STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16382

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

January 2, 2007

E-MAIL

TO: Dave White

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open 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:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You indicated that you serve as president of the Oswego City School District Board of Education and that a member of the Board sent an email message to the Board attorney seeking advice "on how to bring an issue before the board that she said was to do with [your] conduct on sending e-mail to an Ass't Superintendent." Your request for a copy of that email was denied, and you have asked whether the denial of access was proper.

In this regard, I offer the following comments.

First, the Freedom of Information Law includes within its coverage all records of an agency, such as a school district. Section 86(4) defines the term "record" to mean:

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

Based on the foregoing, I believe that email maintained by or for the District would constitute a District record that falls within the scope of the Freedom of Information Law.

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

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A board of education, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41. In my view, in most instances, a Board member acting unilaterally, without the consent or approval of a majority of the total membership of the Board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a Board member by means of law or rule. In the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

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. In my view, two of the exceptions are pertinent in considering rights of access.

The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." 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 the school district 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 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)].

I question, however, who or what the client may be in the context of your question. In my view, the client is likely the District's governing body, the Board of Education. Unless directed or authorized by a majority of the Board to seek legal advice from the Board's attorney, I do not believe that a single Board member, acting on his or her own initiative, may be viewed as the client or,

therefore, that communications between that Board member and the District's attorney would fall within or be exempted from disclosure based on the assertion of the attorney-client privilege.

The other exception pertains to communications between or among government officers or employees. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. In my opinion, a communication between a Board member and the District's attorney would consist of "intra-agency material" that is accessible or deniable, in whole or in part, based on the content of the communication.

Lastly, it is suggested that you might raise the issue before the Board to seek clarification and certainty in order to establish the identity of the client for the purpose of asserting the attorney-client privilege. In addition, you or any Board member could introduce a motion or resolution to authorize disclosure of this or other email communications to you. If the motion is carried by a majority vote of the Board's membership, the record must be made available to you, even if it could be withheld from the general public under the Freedom of Information Law. I note, too, that the Freedom of Information Law is permissive; even though an agency *may* withhold records from the public in accordance with the grounds for denial of access appearing in §87(2), it is not ordinarily required to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. The only instance in which an agency must withhold records would involve a situation in which a statute forbids disclosure.

I hope that I have been of assistance.

RJF:tt

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January 2, 2007

Mr. Carlos Torres
#47799530
Buffalo Federal Detention
4250 Federal Drive
Batavia, NY 14020

Dear Mr. Torres:

I have received your request citing the federal Freedom of Information and Privacy Acts for copies of all of your mental health records from a federal detention facility, as well as New York City and New York State correctional facilities.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the New York Freedom of Information Law. This office does not maintain possession or control of records generally, and we do not maintain any of the records of your interest.

Since you referred to a federal detention center, I point out that federal government agencies are subject to the federal Freedom of Information and Privacy Acts. This office has no jurisdiction regarding the federal Act. The state and New York City entities to which you referred are subject to the New York Freedom of Information Law. When a request is made under the New York Freedom of Information Law, it should be directed to the an agency's records access officer. The records access officer has the duty of coordinating an agency's response to requests.

Although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director

of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. It is noted that under §33.16, there are certain limitations on rights of access.

Since you indicated that you do not have the resources to pay for copies, I point out that the federal Freedom of Information Act includes provides concerning the possible waiver of fees. The New York Freedom of Information Law contains no such provision, and 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 the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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FOIL-AO-10384

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January 3, 2007

E-Mail

TO: Patricia A. Buckler, Treasurer, Harpursville Fire Department

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Buckler:

I have received your letter in which you sought an advisory opinion concerning the obligation of the Harpursville Fire Department in relation to a certain request made under the Freedom of Information Law. Specifically, you wrote that:

> "We have had several requests from an individual for information such as treasurer's reports, minutes of meetings and bank statements which we have provided to him. The individual is now requesting copies of all the checks from 2004-2006 as well as receipts for the internet banking transfers.
>
> "Since we have already provided the equivalent information with the bank statements (each check is listed on the bank statement as well as each internet transfer) and treasurer's reports, must we also provide copies of each check?"

Based on a judicial decision involving similar facts, the Department would not be required to grant access to the checks if indeed the bank statements include equivalent information. In that decision, Boni, et al. v. Mills, et al. (Supreme Court, Ulster County, February 27, 2003), a school district provided 295 treasurer's reports containing information equivalent to that contained in 2,880 pages of bank statements. The court rejected the contention that the district was required to make the bank statements available, stating that the applicant for the records "failed to specifically 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."

Because it has already disclosed documentation containing information equivalent to that contained in the records sought, I do not believe that the Department would be required to make the latter series of records available.

I hope that I have been of assistance.

RJF:jm

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January 3, 2007

Mr. David S. Ladenheim
[redacted]

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

Dear Mr. Ladenheim:

I have received your letter and the materials attached to it. As I understand the matter, you have sought records from the New York City Taxi and Limousine Commission, specifically, the "full name and address of complainant Javed" and "for the last year all the unredacted tickets he has written." In response, you were informed that the "complainant" is not an employee of the Commission and, therefore, it does not possess the records of your interest. It was suggested that you might contact the Port Authority Police Department to seek the records at issue.

You asked whether you "have the legal right to know the name and address of [your] accuser....to [gain access to] all the tickets issued by an agency, in the name of that accuser", and whether it is "permissible to use hearsay evidence in an administrative hearing." You also sought an opinion concerning whether various federal laws might have been broken.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the New York Freedom of Information Law. I have neither the jurisdiction nor the expertise to respond to your questions relating the use of hearsay or the possibility that violations of federal laws might have occurred. However, in an effort to provide guidance, I offer the following comments.

First, the Freedom of Information Law pertains to existing records maintained by or for an agency, such as the Commission. Insofar as the Commission does not maintain the records of your interest, that statute would not apply.

Second, when the Freedom of Information Law is applicable, 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. 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 with respect to complaints 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.

It appears in the situation that you described that the "complainant" is an employee of the Port Authority Police Department. In my view, when the kind of record that you seek is prepared by a public employee acting in the performance of his or her governmental duties, disclosure of his or her identity does not involve information that could be characterized as intimate or personal or, therefore, that disclosure would constitute an unwarranted invasion of personal privacy. Again, however, it appears that the Commission does not maintain the records of your interest. I note, too, that §89(7) of the Freedom of Information Law specifies that the home address of a present or former public officer or employee need not be disclosed.

Lastly, I believe that there is a clear distinction between rights of access conferred upon the public under the Freedom of Information Law and rights conferred upon a litigant via the use of discovery, and the courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings and in criminal proceedings under the Criminal Procedure Law (CPL). The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally,

while the discovery provisions of the CPLR or the CPL are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

As stated by the state's highest court, the Court of Appeals, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the CPLR. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a litigant, and the nature of the records or their materiality to a proceeding. The materials made available in discovery to a litigant through discovery may not be available to the public under the Freedom of Information Law. Conversely, there may be instances in which records are beyond the scope of discovery, but which may be available under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jason P. Gonzalez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16386

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January 4, 2007

E-Mail

TO: Ms. 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 information presented in your correspondence, unless otherwise indicated.

Dear Ms. LaFiandra:

As you are aware, I have received a variety of material from you concerning requests for invoices maintained by the South Orangetown School District. The invoices involve fees paid to a consultant for services rendered to particular students. Although the District disclosed the invoices, you wrote that "[a]ll the names were redacted" and that "the invoices have not been broken down in any way." The Superintendent indicated that the records sought do not include "information disaggregated by individual student" and that, therefore, "we redacted all of the names of the students from the information as I understand we are able to do according to the regulations."

Based on my understanding of the matter, the difficulty that you have encountered relates to fact that the District does not maintain records in which you are interested in the form in which you are seeking them. In a conversation with the Superintendent, I was informed that invoices pertaining to consultants in this context do not include any breakdown, by student, of services rendered; rather, the invoices may refer to several students without specificity regarding the time or services provided to any particular student.

In this regard, I offer the following comments.

First, the Freedom of Information Law does not deal with the manner in which records must be kept, nor does it include requirements concerning the content of records. That statute pertains to existing records maintained by or for an agency, such as a school district, and §89(3) states in relevant part that an agency is not required to create a record in response to a request. If no record exists containing the information sought, the District would not be required by the Freedom of Information Law to prepare a new record on your behalf.

In short, there appears to be no record that specifies the amount of time that the consultant spent with any particular student or the amount billed for working with any particular student.

Second, notwithstanding the foregoing, I believe that you have the right to gain access to invoices that include your child's name, so long as disclosure of any such records would not render the identity of any other student easily discernible. Pertinent are the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) and the regulations promulgated pursuant to FERPA by the U.S. Department of Education (34 CFR Part 99). In brief, FERPA applies to all educational agencies or institutions that participate in grant or loan programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Concurrently, FERPA provides rights of access to education records to a parent of a student under the age of eighteen.

The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

"(a) The student's name;
(b) The name of the student's parents or other family member;
(c) The address of the student or student's family;
(d) A personal identifier, such as the student's social security number or student number;
(e) A list of personal characteristics that would make the student's identity easily traceable; or
(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

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

If information pertaining to students other than your child can be redacted from the invoices or other records in a manner that ensures that their identities are not "easily traceable", I believe that the District would be required to disclose the remainder of those records, including those portions that identify your child. It is reiterated, however, that disclosure any such records would not specify the amount of time spent working with your child or the monies expended by the District relating to your child specifically. On the other hand, if redactions of names of students other than your child would not serve to adequately protect their privacy in a manner consistent with federal regulations, I believe that all identifying information, including information pertaining to your child, could be redacted.

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

RJF:jm

cc: Joseph Zambito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16387

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January 4, 2007

E-MAIL

TO: Marty Calderon

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Calderon:

I have received your "complaint" concerning a request made under the Freedom of Information Law sent to the Town of Ossining.

In this regard, it is noted that MaryAnn Roberts serves as Clerk for both the Town and Village of Ossining. I contacted her to ascertain the status of your request, and she informed me that the request had never been received. That being so, I faxed a copy of your request to her.

The request involves a copy of a contract between the Town/Village and A & P Collision Inc., a towing company, a statement indicating the number of years that the Town/Village has contracted with that company, and all police records "of tows given to A & P collision for cars towed on the command of the Town of Ossining Police Department." In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) provides in relevant part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no record indicating the number of years that the Town/Village may have contracted with A & P, there would be no obligation to prepare a new records containing the information sought.

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

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

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

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

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

In the context of your request, there is no time period indicated regarding towing done by A & P at the request of the Police Department. Again, whether those kinds of records are maintained in a manner in which they can be retrieved with reasonable effort would serve as the key element in determining whether the request meets the standard of reasonably describing the records.

Lastly, insofar as a request reasonably describes existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. If indeed there is a contract between the Town/Village and a towing company, I believe that it would be accessible, for none of the grounds for denial of access would be applicable. Similarly, if records merely indicate that a particular towing company performed services at the request of a municipality, in my opinion, they, too, would be accessible.

I hope that I have been of assistance.

RJF:tt
cc: Hon. MaryAnn Roberts

FOIL-AO-16388

From: Robert Freeman
To: Peter Meyer
Date: 1/5/2007 2:44:31 PM
Subject: Re: FOIL question

The function of a records access officer is to coordinate an agency's response to requests. That being so, often a variety of officers or employees within an agency may be authorized to disclose records based on the direction or policy established by the records access officer. In a related vein, the regulations promulgated by the Committee on Open Government, which have the force of law, state that the designation of a records access officer "shall not be construed to prohibit officials who have in the past been authorize to make records or information available to the public from continuing to do so" [21 NYCRR §1401.2(a)].

In consideration of the foregoing, while it is recommended that a request be made to an agency's records access officer, if a request is made to a different official, I believe that he or she must either respond directly to the request or forward the request to the records access officer.

I hope that I have been of assistance.

16389

From: Robert Freeman
To: cdooley@rwmattys.com
Date: 1/8/2007 10:19:04 AM
Subject: Dear Ms. Dooley:

Dear Ms. Dooley:

I have received your inquiry concerning fees that may be assessed in relation to requests that records be emailed. In this regard, first, the Freedom of Information Law authorizes the assessment of a fee only when records are reproduced. When records can be emailed, they are not reproduced and, consequently, no fee may be charged.

Second, with respect to scanning, it has been advised that when doing so involves no effort additional to an alternative method of responding, no fee may be charged. If scanning would involve additional effort, an agency would not be required to do so. In that event, which often would involve photocopying, the agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches. Attached is an advisory opinion on the subject that is too recent to have been posted on our website.

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

Bob Freeman

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
DEPARTMENT OF STATE
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January 8, 2007

Ms. Toni Brighton
[redacted]

The staff of the Committee on 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. Brighton:

As you know, we are in receipt of your request for an advisory opinion regarding application of the Freedom of Information Law to a request you made to the Middletown Police Department for records pertaining to your former employment with the Department. In this regard, we offer the following comments.

First, you indicated the Department refused to certify that certain records you have requested do not exist. In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." This provision of the statute is not discretionary, as evidenced by the Legislature's choice of language, directing that the agency "shall certify".

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

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould, stating that:

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

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

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

In the context of your request rather than citing §87(2)(g) as a basis for a blanket denial of access to the records at issue in Gould, the Department appears to have engaged in a blanket denial by denying the existence of the records which, in our view, is equally inappropriate. We are not suggesting that the record or records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, any such records must be reviewed by the Department for the purpose of identifying those portions that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

Finally, we believe that the only ground for denial of significance is the provision of §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.

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 Middletown Police Department. 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: Chief Byrne
Lt. Rickard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16391

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 8, 2007

Mr. Robert C. Black
Attorney and Counselor at Law
3500 Main Street, Suite 130-132
Amherst, NY 14226

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

Dear Mr. Black:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Albany Housing Authority. You requested records from the Authority pertaining to yourself, and you asked whether we would answer the following questions: "(1) Is the Albany Housing Authority subject to FOIL? (2) Were the materials I requested subject to FOIL? (3) Is the Albany Housing Authority required to comply with my request?" In response, we offer the following comments.

