long been available to the public because the recipient of the records placed the records on the internet. The court rejected the argument and determined that the records remained accessible and that there was no justifiable reason for prohibiting their placement on the internet [Belth v. New York State Department of Insurance, 733 NYS2d 833].

In sum, in this instance, because the records are accessible from the County Clerk's office and were legally obtained, I do not believe that the Clerk may preclude their publication or forbid you in any way from using the records in any manner that you may choose.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Donna L. Benson
James Folts

From: Robert Freeman
To: [redacted]
Date: 12/28/2006 3:15:39 PM
Subject: Dear Mr. Gardner:

Dear Mr. Gardner:

I have received your inquiry concerning the process by which a request may be made when seeking records under the Freedom of Information Law.

In this regard, first, the regulations promulgated by the Committee on Open Government (21 NYCRR §1401.2), which have the force of law, require that each agency, such as a school district, designate one or more persons as "records access officer." The records access officer has the duty coordinating an agency's response to requests for records, and a request should be made to that person.

Second, although an agency may require that a request be made in writing, there is no particular form that must be used. I note that a sample request letter appears in our guide, "Your Right to Know," which is available on our website. Additionally, legislation that recently went into effect requires that an agency accept requests and transmit records requested via email when they have the ability to do so.

Lastly, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, an attempt should be made to include sufficient detail in a request to enable agency staff to locate and identify the records of your interest.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
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