First, we note that it has been held that municipal housing authorities are subject to the Freedom of Information Law. By way of background, that statute applies to agency records and that §86(3) of the Law defines the term "agency" to include:

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

Section 3(2) of the Public Housing Law states that municipal housing authorities are public corporations. Since the definition of "agency" includes public corporations, we believe that a public housing authority is clearly an "agency" required to comply with the Freedom of Information Law, and it has been so held [Westchester Rockland Newspapers, Inc. v. Fischer, 101 AD 2d 840 (1985)].

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

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever

> including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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.

The initial ground for denial is frequently relevant with respect to records relating to public housing. That provision, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." the only provision of which we are aware in the Public Housing Law that requires confidentiality, §159, provides guidance concerning the disclosure of information furnished by applicants for dwellings in projects maintained by public housing authorities. That statute states in part that:

> "[I]nformation acquired by an authority or municipality or by an officer or employee thereof from applicants for dwellings in projects of an authority or municipality or from tenants of dwellings thereof or from members of the family of any such applicant or tenant or from employers of such persons or from any third person, whether voluntarily or by compulsory examination as provided in this chapter, shall be for the exclusive use and information of the authority or municipality in the discharge of its duties under this chapter and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the authority, municipality or successor in interest thereof is a party or complaining witness to such action or proceeding."

Based on the language quoted above, a public housing authority or municipality can not disclose information identifiable to tenants to the public.

Next, since the matter involves Section 8 housing, particularly pertinent in our view is the determination rendered in Tri-State Publishing, Co. v. City of Port Jervis (Supreme Court, Orange County, March 4, 1992) in which the court essentially agreed with an advisory opinion written by this office in 1991. Because tenants in section 8 housing must meet an income qualification, it has been consistently advised that insofar as disclosure of records would identify tenants, they may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], even if the dwellings are not public housing units or under the jurisdiction of a housing authority. Conversely, following the deletion of identifying details pertaining to any other tenants, we believe that records pertaining to you must be released to you.

Finally, while it may be worth your while to contact the Authority to ascertain whether it has received your request, with respect to the Authority's failure to respond to 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.

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-16392

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January 8, 2007

Mr. Anthony Brandon
06-A-6450
Downstate Correctional Facility
Box F, Red Schoolhouse Road
Fishkill, NY 12524-0445

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

Dear Mr. Brandon:

I have received your letter, and as requested, enclosed is "Your Right to Know", which serves as a guide to both the Freedom of Information Law and the Open Meetings Law.

With respect to the ability to obtain a pre-sentence report, 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 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:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 8, 2007

Mr. William S. Lofquist
[redacted]

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

Dear Mr. Lofquist:

I have received your letter and a variety of materials relating to it. The matter concerns a request for records made to the Town of Geneseo involving the development of a retail center, and you have raised a series of questions.

The first pertains a response to a portion of a request indicating that the records sought are missing, and you asked whether the Town is required to "provide the affidavit" that you requested. Although I believe that Ms. Jobin-Davis of this office has offered guidance concerning the issue, it is reiterated that when an agency, such as a town, indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Second, you asked whether the Town is required to contact entities that created certain records to retrieve copies if the Town's records are no longer available. In this regard, if the records at issue were prepared for the Town, I believe that it would be obliged to do so. The Freedom of Information Law pertains to all records of an agency, and §86(4) defines the term "record" to mean:

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

Based on the foregoing, if the documents of your interest are kept or were prepared for the Town, I believe that they would constitute Town records, irrespective of their physical location. In

instances in which records are kept or were prepared for an agency, it has been advised that a request be made to the agency's records access officer. In carrying out his or duty to coordinate the agency's response, I believe that the records access officer must either direct the person or entity in possession to disclose the records directly, or obtain the records for the purpose of determining rights of access and, thereafter, disclosing them in accordance with law. On the other hand, when records are not kept, held, filed, produced or reproduced for an agency, the Freedom of Information Law would not apply.

Next, you asked whether there are recordkeeping requirements imposed on the Town or a municipal attorney and what the consequences might be for failure to abide by those requirements. In this regard, the Freedom of Information Law does not address the issue. However, as you are likely aware, 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-recoding 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 such programs for the orderly and efficient management of records including identification and management of interactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and

> distribute to local governments retention and disposal schedules establishing minimum retention periods..."

In view of the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of records has been reached. I note that the provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives and Records Administration.

I am unaware of provisions that deal with failures to comply with Article 57-A of the Arts and Cultural Affairs Law.

Lastly, various records that you requested appear to have been withheld in their entirety under §87(2)(g), the provision pertaining to "inter-agency or intra-agency materials", which includes those records prepared by consultants retained by agencies. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 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 §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).

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

It is emphasized that although §87(2)(g) potentially authorizes an agency to deny access, due to its structure, it often requires disclosure. Specifically, that provision permits an agency to withhold records that:

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

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

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

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

FOIL-AO-1639/

From: Robert Freeman
To: Fina Del Principio
Date: 1/9/2007 12:10:19 PM
Subject: Re: FOIL question

Hi - -

Happy New Year to you, too.

With respect to your question, it is clear that records involving overtime pay, as well as attendance records, identifiable to particular employees must be disclosed. The records relate to public employees, and disclosure, therefore, would constitute a permissible rather than an unwarranted invasion of personal privacy.

If you need more detailed information, there are opinions on our website under "payroll information, overtime" and "attendance records" that might be useful.

I hope that this helps.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16395

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January 9, 2007

Mr. Mark Anderson
86-B-1575
Mt. McGregor Correctional Facility
1000 Mt. McGregor Road
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. Anderson:

I have received your letter in which you complained that certain agencies have 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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 generally pertains to entities of state or local government. I do not believe that Prisoners' Legal Services is a governmental entity or, therefore, that it is required to comply with that law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16396

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

January 9, 2007

Mr. Francis Brozzo
[redacted]

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

Dear Mr. Brozzo:

I have received your letter in which you complained that the Department of Motor Vehicles has not responded to your request for a record.

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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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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January 9, 2007

Mr. Sammy Caswell
06-B-1575
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

Dear Mr. Caswell:

I have received your letter in which you appealed a denial of access to records by the Auburn City Police Department 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 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,

Janet M. Mercer

Janet M. Mercer
Administrative Professional

JMM

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 9, 2007

E-Mail

TO: Mr. Mark Fleisher

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. Fleisher:

As you are aware, I have received your letter concerning a request made to the State Police for records regarding "the killing of a NY State Trooper" in 1928. Even though the event occurred nearly eighty years ago, the records were withheld in consideration, in your words, of "privacy, internal administrative procedures and investigative nature of the material." You have sought an advisory opinion concerning the propriety of the response.

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

In short, I believe that the blanket denial of the request was inconsistent with law.

Second, the extent to which the exceptions to which the State Police referred may properly be asserted is, in my opinion, highly questionable in consideration of the passage of time.

With respect to privacy, §87(2)(b) authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." It is assumed that many, if not all, of those identified in the records are deceased. That alone would, in my view, diminish the likelihood that a denial of access based on the cited provision may be justified.

The Court of Appeals recently dealt with issues relating to those who died in the attacks of September 11, 2001, as well as their surviving family members. 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])" [New York Times Company v. City of New York Fire Department, 43 NY3d 477; 484-485 (2005)].

Based on the foregoing, it is clear that there may be an interest in protecting privacy in consideration of the deceased, as well as their family members. Nevertheless, the ensuing question involves the content of records, and whether the information is so intimate or personal that disclosure would result in an "unwarranted" invasion of privacy. As stated by the Court:

> "The recognition that surviving relatives have a legally protected privacy interest, however, is only the beginning of the inquiry. We must decide whether disclosure of the tapes and transcripts of the 911 calls would injure that interest, or the comparable interest of people who called 911 and survived, and whether the injury to privacy would be 'unwarranted' within the meaning of FOIL's exception."

In its focus on the nature of the calls, it was found that:

> "The privacy interests in this case are compelling. The 911 calls at issue undoubtedly contain, in many cases, the words of people confronted, without warning, with the prospect of imminent death. Those words are likely to include expressions of the terror and agony the callers felt and of their deepest feelings about what their lives and their families meant to them. The grieving family of such a caller – or the caller, if he or she survived – might reasonably be deeply offended at the idea that these words could be heard on television or read in the New York Times.
>
> "We do not imply that there is a privacy interest of comparable strength in all tapes and transcripts of calls made to 911. Two factors make the September 11 911 calls different.
>
> "First, while some other 911 callers may be in as desperate straits as those who called on September 11, many are not. Secondly, the September 11 callers were part of an event that has received and will continue to receive enormous - - perhaps literally unequalled - - public attention. Many millions of people have reacted, and will react, to the callers' fate with horrified fascination. Thus it is highly likely in this case - - more than in almost any other imaginable - - that, if the tapes and transcripts are made public, the will be replayed and republished endlessly, and that in some cases they will be exploited by media seeking to deliver sensational fare to their audience. This is the sort of invasion that the privacy exception exists to prevent" (id. 485, 486).

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. I would conjecture that the records that you have requested do not contain "expressions of terror or agony" or reflections of "deepest feelings" or emotions. Unless there is a demonstration that the records at issue include intimate personal information or sentiments in some way comparable to those referenced in New York Times, it is doubtful in my view the State Police could demonstrate that disclosure would result in an unwarranted invasion of privacy.

The remaining grounds for denial offered by the State Police involve §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;

> 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;"

That the records are "investigative in nature" is not determinative of rights of access. Critical is the effect of disclosure and whether or the extent to which disclosure would result in the kinds of harm described in subparagraphs (i) through (iv.) In view of the fact that nearly eighty years have passed since the event, it is inconceivable that significant aspects of the records relating to it 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 "internal administrative procedures", 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

> 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 some eighty 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)]

In an effort to enhance knowledge of and compliance with the Freedom of Information Law, a copy of this opinion will be sent to the records access officer at the State Police.

I hope that I have been of assistance.

RJF:jm

cc: Laurie Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16399

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January 10, 2007

Mr. William Erbis
[redacted]

Dear Mr. Erbis:

Your letter to Laurence Sombke in which you requested certain court records from the Committee on Open Government has been forwarded to the Committee.

In this regard, first, the Committee on Open Government is authorized to provide advice and guidance concerning the Freedom of Information Law. It does not have general custody or control of records, and its functions do not include acquiring records on behalf of persons seeking records.

Second, the regulations promulgated by the Committee pursuant to the Freedom of Information Law (21 NYCRR §1401.2) require that each agency must designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be directed to that person.

Third, the courts are beyond the coverage of the Freedom of Information Law. That statute, as suggested above, pertains to agency records, and §86(3) defines the term "agency" to include:

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

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

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

Based on the 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 a request for court records be made to the clerk of the court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16400

41 State Street, Albany, New York 12231
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January 10, 2007

Ms. Ann M. Ott
[redacted]

The staff of the Committee on 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. Ott:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to your local police department. You described your inability to obtain information from a particular police officer based on repeated attempts to contact him by phone. We advise that you submit your request for a copy of the report, in writing, to the records access officer of your local police department. In this regard, we offer the following comments.

While an agency may respond to verbal requests for information, there is nothing in the Freedom of Information Law that would require it to do so. In the alternative, if you submit a request in writing, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain

> within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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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January 11, 2007

E-MAIL

TO: Amy Vanderlyke

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. Vanderlyke:

I have received your inquiry concerning "instances in which an individual has been presented with retaliation charges stemming from filing a FOIL request." You offered an example in which "employee A" is accused of harassment by "employee B", and employee A submits a request for records pertaining to employee B pursuant to the Freedom of Information Law. Thereafter, the employer "files a retaliation charge against employee A based on employee A's FOIL request."

In this regard, I am unaware of any situation in which charges have been filed against a person for requesting records pursuant to the Freedom of Information Law. Further, based on a decision by the Court of Appeals, the state's highest court, the motivation of a person seeking records is irrelevant. The Court determined 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.

In short, records may be available or deniable in whole or in part, not based on the interest, intended use or motivation of the person seeking them, but rather based on the provisions of §87(2) of the Freedom of Information Law. That provision reflects that statute's presumption of access, directing that all agency records be made available, except those records or portions thereof that fall within one or more of the grounds for denial of access appearing in paragraphs (a) through (j).

Lastly, while I am not an expert on the subject, I would conjecture that the initiation of a retaliation charge due to the assertion of the right to request and obtain records under the Freedom of Information Law might give rise to a valid cause of action under the federal Civil Rights Act.

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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January 11, 2007

E-MAIL

TO: Michael A. Genito

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Genito:

As you are aware, I have received your letter and the materials relating to it. The matter relates to a request made by Timothy Chittenden to inspect certain records pursuant to the Freedom of Information Law. In response to the request, copies of records were made following redactions, and Mr. Chittenden was charged and paid $39.50 for the copies through the use of a credit card. Mr Chittenden indicated that some of the records did not include redactions and should have been available to him for inspection at no charge. That being so, he reversed the credit card charge. It is your view, since none of the fee was paid and Mr. Chittenden owes payment to the City, that the City is not required to honor his ensuing requests for records until the requisite amount is paid.

In this regard, first, while there is no judicial decision of which I am aware that focuses on the subject, it has been advised that when an applicant for records is in arrears in payment of fees for copies of records previously requested, the agency is not required to honor new requests until the amount owed to the agency has been paid.

Second, when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there may often be situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the ground for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record. When accessible and deniable information appear on the same page, preparing a redacted copy and charging the established fee for a copy, in my opinion, and based on judicial precedent, is proper (see VanNess v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999).

In short, in my opinion, insofar as individual pages among the records sought by Mr. Chittenden include items that may properly be redacted, the City is justified in charging a fee for copies. Unless payment is tendered for those copies, I do not believe that the City is required to honor ensuing requests for records made by Mr. Chittenden.

I hope that I have been of assistance.

RJF:tt

cc: Timothy Chittenden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16403

41 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 12, 2007

Mr. Dominick Viola
C#365504, W-302
P.O. Box 300
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. Viola:

I have received your letter in which you have requested an advisory opinion concerning access to your pre-sentence report.

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

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

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

In addition, subdivision (2) of §390.50 states in part that:

> "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

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 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16404

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

January 16, 2007

E-Mail

TO: Ms. Suzanne Schreter

FROM: Robert J. Freeman, Executive Director RJF

Dear Ms. Schreter:

I have received your letter concerning difficulties that you have encountered in relation to your business, which appears to be in the Town of Marlboro. Although you referred to requests made under the Freedom of Information Law, you raised no questions relating to that law, and the nature of guidance that you may be seeking is unclear. Nevertheless, in an effort to enhance your understanding, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Insofar as information sought from an agency, such as a town or a village, does not exist in the form of a record or records, the agency is not required to create or prepare a record in response to a request. It is noted that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the

> event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

If you have specific questions concerning the Freedom of Information Law, I would be pleased to respond.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-16405

From: Camille JobinDavis
To: Bill Lofquist
Date: 1/16/2007 3:20:11 PM
Subject: Re: FOIL request, Town of Geneseo

Dear Prof. Lofquist:

I would be happy to add your request for a written advisory opinion to our "stack" of requests for advisory opinions. Please be advised that we respond to such requests on a "first in, first out" basis, and at this time it takes approximately 6-8 weeks to issue a written advisory opinion.

But before I do that, I want to inform you that I have clarified my initial reaction to your question with our executive director, and we believe as follows: because the Court of Appeals has determined that communications from consultants are intra-agency communications, the provision of section 87(2) that requires an agency to make statistical and factual portions of those communications public (subsection [g]), would apply to communications sent from the Town to the consultant also. In our opinion, communications from the Town to the consultant are still part of the intra-agency deliberative process, and would be required to be disclosed only to the extent required by section 87(2)(g).

I hope this is helpful to you. If you would prefer that we issue a legal opinion on this issue, please advise. Thank you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant 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-16406

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

January 17, 2007

E-MAIL

TO: Timothy A. Collins

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Collins:

I have received your letter in which you asked whether the identity of a person who submitted a request for records to one of the state's retirement systems for your client's final average salary determination must be disclosed.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. From my perspective, with the exception of portions of certain kinds of requests, requests for records made pursuant to the Freedom of Information Law must be made available under that statute.

In my view, the only instances in which a request may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the

minutes of a meeting of a community board, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, Nay 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

In the context of your inquiry, I do not believe that a request for the final average salary determination would involve information about the person seeking the record that could be characterized as intimate or highly personal. For that reason, it is my opinion that the identity of that person must be disclosed to 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-1604

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

January 17, 2007

Mr. Alan P. Lebowitz
General Counsel
NYS Office of the State Comptroller
110 State Street
Albany, NY 12236

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

Dear Mr. Lebowitz:

I have received your letter in which you requested an advisory opinion concerning the obligation of the Office of the State Comptroller disclose certain information contained within the agency's audit work papers pursuant to the Freedom of Information Law.

You wrote that, during the course of auditing a school district, it was learned that the district issued laptop computers to three members of the board of education and seven employees, and that those computers "had been used extensively for personal purposes", including "accessing pornographic websites." You asked whether, in my view, you would be required to disclose "(1) the names of the persons to whom the computers were issued, and (2) a list of the personal purposes for which the computer issued to each person was used, including the names of the persons to whom computers were issued on which [you] found pornography."

You indicated that the laptop computers were not password protected, and that your staff did not attempt to identify the individuals who in fact used them inappropriately. Further, although the district adopted a policy that prohibits the use of the computers to access pornographic sites, it "did not clearly prohibit the use of the computers for personal purposes", nor did the policy clearly apply to members of the board of education.

Because the information at issue is purely factual in nature and does not identify or allege that any particular individual engaged in the inappropriate use of a computer, I believe that it is accessible under the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law is expansive in its scope, for it pertains to all agency records and defines the term "record" in §86(4) to mean:

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

Based on the foregoing, the documentary materials that you described in my opinion clearly constitute "records" that fall within the framework of the Freedom of Information Law.

Second, as you are aware, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. From my perspective, two of the grounds for denial of access are pertinent to an analysis of rights of access. Neither, however, could in my opinion justifiably be asserted as a means of denying access.

One of the exceptions to rights of access, 87(2)(g), pertains to internal governmental communications, but due to its structure, it may require 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.

In a decision rendered by the Court of Appeals in which the Court dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i), it was 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 [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 et al. v. New York City Police Department, 87 NY2d 267, 276-277 (1996)].

It is also noted that it was held by the Appellate Division more than twenty-five years ago that statistical or factual information contained within audit work papers are accessible [see Polansky v. Regan, 81 AD2d 102 (1981)].

As I understand the nature of the information in question, all of it is factual. It is a fact that laptop computers were issued to certain board members and district employees. It also a fact that the computers were used to access pornographic websites. It is reiterated that the work papers do not include any allegation that any particular individual engaged in inappropriate use of a computer.

The other exception of significance is §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In addition, §89(2)(b) 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 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 those persons are required to be more accountable than others. With regard to records relating to them, the courts have found that, as a general rule, records that are relevant to their duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67

NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to their duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In the context of the situation that you presented, in my opinion, it is clear that the identities of those to whom computers were issued relates to the performance of those persons' functions and duties as officers or employees of a government agency. They would not have gained the use of the computers but for their roles as board members or employees of the district. I note that it has been advised in many instances that the identities of public officers or employees to whom vehicles are assigned, to whom government credit cards have been given, or who have the use of government owned cell phones are accessible to the public, for disclosure of portions of records containing those facts would, if disclosed, in our view, result in a permissible, not an unwarranted invasion of personal privacy.

With respect to the "personal purposes for which the computer issued to each person was used," again, there is no specification or indication in the records of the identity of the person or persons who may have engaged in inappropriate use of the computers. That being so, I do not believe that it could justifiably be contended that disclosure would constitute an unwarranted invasion of the privacy of any specific person. From my perspective, even though computers were assigned for use by named board members or employees, the information at issue pertains to the use of the computers, not to their use by any particular person.

Lastly, in its consideration of the intent and utility of the Freedom of Information Law, the Court of Appeals has recognized and confirmed that the public has the right to obtain records in the nature of those at issue, finding 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)].

Based on the preceding analysis, I believe that the items at issue must be disclosed in response to a request made under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16408

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

January 17, 2007

E-MAIL

TO: Norman Oder

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. Oder:

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 City Planning. You indicated that you have not yet obtained any of the requested records, even though you were informed on August 15, 2006, that you would receive "a determination in 30 business days." 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, 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.

Accordingly, the law requires that the Department should have responded to your initial request, sent via email on July 26, 2006, within five business days. Assuming that it was received by the Department in the earlier part of the day, it is our opinion that the Department should have responded to your request, in writing, on or before Wednesday, August 2, 2006. According to the information you provided, no communication was sent until August 15, 2006, at which time you were informed that "a determination of whether your request will be granted in whole or in part shall be made within approximately thirty (30) business days. This too, in our opinion, would have failed to comply with the parameters set forth in §89(3) that require the Department to grant or deny access within twenty business days of its acknowledgement of receipt of the request or indicate a reasonable date by which it will grant or deny access.

In response to your appeal of October 24, 2006, the Department indicated that it would permit you to inspect a portion of the records responsive to your request, and that you would be notified, within thirty business days, as to whether any additional records would be made available to you. It is reiterated that §89(4)(a) offers two options that must be accomplished within ten business days of the receipt of an appeal: it must either grant access to the records or fully explain in writing the reasons for further denial. Consequently, it is our opinion that the Department constructively denied access to the requested records, and that you have the authority to initiate an Article 78 proceeding to compel disclosure.

Please 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.

CSJ:tt

cc: Wendy Niles
David Karnovsky

FOIL-AO-16409

From: Camille JobinDavis
To: scook@dailygazette.net
Date: 1/18/2007 11:57:36 AM
Subject: Fwd: Freedom of Information Law - settlement agreement

Steve,

The following is a link to an advisory opinion that clearly states our opinion, on behalf of the Committee on Open Government, that when the identity of the student is known, that the school district is not permitted to release such a settlement agreement:

http://www.dos.state.ny.us/coog/ftext/f14422.htm

In keeping with this written opinion, I believe that if the identities of the students are known, the settlement agreement should be withheld.

Perhaps there is another way to get to the information you want through the Freedom of Information Law. I need to go out for about an hour, but if you could call and leave your phone number, I will call you when I return. Thanks.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
41 State Street
Albany NY 12231
(518) 474-2518 - Phone
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Website - www.dos.state.ny.us/coog/coogwww.html

From: Robert Freeman
To: [redacted]
Date: 1/19/2007 9:41:06 AM
Subject: addresses of public employees

Dear Mr. Heidcamp:

I have received your letter in which you asked whether a school district must release the addresses of its employees. It is assumed that your interest involves home addresses.

In this regard, §89(7) of the Freedom of Information Law states in relevant part that: "Nothing in this article [the Freedom of Information Law] shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system..."

Based on the foregoing, it is clear that an agency, such as a school district, is not required to disclose the home addresses of its employees.

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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From: Robert Freeman
To: johnWatson@cvb.state.ny.us
Date: 1/19/2007 9:02:04 AM
Subject: Good morning - -

Good morning - -

A tape recording of a meeting of a public body clearly constitutes a "record" that falls within the coverage of the FOIL. It is noted that it was held as early as 1978 that a tape recording of an open meeting of a public body is accessible to the public (Zaleski v. Hicksville Union Free School District, Sup. Ct., Nassau County, NYLJ, December 27, 1978). In short, since anyone could have been present at the meeting, there would be no basis for denying access to the tape recording.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 19, 2007

Mr. Jack N. Bonne
[redacted]

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

Dear Mr. Bonne:

As you aware, I have received your letter and the materials attached to it. You have sought guidance concerning delays in responding to your requests for records of the Town of Pound Ridge.

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, 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 records to which you referred must be disclosed, for none of the grounds for denial of access appear to be applicable.

In an effort to enhance understanding of and compliance with law, copies of this opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. Gary David Warshauer
Evelyn Olsen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 19, 2007

Mr. Frank Uceta
05-A-4477
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. Uceta:

I have received your letter in which you complained in relation to a request made under the Freedom of Information Law request to the New York City Police Department. Although you were informed by the Department that you would receive a response by December 31, 2006, 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

It is noted that the person designated by the New York City Police Department to determine appeals is Jonathan David.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 22, 2007

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 two questions:

1. "May a municipality approve a FOIL request but then not provide the supporting documentation?"

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

2. "May a municipality make the requesting party come in and copy their own FOIL requests? And then when the party shows up during normal business hours, tell them that they have to make an appointment to get their FOIL requests? Or when the requesting party shows up at the agreed appointed time, tell them that: a) the records aren't available, b) the copier is broke, c) the party who needs to pull the records isn't in, d) their office is moving and they can't find anything, etc.?"

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

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.

3. "Does a requesting party have to visit the municipality to receive their FOIL requests, may they be mailed?"

An applicant for records may view records at the municipal office, pick up copies at the municipal office, or request photocopies by mail, in which case up to twenty-five cents per photocopy plus the cost of postage may be charged.

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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January 22, 2007

E-MAIL

TO: Thomas F. Rossi

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. Rossi:

We are in receipt of your request for guidance on three issues with respect to application of the Freedom of Information Law. For the sake of clarity, we have set forth your requests, in their entirety, below, immediately followed by our responses.

> 1. "Are police reports (except for minors and sex crimes) subject to FOIL? Cannot open this up in the advisory section, it's black, not clickable blue."

Police reports are records maintained by an agency subject to the Freedom of Information Law. It is emphasized initially 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."

While 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 reports", we note 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 "police" or "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.

We 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 (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 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.

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 our view be withheld.

In its analysis of the matter, the decision in Gould 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, an 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 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, police incident reports, by their nature, differ in content from one situation or incident to another. 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.

Further, please note that advisory opinions available online are indicated by number in blue, and underlined, on our website. Advisory Opinions issued prior to 1993 are indicated in black, and are not available in electronic format. Should you require a copy of any of the opinions indicated in black, please contact our office, and we will fax or mail them to you. Please note that in addition to those listed under "police blotters," advisory opinions regarding police records can be found under additional key phrases, including "booking records" "incident reports", "law enforcement" and "arrest records."

> 2. "Is it mandatory to use the FOIL sample request letter to make a request?"

No, the sample request letter developed by the Committee on Open Government is offered only as a guide for making requests for records.

> 3. "A NYC agency asks FOIL requestors who visit in person to sign a form stating that they will abide by the NYC administrative guidelines in relation to viewing FOIL documents in their office. Is it mandatory that I sign that form?"

There is nothing in the Freedom of Information Law or any other state statute of which we are aware that deals with such agreement in order to inspect records. An agency might have concerns about the integrity or safety of records during an inspection by a member of the public, and in our opinion, it may not be unreasonable to require a written agreement that records will not be

defaced, removed, placed out of order, etc. Further, if a visitor is unwilling to comply with reasonable rules of conduct while inspecting records, it is our opinion that s/he should request and pay for copies of records.

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-16416

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January 22, 2007

E-MAIL

TO: John Quenell

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 Mr. Quenell:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made for your town's tentative budget, and subsequently, for the preliminary budget . It appears the Town Board had not yet seen the tentative budget at the time of your request. You indicated that you were required to submit a written request and pay twenty-five cents per page for a copy of the tentative budget, but not required to submit either a written request or payment for a copy of the preliminary budget. You questioned whether this "inconsistent treatment regarding the two forms of the budget [is] warranted?" 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, and includes all agency records within its coverage. Section 89(3) of the Law states in part that an agency may require that a request be made in writing. Therefore, while an agency may accept an oral request, we believe that it may require a written request.

We note that §106(4) of the Town Law provides that "[t]he preliminary budget shall be filed in the office of the town clerk and the town clerk shall reproduce for public distribution as many copies as the town board may direct." In addition, as you know, the town board must hold a public hearing on the preliminary budget in accordance with §108 of the Town Law. That statute states in relevant part that:

> "Notice of such public hearing shall be published at least once in the official newspaper, or if no official newspaper has been designated, in any newspaper having general circulation in the town....The notice of hearing shall state the time when and the place where the public hearing will be held, the purpose thereof and that a copy of the

> preliminary budget is available at the office of the town clerk where it may be inspected by any interested person during office hours...The town clerk shall cause a copy of the notice to be posted on the signboard of the town, maintained pursuant to subdivision six of section thirty of this chapter, not later than five days before the day designated for such hearing...."

Based on those provisions, we do not believe that a written request should be needed to inspect the preliminary budget, because the right to inspect is clearly conferred by Town Law; however, a town could, in our opinion, require that a written request be made if a copy of the tentative budget is requested, for the law makes no specific reference to publication of the tentative budget.

Finally, there is nothing in the Freedom of Information Law with respect to the waiver of fees for copies of records. However, again, because the right to inspect the preliminary budget is clearly conferred by Town Law, it is our opinion that the Town could require payment for a copy of the tentative budget, and subsequently provide free copies of the preliminary budget.

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-1604/17

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January 22, 2007

Hon. Barbara J. Plummer
County of Saratoga
Board of Supervisors
40 McMaster Street
Ballston Spa, NY 12020

The staff of the Committee on 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. Plummer:

As you are aware, I have received your letter in which you sought an advisory opinion concerning a variety of issues relating to a request made under the Freedom of Information Law to Saratoga County.

You wrote that in 2002 the County Board of Supervisors "formally endorsed the concept of a county water system" and has since "pursued the design, approval, financing, and construction of a county water system that would sell water municipalities and, among others, prospective tenants of the Luther Forest Technology Park..." You specified that "records maintained by the various departments of the County of Saratoga and the County's engineering, legal, bonding and real estate appraisal consultants concerning the water project are voluminous and increasing daily." Additionally, you indicated that the applicant for the records asked that they be available for inspection, and that retrieving and transporting the records to a single location "would effectively bring work on the project to a halt until the requestor completed her review, which would likely take days, if not weeks." You also wrote that many of the records "are active working files."

The request was characterized in your letter as "a massive fishing expedition", for it includes:

"1. All supporting documentation used to develop the Project.

2. All supporting documentation for the environmental impact review of the Project.

3. All permit applications for the Project and all related communications and supporting documentation.

> 4. All information related to how the Project will be paid for, including but not limited to financing plans, correspondence with the state comptroller's office related to the Project, any grant applications, and then supporting information for any of the above mentioned materials.
>
> 5. All research related to the Project.
>
> 6. All board minutes, correspondence (including e-mail), and any other records of communications related to the Project, including these made by government officials, agents of the government, and contractors for the government.
>
> 7. All information or communications related to the interest or lack thereof of potential customers in the Project, including but not limited to any documents containing commitments or estimates of projected water use by potential customers."

Although you raised seven questions relating to the foregoing, the most pertinent issue in my opinion involves the extent to which the request "reasonably describes" records sought as required by §89(3) of the Freedom of Information Law. In my view, it is likely that several aspects of the request do not meet that requirement. In considering that standard, the Court of Appeals has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing

or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. In this instance, I am unaware of the means by which the County maintains records concerning the water project. If the County maintains all such records in a file or group of files that are retrievable on the basis of the terms of the request, I believe that the request would meet the requirement that the records be reasonably described. On the other hand, however, due to the scope of the project, it appears that the County maintains records falling within the scope of the request in a number of locations or departments and by means of different filing systems within those departments. In those situations in which records falling within the request cannot be found with reasonable effort, the request, in my opinion, would not reasonably describe them.

With particular respect to the portions of the request involving "[a] supporting documentation used to develop the Project", "[a]ll supporting documentation for the environmental impact review of the Project," and "research", again, to the extent that those materials are filed or maintained in a manner that enables County staff to locate them with reasonable effort, I believe that the request would reasonably describe the records. Nevertheless, there may be a variety of records from an array of sources used in and outside the scope of one's governmental duties that may have been used or read in support of or to engage in research regarding the project, including curricular materials used in undergraduate, graduate or post graduate studies, library materials, magazine articles, documentaries, films (i.e., for training), professional journals and similar documentation read or seen over the course of years. Those kinds of materials may contribute to one's breadth of knowledge and may, consciously or otherwise, tend to support a position on a given subject. However, identifying or recalling those kinds of materials that may have resulted in the acquisition of knowledge and which even may tend to support a statement or position would, in my opinion, frequently involve an impossibility. For purposes of the Freedom of Information Law, to the extent that is so, the request would not meet the standard of "reasonably describing" the records sought, for such a request would not enable the County to locate and identify the records in the manner envisioned by that statute.

With regard to the remaining issues, I offer the following comments.

First, when records are available on the County's website, it would be appropriate in my opinion to direct the applicant for the records to that source. In my experience, most who receive guidance of that nature are grateful to learn of a substitute for making records available pursuant to the Freedom of Information Law at government offices, and it is suggested that the applicant be asked to do so. However, if the applicant would prefer to physically inspect records that are available in their entirety, I believe that he/she has the right to do so.

In situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the grounds for denial appearing in §87(2), I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record (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).

Second, you asked whether applicant for records that are in possession of the County's various consultants "may be referred to each and every consultant's office at a particular date and time for inspection of such records on-site", or whether all such records must be "produced in bulk at a centralized location for inspection..." Section 87(1) of the Freedom of Information Law requires that each agency adopt rules and procedures for implementation of the law consistent with regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401). Section 1401.3 of the regulations requires that an agency's rules "shall designate the locations where records shall be available for inspection and copying." Assuming that the County has designated the locations where records are available for inspection or copying, I believe that an applicant for records would have the right to do so at those locations and that he/she could not be required to travel to the offices of consultants for the purpose of inspecting records. However, an applicant could be informed of the locations where consultants maintain records and offered the opportunity to inspect records at any such location.

Third, you asked whether records must be "produced through the date of the request....or through the date of the actual production of the records, where the request does not state that it is an ongoing request." To be fair to applicants, it has been advised that they be informed that a response to a request will include only those records maintained by an agency as of a particular date, and that requests for documents prepared or received after that date would require the submission of a new request. Alternatively, an agency could choose to honor the request up until the date that records are granted or denied in whole or in part, and in that event, I believe that the applicant should also be so informed. I note that it has been advised that an agency is not required to honor an "ongoing" or prospective request (i.e., a request for minutes of meetings to be held in the future by the Board of Supervisors), for the Freedom of Information Law pertains to existing records. Because that is so, in a technical sense, an agency can neither grant nor deny access to records that do not yet exist.

Fourth, "[m]ust all records be produced for inspection on the same date and time at the same place?" To do so may be impractical for both the agency and the applicant, and it has been advised that records may be made available on a piecemeal basis when appropriate. Further, as indicated earlier, the County may have designated more than one location for inspection and copying of records.

Fifth, with respect to copying "emails", you asked whether the County may "print out a paper copy of each email and charge a fee of 25 cents per page for each copy." Section 87(1)(b) of the Freedom of Information Law pertains to fees for copies and states that an agency may charge up to twenty-five cents per photocopy or the actual cost of reproduction in other circumstances. When emails are printed out, no photocopies are made, and an agency in my opinion could not charge twenty-five cents for each copy. Again, the fee in the circumstance that you described would be based on actual cost, such as paper and ink.

Next, you wrote that it is anticipated that many of the records sought fall within §87(2)(g), but you asked whether other exceptions might apply. The only other exception which might, based on the nature of the records sought, be pertinent would be §87(2)(a) concerning records that "are specifically exempted from disclosure by state or federal statute." One such statute, §4503 of the Civil Practice Law and Rules (CPLR) codifies the attorney-client privilege. It is possible that some of the records sought involve communications between County officials and attorneys representing

the County. To the extent that those communications seek legal advice or reflect legal advice offered by those attorneys, I believe that they would be privileged and confidential and, therefore, exempt from disclosure.

Lastly, you indicated that the applicant asked for "a written description of any information not disclosed" and questioned whether the County is obliged to prepare such a summary. Section 89(3) of the Law requires an initial denial of access be made in writing, and §1401.(2)(b)(ii) of the regulations states that the reasons must be given in writing. When access is denied following an appeal, §89(4)(a) requires that the agency must "fully explain in writing" the reasons for further denial. There is nothing in the Freedom of Information Law or judicial decision, however, 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. If the request for a summary involves an explanation beyond that required in the provisions cited above, the County, in my view, would not be required to do so.

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-1604/18

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January 23, 2007

Mr. Michael Von Lee
[redacted]

Dear Mr. Lee:

I have received your letter addressed to me as records access officer for the Department of Taxation and Finance in which you requested a variety of records under the Freedom of Information Law. In this regard, please be advised that I serve as executive director of the Committee on Open Government, which is a unit of the Department of State. The Committee is authorized to provide advice and opinions concerning the Freedom of Information Law; this office does not maintain custody or control of records generally, and we have none of the records that you requested.

It is noted that there is no central repository of records pertaining to individuals, and requests should be made to the records access officers at the agencies that are likely to maintain records of interest. For instance, birth records in New York are generally maintained by town and city clerks, and in New York City by the Health Department; education records would be maintained by the institutions attended by an individual; license and permit records would be maintained by the agencies that issued them. Further, some of the records to which you referred are maintained by federal agencies subject to the federal Freedom of Information Act, and requests should be made to those agencies.

Both the federal and state access to records laws require that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records of interest.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16419

41 State Street, Albany, New York 12231
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January 23, 2007

Mr. James Bradley
06-A-4210
Downstate Correctional Facility
Box F
Fishkill, NY 12524

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

Dear Mr. Bradley:

I have received your letter in which you wrote that a county has asked that you pay for a copy of your pre-sentence report, but you wrote that you "don't have the money."

In this regard, although the means by which you have attempted to obtain the report is not clear, I note that, unlike the federal Freedom of Information Act, which applies to federal agencies and includes provisions concerning fee waivers, the New York Freedom of Information Law, which applies to state and local government agencies, contains no similar provision. Further, it has been held under the New York law that an agency may charge its established fee, even though a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)]. Based on §87(1)(b)(iii) of the Freedom of Information Law, the fee for photocopies of records up to nine by fourteen inches cannot exceed twenty-five cents per photocopy.

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

OML-AO-4323
FOIL-AO-16420

From: Robert Freeman
To: [redacted]
Date: 1/24/2007 4:03:49 PM
Subject: Dear Ms. [redacted]

Dear Ms. [redacted]

I have received your inquiry in which you asked whether a board of education may"keep [you] from attending a meeting where [y]our child will be discussed." You indicated that the issue involves an appeal of a decision to suspend your child.

In this regard, first, I believe that the board would have the authority to conduct an executive session pursuant to §105(1)(f) of the Open Meetings Law. That provision states in part that public body, such as a board of education, may enter into executive session to discuss "matters leading to the...discipline...of a particular person..." Second, §105(2) indicates that the only people who have the right to attend an executive session are the members of the public body. That provision authorizes a public body to permit the attendance of persons other than members, but does not require that it must do so.

Lastly, notwithstanding the absence of a right to attend the meeting in question, I point out that records identifiable to a minor student are in most instances available to a parent of the student pursuant to the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g).

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 - 16421

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

January 24, 2007

Ms. Jennifer Forte
[redacted]

The staff of the Committee on 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. Forte:

I have received your letter and the correspondence relating to it. Based on a review of the materials, I offer the following comments.

First, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it does not require the disclosure of information *per se*, but rather existing records in accordance with it provisions. That being so, the staff of an agency may choose to offer information in response to questions, but it is not obliged to do so. Similarly, that statute pertains to existing records. Therefore, when an agency does not maintain requested records, the Freedom of Information Law does not require the disclosure or responses to questions.

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 "sball 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 materials indicate that you encountered a series of delays in your efforts to gain access to records of the Department of Health. For future reference, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Robert LoCicero

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO - 16422

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January 24, 2007

Mr. John J. Cataldo
[redacted]

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

Dear Mr. Cataldo:

I have received your letter concerning the appointment by the Liverpool Central School District Board of Education of a certain independent contractor. Since you raised a variety of issues, I point out that the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information and Open Meetings Laws. Because that is so, the following remarks will be limited to matters relating to those statutes.

First, you referred to a meeting of the Board during which the Board considered items that were not identified on its agenda. In this regard, there is nothing in the Open Meetings Law that pertains to agendas. A public body, such as a board of education, may prepare an agenda, but it is not required to do so. Similarly, unless it has adopted a rule or policy to the contrary, a public body is not obliged to adhere to its agenda and may discuss matters that do not appear on an agenda.

Also with respect to the Open Meetings Law, the materials do not clearly indicate how or when the appointment was made. Based on judicial decisions, I believe that any such action could validly have been taken only during an open meeting. 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.

Further, if a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

Therefore, if the board reached a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. I note 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.

Second, a significant issue appears to involve the background of the contractor appointed by the Board. In this regard, insofar as an agency, such as a school district, maintains records, rights of access to the records 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.

With respect to records relating to the contractor, such as a resume, an application or similar records, of primary relevance is §87(2)(b), which authorizes an agency to withhold records to the

extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

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

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

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

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

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

> individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

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

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

I believe, too, that the thrust of judicial decisions relating to public employees is pertinent in the context of your remarks. While the contractor is not a public employee, his qualifications would be relevant in considering whether to retain him.

In Kwasnik v. City of New York, [Supreme Court, New York County, September 26, 1997; aff'd 262 AD2d 171 (1999)], the court cited an opinion rendered by this office in which it was advised 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)]."

In my opinion, based on the foregoing, the identities of the contractor's private employers may be withheld. Further, §89(2)(b)(i) indicates that an unwarranted invasion of personal privacy includes the disclosure of personal references of applicants for employment. Other items within an application for employment, a resume or similar records 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 short, I believe that a variety of details concerning the contractor's professional or business background should be disclosed if requested under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1604/23

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

January 24, 2007

Ms. Eileen Haworth Weil
[redacted]

Dear Ms. Weil:

I have received your letter concerning a request made pursuant to the Freedom of Information Law to Sullivan County. Since the receipt of your correspondence, I have received a copy of a response to your appeal by the County Attorney, which was sent to this office as required by §89(4)(a) of the Freedom of Information Law. The County Attorney wrote that the County "forwarded to you all records that it possesses that are responsive to your inquiry."

Although the matter appears to be moot, for the County has apparently satisfied your request to the extent possible, I offer the following brief comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in relevant part that an agency, such as the County, need not create or prepare new records in response to a request.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Samuel S. Yasgur

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 16424

41 State Street, Albany, New York 12231
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January 24, 2007

Mr. Robert McErlean
[redacted]

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

Dear Mr. McErlean:

I have received your letter and the materials relating to it. You have sought an advisory opinion involving a "simple yes or no answer" concerning a request made pursuant to the Freedom of Information Law to the New York State Department of Environmental Conservation.

In this regard, I do not believe that a response can be given by offering a "simple yes or no." Further, there are several issues associated with the request that must be considered.

First, it is emphasized that the Freedom of Information Law pertains to existing records. That point may be significant, for it appears that your request involves records that were prepared at least twenty years ago. That being so, I point out that agencies often are not required to maintain records permanently. Article 57 of the Arts and Cultural Affairs Law deals in part with the retention and disposal of records, and the Commissioner of Education, through the State Archives, develops schedules indicating minimum retention periods for various categories of records. When the minimum retention period is reached, an agency may dispose of its records. I would conjecture that many of the records sought, due to the time that has passed, have been legally destroyed. Insofar as records no longer exist, the Freedom of Information Law would not apply.

In a related vein, §89(3) of the Freedom of Information Law states in part that an agency need not create a record in response to a request. In certain aspects of your request, you sought "information that would explain or show how" the Department carried out certain of its functions. If no such records exist, the Department would not be required to create new records containing the information sought on your behalf.

Also of likely relevance is another aspect of §89(3), the provision requiring that an applicant "reasonably describe" the records sought. In considering that standard, the Court of Appeals, the

state's highest court, has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. In this instance, I am unaware of the means by which the Department maintains its records. Insofar as it maintains the records of your interest in a file or group of files that are retrievable on the basis of the terms of the request, I believe that the request would meet the requirement that the records be reasonably described. On the other hand, however, due to the scope of the request and the passage of time, there may be instances in which records falling within the request cannot be found with reasonable effort. In those instances, I do not believe that the request would have reasonably described the records.

Second, to the extent that the records sought exist and have been reasonably described in accordance with the preceding commentary, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 I am unfamiliar with the content of the records at issue, it appears that the exception of primary significance would be §87(2)(g). That provision pertains to internal governmental communications and records transmitted between or among agencies. 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.

Next, I have no expertise concerning "the public trust doctrine" or its relationship to the Freedom of Information Law.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to

have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that the foregoing enhances your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Fawzy I. Abdelsadek
Ruth Earl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16425

41 State Street, Albany, New York 12231
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January 24, 2007

E-Mail

TO: Mr. Skip Beaver

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. Beaver:

I have received your letter in which you questioned "how much information can be released to the media regarding an arrest prior to and during litigation."

In this regard, in general, there are few restrictions on the information that may be disclosed, for 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, the state's highest court, 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)].

The only instances in which records must be withheld involve situations in which a statute separate from the Freedom of Information Law prohibits disclosure, as in the case of police records pertaining to the arrest of juveniles (Family Court Act, §784) or records identifying the victim of a sex offense (Civil Rights Law, §50-b).

Further, in my view, unless 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.

While arrest records are not specifically mentioned in the current Freedom of Information Law, the original Law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. In my opinion, even though reference to those records is not made in the current statute, I believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it was held by the Court of Appeals several years ago that, unless sealed under §160.50 of the Criminal Procedure Law, records of the arresting agency identifying those arrested, i.e., booking records, must be disclosed [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)].

I note that §87(2)(b) of the Freedom of Information Law authorizes agencies to withhold records when disclosure would result in "an unwarranted invasion of personal privacy." Not every disclosure of personal information is "unwarranted", and there are numerous situations in which disclosure would constitute a permissible invasion of personal privacy. That is generally so in the case of arrest or booking records.

Unless sealed, the records at issue would in my opinion be available in great measure, if not in their entirety. The portions of such records that might be withheld, depending on the facts and circumstances, would involve the identities of witnesses, for example. If the identities of witnesses have not yet been disclosed or are not part of a public court record, those portions of the records might be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy pertaining to those persons.

I hope that 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-1604/26

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January 24, 2007

E-Mail

TO: Mr. William Maddock

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Maddock:

I have received your letter in which you sought an opinion concerning the propriety of a denial of your request by the Office of Professional Discipline at the State Education Department for records relating to your complaint pertaining to a dentist.

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.

Pertinent in this instance is the first ground for denial, §87(2)(a), which authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute."

One such statute is §6510(8) of the Education Law, which provides that:

> "The files of the department relating to the investigation of possible instances of professional misconduct, or the unlawful practice of any profession licensed by the board of regents, or the unlawful use of a professional title or the moral fitness of an applicant for a professional license or permit, shall be confidential and not subject to disclosure at the request of any person, except under upon the of a court in a pending action or proceeding. The provisions of this subdivision shall not apply to documents introduced in evidence at a hearing held pursuant to this chapter and shall not prevent the department from sharing information concerning investigations with other duly authorized public agencies responsible for professional regulation or criminal prosecution."

Based on the foregoing, it appears that the denial of your request was based on §6510(8) and, therefore, would have been proper.

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

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January 24, 2007

Mr. Ralph Bombardiere
Executive Director
New York State Association of Service Stations
and Repair Shops, Inc.
6 Walker Way
Albany, NY 12205

Dear Mr. Bombardiere:

Your letter addressed to the Office of the Inspector 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.

In short, you complained that requests made to the Department of Environmental Conservation have resulted in "nothing but excuses." 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. 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 (j) of the Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Ruth Earl, Records Access Officer

FOIL-AO-1061/28

FAX TRANSMISSION SHEET

NYS DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT
(518) 474-2518
(518) 474-1927-Fax

WEBSITE ADDRESS: http://www.dos.state.ny.us/coog/coogwww.html

TO: Bill Usas

FROM: Camille Jobin-Davis

MESSAGE: Attached is an advisory opinion that is responsive to your question about the availability of a memo from the ethics board to the town board pertaining to allegations before the ethics board. Please note, in particular, the material beginning on page three.

And to expand on the advice rendered on page four, that most likely the record would not be required to be made available unless the town adopted the findings . . . if the town board does not take action on the recommendations of the ethics board, if they neither adopt the recommendations nor reject them, there may be a provision in the town's charter that say non-action is the equivalent of adoption. If there is such a provision, and if all the other presumptions contained in our attached advisory opinion are true in your situation, them, in my opinion, the findings would be required to be made available to the public.

Please call with any further questions.

Number of Sheets (including this cover sheet) 7

If there is a question or problem, please call 518/474-2518.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16429

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

January 24, 2007

Ms. Jan Smith
[redacted]

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

Dear Ms. Smith:

As you are aware, I have received your letter and materials relating to it.

By way of background, you wrote that a group of parents in the Horseheads School District expressed concerns relating to the behavior of a certain coach, who is also a teacher in the District. The matter was investigated by the District's attorney who, at the conclusion of the investigation, informed parents that the subject of the inquiry "understands the significance of these issues, and has established strategies to address them prior to the next season." The attorney, according to your letter, also assured parents that the individual's "performance improvement plan will be closely monitored by the administrators."

You requested the "performance improvement plan", but the District denied the request and indicated that:

> "...this personnel document is not a document available under the Freedom of Information Law in that it would constitute an unwarranted invasion of personal privacy of Coach Monks. Had the complaints regarding Coach Monks been substantiated or found to be meritorious so as to constitute formal discipline, we may have reached a different conclusion in this matter."

If I accurately understand the facts, the performance improvement plan should be disclosed. In this regard, I offer the following comments.

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

Second, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another and from one employee to another. Neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). The contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

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

There are numerous instances in which portions of personnel records are available, while others are not. I would agree that records indicating charges or allegations that could not be proven or substantiated may be withheld. However, from my perspective, a "performance improvement plan" or similar directive should generally be available, irrespective of whether it relates to a complaint or incident. When a board of education establishes goals and objectives to be met by a superintendent of schools, for example, I believe that a document of that nature is public, and that similar documents pertaining to other employees are equally accessible.

In terms of the exception regarding unwarranted invasions of personal privacy, it is clear that the record at issue is relevant if not critical to the performance of the duties of the employee in question. That being so, it appears that it would result in a permissible, not an unwarranted invasion of personal privacy.

A separate exception is also pertinent to an analysis of rights of access. That provision, however, due to its structure, often requires disclosure.

Specifically, §87(2)(g) permits an agency provide in pertinent part that:

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

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

Concerning "instructions to staff that affect the public" and "final agency policy or determinations", which are generally available, respectively, under subparagraphs (ii) and (iii) of §87(2)(g) of the Freedom of Information Law, there is little decisional law that deals directly with those provisions. Typically, agency guidelines, procedures, staff manuals and the like provide direction to an agency's employees regarding the means by which they must 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 accessible. 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 directory in nature that would in my view be accessible pursuant to §87(2)(g)(ii). In this instance, it appears that the content in the performance improvement plan represents a mandate that instructs the individual in relation to duties that he performs concerning students. If that is so, the cited provision in my view would require disclosure.

Lastly, in affirming the Appellate Division decision in Capital Newspapers, a decision cited earlier, the state's highest court found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient

> information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, I believe that the District must disclose the record of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
William C. Congdon
Judy Christiansen

FOIL-AO-16430

From: Robert Freeman
To: scott@edenny.gov
Date: 1/25/2007 10:22:28 AM
Subject: Dear Mr. Henry:

Dear Mr. Henry:

I have received your communication concerning "a question about allowing access to a code enforcement officer's desktop computer and its contents (such as sensitive information)".

In this regard, the Freedom of Information Law pertains to all government agency records, including those maintained or stored in its employees' desktop computers. In general, that statute requires that all records must be made available, except those records or portions of records that fall with one or more the grounds for denial of access appearing in paragraphs (a) through (j) of §87(2). I note that the content of records and the effects of their disclosure serve as the key factors in determining rights of access, not the location where records are kept or stored.

If you have a specific question relating to information stored on an agency's computer, please feel free to contact 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

FOIL-AO-16431

From: Robert Freeman
To: [redacted]
Date: 1/25/2007 10:27:32 AM
Subject: Dear Mr. Hoffman:

Dear Mr. Hoffman:

Although an agency, such as a village, may respond to requests for records made verbally, there is no obligation to do so. Pursuant to §89(3) of the Freedom of Information Law, which includes all agency records within its scope, an agency may choose to require that any request for a record be made in writing.

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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1604/32

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

January 25, 2007

Ms. Joan Castor
Mr. Fred Fox
[redacted]

The staff of the Committee on 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. Castor and Mr. Fox:

I have received your letter in which you complained with respect to the taxes that must be paid in the Town of Cohocton. You referred specifically to the water tax, expressed the view that the tax is exorbitant, and asked whether this office is "able to look into this matter..." You added that a request for the budget of the water department was ignored, and that your husband was informed that "it was not available."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning public access to government information, primarily in relation to the Freedom of Information Law. This office is not empowered to investigate the kind of matter to which you referred. However, in consideration of your comments, I offer the following remarks.

First, it is noted that the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency, such as a town, is not required to create a record in response to a request. Therefore, if, for example, there is no particular record that can be characterized as the "budget for the water department", the Town would not be required to prepare a record of that nature on your behalf.

Second, and in a somewhat related vein, §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 on the foregoing, the Town's complete budget as well as materials used in the development of the budget, which might include reference to allocations relating to a water department or supplying water to the residents, would constitute Town records. Water bills, materials indicating payment to employees, consultants or contractors, documentation involving water rates and their establishment would also constitute "records" falling within the scope of the Freedom of Information Law.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. The kinds of records described above, and many others, are accessible in great measure if not in their entirety, for none of the grounds for denial of access would be applicable.

Lastly, an agency cannot ignore a request for records. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

It is noted that new language was added to that provision on May 3, 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.

Enclosed for your consideration is "Your Right to Know", which summarizes 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:jm

Enc.

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16433

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

January 26, 2007

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 letter in which you indicated that you requested records from 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

It is noted that the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: C. Youmans

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16434

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

January 26, 2007

Mr. Theodore Barnes
06-R-4276
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

Dear Mr. Barnes:

I have received your letter in which you complained that Odyssey House had not responded to your request for records made pursuant to the Freedom of Information Law.

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

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

Based on the foregoing, the Freedom of Information Law generally applies to records of state and local government. I believe that Odyssey House is a not-for-profit corporation, not a governmental entity. If that is so, it would not be subject to the Freedom of Information Law.

Since you referred to medical records, it is noted that §18 of the Public Health Law generally requires that providers of medical services, such as hospitals, physicians or treatment facilities, must provide access to medical records to the subjects of the records. Therefore, it is suggested that you might request medical records pertaining to yourself from Odyssey House, citing §18 as the basis for your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-16435

From: Robert Freeman
To: Jordan Moss
Date: 1/29/2007 12:34:14 PM
Subject: Re: FOIL question

Jordan - -

I believe that the governing body of the EDC consists either of ex officio City officials or persons appointed by the Mayor directly or upon nomination by borough presidents. If that is so, EDC would in my opinion constitute an "agency" required to comply with the Freedom of Information Law.

The only exception to rights of access relative to the names of submitters of proposals in the RFP process would be §87(2)(c), which enables an agency to withhold records insofar as disclosure would "impair present or imminent contract awards...." Assuming that the deadline for submission of proposals has been reached, I do not believe that there would be any basis for withholding portions of the records at issue that identify the persons or entities that submitted proposals. It is suggested, therefore, that you contact the EDC to express the view verbally that names of the submitters must be disclosed pursuant to FOIL; if that does not result in disclosure, it is suggested that you initiate a written 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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16436

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

January 29, 2007

Mr. Kevin Conlon, Managing Editor
Cortland Standard
110 Main Street
Cortland, NY 13045

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

Dear Mr. Conlon:

As you are aware, I have received your letter in which you sought an advisory opinion concerning "what information police agencies are required to provide...to the news media about arrests and pending investigations." You indicated that the police chief has refused to release records, including those indicating the blood alcohol levels of people charged with drunken driving, and "contends that such information as a defendant's occupation, employer, eye color, weight and height is personal information that cannot be released." You also asked what recourse there may be if an agency denies access to information that must be disclosed under the Freedom of Information Law.

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 (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 state's highest court, the Court of Appeals, expressed its general view of the intent of the Freedom of Information Law and the obligations imposed upon agencies 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).

Second, from my perspective, unless an arrest or booking record has been sealed pursuant to §160.50 of the Criminal Procedure Law, it must be disclosed. Under that statute, when criminal charges have been dismissed in favor of an accused, the records relating to the arrest ordinarily are sealed. In those instances, the records would be exempted from disclosure by statute [see Freedom of Information Law, §87(2)(a)].

Although arrest records are not specifically mentioned in the current Freedom of Information Law, I note that the original version of the law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. 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, 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)].

Third, often most relevant in the context of your inquiry is §87(2)(e), which permits an agency to withhold records that are:

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

The ability to deny access to records is dependent on the effects of disclosure. Only to the extent that the harmful effects described in subparagraphs (I) through (iv) would arise may §87(2)(e) be asserted.

In the context of criminal proceedings, a variety of information is routinely disclosed. An arraignment, for example, occurs during a public judicial proceeding, and information equivalent to that disclosed during an arraignment must, in my view, be disclosed by a police department or prosecutor. It has been held that once information has been disclosed during a public judicial proceeding, the grounds for denying access under the Freedom of Information Law no longer apply [see Moore v. Santucci, 151 AD2d 677 (1989)]. Further, when a person is arrested, taken into custody and is committed to a county jail, a record must be maintained at the jail that includes numerous details, all of which must be disclosed. Specifically, §500-f of the Correction Law, which pertains to county jails, states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what any by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record, and shall be kept permanently in the office of the keeper."

Similarly, it has been held that mugshots of defendants are accessible, unless they have been sealed by statute due to the dismissal of charges. 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 could properly be withheld, notwithstanding the provisions of §87(2)(e) or §87(2)(b), which authorizes an agency to deny access when disclosure 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 access to mugshopt, 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)].

Although they do not constitute law, pertinent are the "principles and guidelines" adopted by the New York Fair Trial Free Press Conference. That entity, which is chaired by the Chief Judge of the Court of Appeals, consists of members of news organizations, as well as associations of judges, chiefs of police, sheriffs and district attorneys. The principles and guidelines reflect a general agreement among its members and includes "Guidelines in Criminal Cases." Guideline 1(a) states that "When and after an arrest is made", the following information should be made available for publication: "The accused's name, age, residence, employment, marital status and similar background information."

In short, a variety of details concerning defendants are often required to be disclosed or disclosed pursuant to widely accepted guidelines, and some of the items which the Chief of Police, according to your letter, believes that he cannot release are required to be disclosed to the public based on statutory direction or judicial precedent. I note that, aside from the statutes concerning the sealing of records, there are relatively rare situations in which a law enforcement agency "cannot" disclose records. The Freedom of Information Law states that an agency "may" withhold records or portions of records in various circumstances; it is not ordinarily required to do so. The only instances in which an agency must deny access would involve the application of statutes that forbid disclosure. For instance, as you may be aware, §784 of the Family Court Act prohibits the disclosure of records pertaining to the arrest and disposition of juveniles, unless a court orders disclosure. Similarly, §50-b of the Civil Rights Law prohibits the disclosure of records that identify or tend to identify the victim of a sex offense.

Nevertheless, there may be instances in which there is a basis in the Freedom of Information Law for withholding some aspects of the kinds of records to which you referred. As indicated previously, §87(2)(e) pertains to records compiled for law enforcement purposes and authorizes a denial of access in certain circumstances. The example to which you referred involving a refusal to release the blood alcohol levels of those charged with drunken driving, depending on the facts, may be among the situations in which a denial of access would be consistent with law. If, for example, disclosure would deprive the person charged with a fair trial, I believe that a denial of access would be appropriate. However, the ability to assert that or other exceptions would be dependent on the attendant facts. As more information becomes available through judicial proceedings or the filing

of records with the courts, which are generally public, the authority of a law enforcement agency to deny access often will diminish.

Other instances in which denials of access would be proper would involve the ability to withhold portions of records that may identify informants or witnesses, for example, or which if disclosed would interfere with an ongoing investigation. Again, the authority to withhold portions of records would not necessarily permit an agency to withhold the records in their entirety. Rather, to comply with law, the records must be reviewed to determine which portions, if any, may justifiably be withheld.

It is reiterated that the language of the law, judicial precedent and commonly accepted principles indicate that the kinds of information to which you referred must in most instances be disclosed.

Lastly, with respect to recourse in the event of a denial of access, §89(4)(a) of the Freedom of Information Law provides a person denied access with the right to appeal the denial. That provision states in relevant part that:

> "...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."

Section 89(4)(b) specifies that the agency has the burden of proving that the harmful effects described in the exceptions would indeed occur by means of disclosure.

In addition, 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.

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-1643

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

January 30, 2007

Mr. Nigel Alexander
01-A-3062
Attica Correctional Facility
P.O. Box 149, Exchange Street
Attica, NY 14011

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

Dear Mr. Alexander:

We are in receipt of your letter in which you ask that this office "look into the delay in answering a F.O.I.L. Request made to the New York City Department of Correction in September 2006." The Department acknowledged receipt of your request, indicating that you could "anticipate responding to your request in writing within two months." As of the date of your correspondence addressed to this office, January 25, 2007, there has been no further response.

Please note that the Committee on Open Government is authorized to provide advice and opinions concerning the application of the Freedom of Information Law. This office is not empowered to compel an agency to grant access to records.

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

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

RJF:tt
cc: Stephen J. Morello, Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1164/38

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

February 1, 2007

Mr. Richard Rivera
04-B-0408
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

Dear Mr. Rivera:

I have received your letter in which you wrote that you would like to appeal a decision rendered by the Erie County Sheriff's Office concerning a request made under the Freedom of Information Law on June 27. You asked for advice concerning the person or body to whom you may appeal a denial of access.

In this regard, first, the provision concerning the right to appeal a denial of a request, §89(4)(a) of the Freedom of Information Law provides in relevant part that:

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

For the reasons to be offered later, it is suggested that you appeal to the Sheriff, asking that if he does not determine appeals that your appeal be forwarded to the proper person or body.

Second, the correspondence indicates that your request was denied on August 10, 2006 and that you were informed in a letter of January 19, 2007, that "the time allotted for an appeal has lapsed." As indicated in §89(4)(a), a person denied access may appeal within thirty days of the denial. Since more than thirty days had elapsed from the denial of your request, I believe that you would have lost your right to appeal if the Office of the Sheriff had complied with law.

The regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

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

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

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. Because that information was not provided, it appears that you may have the ability either to appeal or initiate a judicial proceeding to seek review of the denial of your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brian D. Doyle

FOIL-AO-1604/39

From: Robert Freeman
To: [redacted]
Date: 2/2/2007 8:48:46 AM
Subject: Dear Ms. Hoare:

Dear Ms. Hoare:

I have received your correspondence in which you asked whether the City of Yonkers may require that an appeal made pursuant to the Freedom of Information Law must be made in writing. In short, based on §89(4)(a) of that law, the City may do so. That provision states in relevant part that "any person denied access to a record may within thirty days appeal **in writing** such denial..." (emphasis added).

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-16440

41 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 2, 2007

Mr. John R. Atkinson
05-A-4828
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. Atkinson:

I have received your letter in which you indicated that you submitted Freedom of Information Law requests to the Suffolk County Supreme Court and that you had not received any responses.

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. 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

FOIL-AO-1644

From: Camille JobinDavis
To: [redacted]
Date: 2/2/2007 3:10:48 PM
Subject: Re: Need advice regarding confirmation of FOIL appointment

Dania,

If the school district does not respond to requests for records in accordance with the provisions of the Freedom of Information Law, your recourse is to appeal the denial of your request. The district is not required by the Freedom of Information Law to answer questions or confirm appointments in writing. Sending a paper copy of your correspondence is up to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant 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-1644

From: Robert Freeman
To: Deirdre Hoare
Date: 2/5/2007 11:51:27 AM
Subject: RE: Dear Ms. Hoare:

Dear Ms. Hoare:

I might have misunderstood your comments. I interpreted your question as involving the propriety of making a verbal appeal. Email, however, clearly involves a writing, and I believe that when an agency has the ability to accept a request or an appeal transmitted via email, it is required to do so, for it would be made in writing.

It is noted that the Freedom of Information Law was recently amended in relation to requests made by email, as well as agencies' responsibilities to transmit records requested vial email when they have the ability to do so. To learn more of the amendment, information is available on our website.

I hope that I have been of assistance.

From: "Robert Freeman" <RFreeman@dos.state.ny.us>
To: <ciaobella711@hotmail.com>
Subject: Dear Ms. Hoare:
Date: Fri, 02 Feb 2007 08:48:46 -0500
Dear Ms. Hoare:

I have received your correspondence in which you asked whether the City of Yonkers may require that an appeal made pursuant to the Freedom of Information Law must be made in writing. In short, based on §89(4)(a) of that law, the City may do so. That provision states in relevant part that "any person denied access to a record may within thirty days appeal in writing such denial..." (emphasis added).

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-1644/3

From: Janet Mercer
To: stacey koulouris
Date: 2/6/2007 1:30:55 PM
Subject: Re: FOIL request

Dear Ms. Koulouris:

I have received your Freedom of Information Law request for a copy of a 911 call made by you on January 30.

Please be advised that the Committee on Open Government provides advice and guidance concerning access to government information, primarily under the state's Freedom of Information Law. This office does not maintain records generally and, as such, has no records concerning your 911 call.

It is suggested that you direct your request to the "records access officer" at the agency that you believe maintains possession of the record of your interest. The records access officer has the duty of coordinating an agency's response to requests.

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

Sincerely,

Janet M. Mercer
Administrative Professional

FOIL-AO-16444

From: Robert Freeman
To: Jill Warner
Date: 2/6/2007 2:27:29 PM
Subject: Re: Question

Hi - -

The law [§89(4)(a)] specifies that a person denied access has 30 days to appeal. In other provisions concerning time periods, reference is made to business days. The absence of reference to business days relative to the time to appeal in my clearly would indicate that the appeal may be made within 30 calendar days.

Hope this helps.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16445

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

February 6, 2007

Mr. Henry Hobson
93-A-6129
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

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

Dear Mr. Hobson:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request to the Suffolk County Supreme Court and that you had not received any response.

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. 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-1644/6

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

February 6, 2007

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 asked whether this office received an appeal determination from the New York City Police Department concerning your appeal dated August 3, 2005. You also raised questions concerning appeals of constructive denials of access and exhaustion of administrative remedies.

In this regard, first, having reviewed our files, an appeal determination dated April 4, 2006 was received by this office.

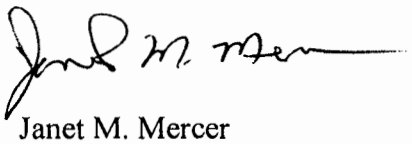
Second, having reviewed the determination by Jonathan David, it appears that a search was conducted and no documents responsive to your request were found. Since no documents exist, the Freedom of Information Law would not apply. The Freedom of Information Law only applies to existing records. Therefore, the procedural steps regarding appeals and exhaustion of administrative remedies would not 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." 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-16447

From: Robert Freeman
To: [redacted]
Date: 2/7/2007 12:29:22 PM
Subject: Dear Ms. Rockwell:

Dear Ms. Rockwell:
I have received your letter in which you asked whether you "have the right to view W-2 forms of the non-teaching staff and administration or is this exempt from the Freedom of Information Law?"

In this regard, portions of W-2 form, such as a social security number, net pay, a home address, etc. may be deleted from the form on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." However, the portions of the form identifying a public employee and indicating the employee's gross wages are, based on the Freedom of Information Law and judicial precedent, accessible to the public.

Attached is an opinion that deals with issue more expansively.

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT
41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
http://www.dos.state.ny.us/coog/coogwww.html

April 8, 1993

Ms. Patricia Carroll
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.
Ms. Patricia Carroll:
I have received your letter of March 20. You wrote that you submitted a request, apparently to your school district, seeking "total w-2 reported wages" paid to staff. It was returned, however, because you did not "word it correctly." You have asked how such a request might be written.
In this regard, I offer the following comments.
First, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient information to enable agency officials to locate and identify the records in which you are interested. In my view, if you requested "total w-2 wages paid" to particular employees during a certain calendar year, your request would have been appropriate. It is suggested that you use the sample letter of request in the enclosed brochure and that you

seek w-2 forms or other records containing information reflective of gross wages paid to particular employees during a calendar year. Second, with certain qualifications, I believe that W-2 forms or records containing equivalent information must be disclosed. 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 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 hundreds of W-2 forms from which portions could be deleted, but I believe that employers, i.e., the District, 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 District, for it would be more efficient and less burdensome to disclose a single listing than hundreds of forms.
I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.
Sincerely,

Robert J. Freeman
Executive Director
RJF:pb
Enc.
cc: Records Access Officer

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

CC: Inetcorp

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1644/8

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

February 7, 2007

E-MAIL

TO: Martin Roby

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Roby:

I have received your letter in which you wrote that you have been "stonewalled" in your efforts in obtaining information from the Town of Stuyvesant.

In this regard, although I am unaware of the information that you are seeking or the manner in which you requested it, 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, need not create a record in response to a request for information. Therefore, while agency personnel may choose to answer questions, the Freedom of Information Law does not require that they do so.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the

> event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1644

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

February 7, 2007

Mr. Peter D. Costa, 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. Costa:

I have received your letter in which you asked whether "a Building Department can charge a fee of $50.00 for a 1 page FOIL request." The request involves a copy of a certificate of occupancy.

From my perspective, unless a statute, which means an act of Congress or the State Legislature, authorizes a fee in excess of twenty- five cents per photocopy, an agency cannot charge a fee for photocopying more than that amount.

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

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the

actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see 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)."

In sum, an agency cannot charge more than twenty-five cents per photocopy, unless a statute authorizes that a different fee may be assessed.

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-1050

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

February 7, 2007

Mr. James J. Bradley
06-A-4210
354 Hunter Street
Ossining, NY 10562-5498

Dear Mr. Bradley:

I have received your letter in which you sought guidance in your efforts in obtaining a transcript of your trial.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of this office, 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 nor 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 (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. It is suggested that you submit your request to the clerk of the court, citing an applicable provision of 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-16451

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

February 8, 2007

Charlene M. Indelicato
County Attorney
County of Westchester
148 Martine Avenue, 6th Floor
White Plains, NY 10601

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

Dear Ms. Indelicato:

As you are aware, I have received your letter in which you sought an advisory opinion concerning a request for:

> "...an updated list of all WCC (Westchester Community College) employees that are CSEA members, agency fee payers, confidential secretaries and any others represented by CSEA under the present Collective Bargaining Agreement between CSEA and Westchester County."

The College denied the request based on an opinion rendered by this office in 1995, which referred to a judicial decision rendered nearly thirty years ago that involved equivalent information (Matter of Wool, Supreme Court, Nassau County, NYLJ, November 22, 1977). The court in Wool determined that disclosure would constitute an unwarranted invasion of personal privacy because union membership is irrelevant to the performance of public employees' duties. It is your view that the rationale for withholding the information at issue is "unclear" and that employees' names and titles, as well as job specifications are public, and that many such titles indicate that employees hold "unionized civil service position[s]."

I agree, 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. The only exception to rights of access of significance in my view is §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". 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.

In Wool, the applicant requested a list of employees of a town "whose salaries were subject to deduction for union membership dues payable to Civil Service Employees Association...". In determining the issue, the Court held that:

> "...the Legislature has established a scale to be used by a governmental body subject to the 'Freedom of Information Law' and to be utilized as well by the Court in reviewing the granting or denial of access to records of each governmental body. At one extreme lies records which are 'relevant or essential to the ordinary work of the agency or municipality' and in such event, regardless of their personal nature or contents, must be disclosed in toto. At the other extremity are those records which are not 'relevant or essential' - which contain personal matters wherein the right of the public to know must be delicately balanced against the right of the individual to privacy and confidentiality.
>
> "The facts before this Court clearly are weighted in favor of individual rights. Membership or non-membership of a municipal employee in the CSEA is hardly necessary or essential to the ordinary work of a municipality. 'Public employees have the right to form, join and participate in, or to refrain from forming, joining or participating in any employee organization of their choosing.' Membership in the CSEA has no relevance to an employee's on-the-job performance or to the functioning of his or her employer."

Consequently, it was held that portions of records indicating membership in a union could be withheld as an unwarranted invasion of personal privacy.

It is emphasized that the holding in Wool was prepared under the Freedom of Information Law as originally enacted in 1974; that statute was repealed and replaced in 1978. Further, over the course of three decades, numerous judicial decisions have been rendered, and I believe that a court considering the same issue today would reach a different conclusion.

In a 1992 decision of the Court of Appeals in which the Court considered "the essence of the exemption" concerning privacy, it referred to information "that would ordinarily and reasonably be regarded as intimate, private information" (Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112). From my perspective, membership in a public employee union could hardly be considered intimate.

It is also noted that several judicial decisions, both New York and federal, pertain to records about individuals in their business or professional capacities 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)."

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).

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. Moreover, as you suggested, disclosure of a public employee's title alone often indicates that he or she is a member of a union. That being so, and in consideration of the preceding commentary, I do not believe that there is a basis for withholding records or portions of records specifying that public employees are members of a public employee union.

Lastly, 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)]. Therefore, even though it may be contended that the information may be withheld, the County has no obligation to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive director

RJF:tt

FOIL-AO-16452

From: Camille JobinDavis
To: Donna Deedy
Date: 2/9/2007 2:29:49 PM
Subject: Re: Freedom of INformation

Donna,

In case we cannot speak by phone today -

In my opinion, business office addresses of a public authority are required to be disclosed pursuant to section 87(3)(b) of the Freedom of Information Law, which requires each agency to maintain "a record setting forth the name, public office address, title and salary of every officer or employee of the agency." Assuming that there are employees at each power plant maintained by LIPA, the Law requires that LIPA make such addresses available to the public upon request. For more information, please read Advisory Opinion #10099, at the following link: http://www.dos.state.ny.us/coog/ftext/f10099.htm .

With respect to a denial of access to such addresses, on "security grounds", most pertinent is section 87[2][f], which permits an agency to deny access to records that "if disclosed could endanger the life or safety of any person." I believe that there is little merit to that argument, as power plant locations would likely be obvious to anyone who lives or works in a community near a power plant, and especially, if what you say is true, that the information is available through many other channels.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
41 State Street
Albany NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1164153

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

February 12, 2007

Mr. Allan G. Schulman, C.E.
Eastland Construction, Inc.
110 East End Avenue
New York, NY 10028

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

Dear Mr. Schulman:

We are in receipt of your request that the Committee on Open Government "undertake an investigation into the failure of [Byram Hills Central School District and South Orangetown Central School District] to fully and completely respond to a valid request for information under FOIL." Before offering advice with respect to your requests for records, it is noted that the Committee 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.

Based on the materials you sent, we have gleaned the following with respect to the Byram Hills School District. You requested many types of records documenting construction of an addition to the Wampus Elementary School, including those transmitted between the District and various contractors. The District permitted you the opportunity to inspect records, after which you requested copies of 350 pages. Subsequently, you wrote to the District indicating that your requests were not answered in full, and the District now maintains the position that "in good faith, [it] has provided you with access to all the records that the district has regarding these matters." It is your contention that the District failed to provide any correspondence between the District and the architect, the construction manager, other prime contractors, or records of communications between the District and All County.

With respect to the South Orangetown Central School District, your District provided copies of many records already in your possession, but it is your position that it failed to respond to a number of specific requests, including the following with respect to a particular construction project: advertisement of bid, notice to bidders, invitation to bid, bid documents, and any documents referencing meetings concerning access doors, change orders, and the architect's failure to return shop drawings.

In this regard, we offer the following comments.

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."

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.

With regard to any documents which you believe have been omitted from either of the Districts' responses, 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 consideration of the delays you have encountered, we 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. 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.
certify due diligent search

It is not clear whether you appealed what you believe to be denials of access due to incomplete responses to your requests. Because of the time limits set forth in the law, if you wish to make appeal, we recommend that you begin the request process again with respect to the missing records or those that have been withheld.

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 Lasselle
Kate Robbins

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16454

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

February 12, 2007

Mr. Robert Thomas
05-A-3102
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. Thomas:

I have received your recent letters in which you indicated that you submitted two Freedom of Information Law requests is the NYS Division of Parole in New York City and have 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I note that the person designated by the Division of Parole to determine appeals is Terrence X. Tracy, Counsel to the Division. Mr. Tracy's address is 97 Central Avenue, Albany, NY 12206.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

OML-AO-4333
FOIL-AO-16155

From: Robert Freeman
To: Deirdre Hoare
Date: 2/13/2007 10:49:39 AM
Subject: (Possible Spam: 10.1150) FW: RE: FOIL Requests of 11/17/06 and 11/18/06

Dear Ms. Hoare:

It is true that the opinions rendered by this office are advisory. Nevertheless, the Committee on Open Government is the sole agency designated by law to provide advice and opinions concerning the Freedom of Information and Open Meetings Laws, and we have been doing so since those laws become effective in the 1970's. Further, in cases in which the courts have cited the opinions rendered by this office, they have agreed in perhaps 90 percent of those cases. Finally and most importantly, the language of the law is clear. Section 106 of the Open Meetings Law clearly states that minutes of meetings of a public body must be prepared and made available within two weeks. Similarly, the Freedom of Information Law in §89(3) prescribes time limits within which agencies must respond to requests for records; it does not authorize agencies to respond by indicating that a request "is being handled" and that an applicant will receive a response "as soon as possible."

My advice may not be binding, but the law is.

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-1656

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

February 13, 2007

E-MAIL

TO: Arthur J. DiBerardino

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. DiBerardino:

I have received your letter in which you asked "to what agency would [you] make a FOIL request to...learn the identity of a witness to an auto accident...."

In this regard, it is noted that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as records access officer. The records access officer has the duty of coordinating an agency's response to requests for records, and a request should be made to that person.

Second, if an accident report was prepared, it would be maintained by the police department that employs the police officer who prepared the report, and a request should be made to the records access officer of that agency.

Lastly, I point out that the Freedom of Information Law pertains to existing records. If the accident report does not include the identity of a witness, an agency would not be required to create a new record that includes the information of your interest.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1604/57

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

February 13, 2007

E-MAIL

TO: Maria Hlushko

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. Hlushko:

I have received your letter in which you asked what your "options" might be if a town may be unnecessarily delaying a response to your request for records requested under the Freedom of Information Law.

In this regard, first, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) 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 for records, and a request should be made to that person. In most towns, the town clerk is 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, 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.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16458

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

February 13, 2007

Mr. Dennis Rogha
91-A-7163
Clinton Correctional Facility
P.O. Box 2000
Dannemora, NY 12929

Dear Mr. Rogha:

I have received your letter in which you asked for addresses to be used to request records prepared at the Bronx House of Detention, which is now closed, and by social workers employed in New York City jails.

The New York City jails and their employees are within the jurisdiction of the Department of Correction, and it is suggested that a request for the records of your interest be directed to its records access officer. An agency's records access officer has the duty of coordinating an agency's response to requests for records. A request may be addressed as follows: Stephen J. Morello, Records Access Officer, Department of Correction, 60 Hudson Street, New York, NY.

Please note that a request made pursuant to the Freedom of Information Law must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable Department staff to locate and identify the records of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16459

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

February 13, 2007

Mr. Richard S. Finkel
Office of the Town Attorney
Town of North Hempstead
Manhasset, NY 11030

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

Dear Mr. Finkel:

Thank you for forwarding a copy of your response to the appeal by the Tribune Company and Newsday reporter Collin Nash. Although it is not our practice to comment regarding all appeals, due to the precedent on which you rely in support of the denial, we feel compelled to offer an opinion.

Mr. Nash requested "permits, certificates of occupancy and outstanding violations or citations" with respect to various properties. His request was denied on the ground that "disclosure would interfere with ongoing investigations and/or judicial proceedings." On appeal, your office upheld the denial of access citing §87(2)(a) of the Public Officers Law, Criminal Procedure Law §190.25 and New York News Inc. v. Office of the Special Prosecutor of the State of New York, 153 AD2d 512, 544 NYS2d 151 (1st Dept 1989). Respectfully, we offer the following comments.

As you know, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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.

That a record has been collected as part of documentation submitted or presented to a grand jury does not alter the nature or character of the record in our opinion, and we believe that you are obliged to disclose the requested records. As you note, 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 permits, certificates of occupancy and citations as having been compiled for law enforcement purposes, even though they may be used in or pertinent to an investigation, would be inconsistent with both the language and the judicial 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 our 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, we 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 our perspective, the requested records, by their nature, indicate 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 our opinion, be unreasonable and

tend to subvert the purposes of the Freedom of Information Law. In support of this view, we 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 the one case on which you rely to deny access, New York News, *supra*, summaries of testimony given to the grand jury in the Tawana Brawley case were leaked to the press prior to the release of the grand jury's report. The Attorney General investigated the leak, obtaining sworn depositions of twenty-two staff members of the Office of the Attorney General. The court upheld the Special Prosecutor's denial of access to the deposition transcripts, based on §87(2)(e) of the Freedom of Information Law. The court likened the deposition transcripts to records of interviews of witnesses collected during an investigation into the deaths of patients at a hospital to which the Fourth Department denied access in Hawkins v. Kurlander, 98 AD2d 14, 469 NYS2d 820 (4th Dept.1983).

Neither of these cases addresses records prepared by a municipal office in the ordinary course of business. Again, King v. Dillon, *supra*, a decision rendered in Nassau County clearly addresses the issue of access to records that were prepared during the ordinary course of business prior to the inception of a criminal investigation and the Nassau County Supreme Court held disclosure was required. Accordingly, it is our opinion that the requested records should be disclosed.

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: Karen Kaiser
Collin Nash

FOIL-AO - 16460

From: Robert Freeman
To: shermand@lew-port.com
Date: 2/14/2007 9:10:59 AM
Subject: Dear Ms. Sherman:

Dear Ms. Sherman:

I have received your inquiry. In brief, I know of no law that deals with information that might appropriately be placed on a school district's website. With respect to photographs or names of students, the governing statute in my opinion is the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). That statute provides parents of minor students right of access to personally identifiable information pertaining to their children. Concurrently, it prohibits an educational agency or institution from disclosing personally identifiable information pertaining to a student without the consent of a parent.

An exception under which disclosure might be authorized involves "directory information". The federal regulations promulgated pursuant to FERPA describe directory information as items such as names, addresses, dates of attendance, participation in sports, honors, awards, etc. Those items may be disclosed, but only after providing notification to parents of the intent to do so. Following receipt of the notification, parents may essentially veto the disclosure of any or all of those items pertaining to their children. To obtain more information on the subject, you can review advisory opinions accessible on our website. Click on to "advisory opinions". When you do so, the page to the right will change, and then you click onto "Freedom of Information Law." From there, you will see a page with the alphabet. In the search box above, enter "directory information", and you will be linked to several opinions dealing with the issue.

I hope that I have been of assistance.

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

FOIL-AO-1646 1

From: Robert Freeman
To: PATRICK MOLLOY
Date: 2/14/2007 11:08:14 AM
Subject: Re: Dear Mr. Molloy:

Although an agency has an obligation to inform a person initially denied access of the right to appeal, there is nothing in the law that requires the agency to inform a person denied access following an appeal that he or she may initiate an Article 78 proceeding. The right to do so is expressed in the law, but the law does not require that an agency inform the person denied access of the right to seek judicial review by initiating an Article 78 proceeding.

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 - 1604/62

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

February 14, 2007

E-Mail

TO: Ms. Kathleen Polcari

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. Polcari:

I have received your letter in which you referred to requests for records made to Department of Health that had not been answered.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16463

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

February 14, 2007

E-Mail

TO: Ms. Barbara Sawtelle

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Sawtelle:

I have received your letter concerning a delay in response to your request made to the Monroe County Department of Health 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, 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: Bonnie Stein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1604/1604/

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February 14, 2007

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 information presented in your correspondence.

Dear Mr. Boden:

I have received your letter and the materials attached to it. You have questioned the propriety of a denial of access to certain information by the Town of Marbletown. You requested "all names and type of coverage (i.e. single, family, etc) for persons listed on Town health insurance policy..." In response, the Supervisor indicated a willingness "to provide you with a statistical breakdown, by type of coverage, so long as there is no personal identification/information attached to it."

I am in general agreement with that response, and in this regard, I offer the following comments.

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

The provision of most significance concerning the information in question is, in my view, §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978);

Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 109 AD 2d 292 (1985) aff'd 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

It is noted that in Matter of Wool, the Court held that:

> "...the Legislature has established a scale to be used by a governmental body subject to the 'Freedom of Information Law' and to be utilized as well by the Court in reviewing the granting or denial of access to records of each governmental body. At one extreme lies records which are 'relevant or essential to the ordinary work of the agency or municipality' and in such event, regardless of their personal nature or contents, must be disclosed in toto. At the other extremity are those records which are not 'relevant or essential' - which contain personal matters wherein the right of the public to know must be delicately balanced against the right of the individual to privacy and confidentiality."

Based on the Wool decision, it might be contended that whether a public employee is covered by a health insurance has no relevance to the performance of that person's official duties, and that, therefore, such information may be withheld.

From my perspective, such a conclusion would be overly restrictive. In Capital Newspapers v. Burns, supra, the issue involved records reflective of the days and dates of sick leave claimed by a particular police officer. The Appellate Division, as I interpret its decision, held that those records were clearly relevant to the performance of the officer's duties, for the Court found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status,

> need, good faith or purpose of the applicant requesting access..." [109 AD 2d 92, 94-95 (1985)].

Perhaps more importantly, in a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals affirmed and found that:

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

In consideration of the factors that have been discussed, it is my view that a disclosure indicating that a public officer or employee is covered by a health insurance plan at public expense would not represent or reveal an intimate detail of one's life. Arguably, the record reflective of the dates of sick leave claimed by a public employee found by the courts to be available represents a more intimate or personal invasion of privacy. However, if a disclosure of the cost of coverage for a particular employee indicates which plan that person has chosen or whether his or her plan involves individual or dependent coverage, such a disclosure may potentially result in the revelation of a number of details of a person's life and an unwarranted invasion of personal privacy. For instance, an indication of cost might reveal whether the coverage involves medical treatment routinely provided by a clinic, as opposed to a primary care physician; it also may indicate the nature of coverage, i.e., whether coverage is basic or includes catastrophic care. Again, the cost may also reveal whether coverage is for an employee alone or for that person's family or dependents.

Most appropriate in my opinion would be a disclosure of costs of health care coverage by category in terms of plans that are offered or available to officers or employees. A separate disclosure should identify those officers or employees who receive coverage. However, in conjunction with the preceding commentary, I do not believe that the Town would be required to disclose the type of coverage an officer or employee has chosen or which specific dependents are covered under the plan.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Vincent Martello
Hon. Katherine Davis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1164/165

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February 14, 2007

Ms. Jennifer Forte
[redacted]

The staff of the Committee on 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. Forte:

I have received your correspondence and offer the following remarks.

First, with respect to your letter of February 8, my response of January 24 concerning agencies' time limits for responding to requests is generic. It relates to any request made under the Freedom of Information Law and may be particularly relevant when an agency fails to respond to a request in a timely manner.

Second, with regard to your letter of November 27 in which you referred to a request for "[a] DOH document that indicates any and all duties as prescribed by Commissioner Antonia Novello to Executive Deputy Commissioner Dennis P. Whalen", you were informed by the Department's records access officer that "Mr. Whalen is responsible for the day-to-day management of the Department of Health and provides leadership, policy information, and direction for all programs of the agency." He asked that you "accept this as the Department's response to your request." Since you did not obtain a "list of duties assigned to Mr. Whalen", it appears that you do not believe that the Department honored your request.

In this regard, I note that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request to comply with that law. Therefore, if no record exists that contains the information of your interest, the Department would not be required to prepare record to comply with the Freedom of Information Law.

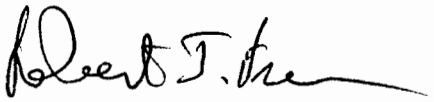
It is also noted that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall

certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

If a record exists that contains the information sought, I believe that it must be disclosed, for none of the exceptions to rights of access would be pertinent.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Robert LoCicero

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16466

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

February 16, 2007

Ms. Ruth Newton
[redacted]

The staff of the Committee on 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. Newton:

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 Suffolk County Police Department. Specifically, you requested a copy of the accident report relating to an accident in which you were involved. The Department provided a copy of the report after blacking out one line of information from the "Accident Description/Officer's Notes" and the entire written statement of driver #2, who was arrested at the scene of the accident for driving while intoxicated. On appeal, the Department refused to provide an unredacted copy of the report, on the grounds that disclosure would interfere with a law enforcement investigation, and that disclosure would constitute an unwarranted invasion of personal privacy. In this regard, we offer the following comments.

First, we understand that as a result of this accident your insurance company has increased your premium, and that if you can provide information as to why this driver was subsequently "unarrested", your premiums may be decreased. We further note that the accident report you were provided indicates "CLOSED (NON-CRIMINAL ONLY)", and with respect to vehicle #2, apparent contributing factors are "alcohol involvement and unsafe speed." Finally, we note that three of the four people involved in the accident were taken to the hospital, except driver #2, who was the only person whose statement is recorded in the report. No tickets were issued. However, as stated previously, the field report created on the same day indicates "OPERATOR #2 ARRESTED AND UNARRESTED ON DWI."

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)]. Here, where the report itself indicates "OPERATOR #2 ARRESTED AND UNARRESTED ON DWI", it doesn't appear that there is any ongoing criminal investigation. If that is so, the report should be made available in its entirety.

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 (j) of the Law. Accordingly, it is our opinion that both the Freedom of Information Law and §66-a would apply to require production of the report you requested in its entirety.

The court's analysis of the matter in the above case, Scott, Sardano & Pomeranz, *supra*, is relevant here, because it states that an agency may withhold names and addresses of individuals from accident reports when they are sought for commercial or fund-raising 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. Because the reports were requested by a law firm seeking to contact accident victims and to solicit their business, 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 to an agency to redact anything from accident reports other than names and addresses when they are to be used for commercial or fund-raising purposes; there is nothing in the Court's decision or in the statute that would authorize an agency to withhold, for example, driver #2's statement.

As we understand §66-a, there is nothing in that statute that would authorize an agency, such as the County, to withhold the items redacted from the copy provided to you, namely details from

the officer's notes and Driver #2's statement. Aside from the broad definition of the term "record" appearing in the Freedom of Information Law, we point out that it has been held that even photographs made during the course of an investigation of an accident and other records comprising a police department's investigation of an accident are part of the accident report and are therefore available under §66-a of the Public Officers Law [see Fox v. New York, 28 AD 2d (1967); Romanchuk v. County of Westchester, 42 AD 2d 783, aff'd 34 NY 2d 906 (1973)].

In sum, it is our view, based on the language of the law and its judicial construction, that the accident report should have been made available to you in full.

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: Rachel C. Anello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16467

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

February 21, 2007

Mr. James L. Kapsis
[redacted]

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

Dear Mr. Kapsis:

I have received your letter and the materials attached to it. The issue involves whether court records maintained by the Office of Court Administration are subject to the Freedom of Information Law. The matter appears to have been precipitated by a request directed to the Administrative Judge for Nassau County for "all recusal letters" from various judges relating to a particular judicial proceeding.

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

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

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

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

As such, the courts are not subject to the Freedom of Information Law. However, I point out that it has been held that the Office of Court Administration is an "agency" required to comply with the Freedom of Information Law. The initial decision on the subject, which cited an advisory opinion prepared by this office, included the following discussion of the matter:

> "The court must look to the intent of the legislature to determine whether the Office of Court Administration, in the exercise of a purely administrative and personnel function, is to be excluded from the applicable provisions of the Freedom of Information Law. Public Officers Law §84 states in part 'The people's right to know the process of governmental decisionmaking and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.'
>
> "In view of the legislative purpose to promote open government, the court is inclined to construe narrowly any section that would tend to exclude offices of government from the law. Public Officers Law §86 specifically refer to courts when it defines 'Judiciary.' The legislature did not include the administrative arm of the court. The Office of Court Administration does not exercise a judicial function, conduct civil or criminal trials, or determine pre-trial motions. Respondent is not a 'court.'
>
> "It is significant to note that respondent refers to several sections of the Judiciary Law that regulate access to judicial records and allegedly perform a function similar to that of the Freedom of Information Law. None of the sections specified would address access to the information sought by petitioner pertaining to personnel and salaries exclusively.
>
> "Accordingly, the court rejects respondent's contention that it is in all respects exempt from the provisions of the Freedom of Information Law." [Babigian v. Evans, 427 NYS 2d 688, 689 (1980) aff'd 97 Ad 2d 992 (1983); Quirk v. Evans, 455 NYS 2d 918, 97 Ad 2d 992 (1983)].

Second, the Court of Appeals has held that records transmitted by a court to an agency are agency records that fall within the coverage of the Freedom of Information Law [see Newsday v. Empire State Development Corporation, 98 NY2d 746 (2002)]. Therefore, when records initially maintained by a court come into the possession of an agency, those materials constitute agency records that are subject to rights of access conferred by the Freedom of Information Law. That statute, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law

Lastly, I recognize that the letterhead of the Administrative Judge includes the phrases "Unified Court System" and "Office of Court Administration." Nevertheless, I am unaware of his function in the context of your inquiry. If it is a judicial function, the records at issue might be found

to be outside the coverage of the Freedom of Information Law [see e.g., Pasik v. Board of Law Examiners, 102 AD2d 395 (1984); appeal withdrawn, 64 NY2d 886 (1985)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Jonathan Lippman
Hon. Anthony Marano
Paul Lamanna

STATE OF NEW YORK
DEPARTMENT OF STATE
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February 21, 2007

Ms. Marianne Pizzitola
Pension & Benefit Coordinator
Uniformed Emergency Medical Service
Officers Union - Local 3621
65-53 Woodhaven Blvd., Suite 106
Rego Park, NY 11374

The staff of the Committee on 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. Pizzitola:

As you are aware, I have received your letter and the correspondence attached to it. You referred to requests for records made to the New York City Fire Department and a series of delays in responding to those 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 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.

Lastly, in consideration of your requests, 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.

Having reviewed your requests, you sought "the number" of certain claims relating to certain time periods or events and "the number" of applications for reasonable accommodations relative to certain categories.

Insofar as records or statistics exist that contain the information of your interest, I believe that they must be made available, for none of the grounds for denial of access appearing in §87(2) would

be applicable or pertinent. If no such records or statistics exist, the Department would not be obliged by the Freedom of Information Law to prepare new records to satisfy your request.

In the future, rather than seeking the number of certain filings or applications, it is suggested that you seek existing records containing certain numbers or statistics, and if they do not exist, individual records that you could use to create your own totals or statistics. For instance, rather than requesting the number of certain applications filed by employees with certain titles, you might request the applications themselves, specifying that personally identifying details may be redacted to protect the privacy of the employees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nicholas Scoppetta
Sabrina Jiggetts

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4337
FOIL-AO-16469

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

February 21, 2007

Mr. Arthur Springer
[redacted]

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

Dear Mr. Springer:

I have received your letter and the materials attached to it. It is noted that you referred to a transcript of a meeting of the Commission on Health Care Facilities in the 21st Century, but that no such record was included among the materials.

Your primary area of complaint involves the inability of some persons present at the meeting to hear discussion or statements of Commission members. Although microphones were apparently available, you wrote that they were not used, despite comments by the public that Commission members could not be heard. In addition, you indicated that copies of a statement "read into the record" by the Chairman were "leaked to professional lobbyists in the audience and to the media", but that your request for the document following the meeting was rejected. You were informed that the statement would be posted on the Commission's website on November 28, eight days after the meeting.

Based on the foregoing, you asked that I "invalidate the actions taken by the commission at this meeting, and order the commission to take appropriate remedial action." You also referred to an advisory opinion prepared at your request several years ago that involved similar facts and wrote that it was advised that "actions taken at meetings where an installed sound system was not used could be invalidated."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information and Open Meetings Laws. Neither the Committee nor its staff is empowered to enforce those statutes or invalidate action, even if a violation of law occurred.

Second, the only reference to the invalidation of action in relation to the Open Meetings Law concerns situations in which action is taken in private that should have been taken in public. Specifically, §107(1) states in relevant 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."

Third, I have reviewed the earlier opinion to which you referred, which was prepared in 2002 and pertained to a meeting of the Board of Directors of the New York city Health and Hospitals Corporation. You described a situation in which the members could have used a microphone but did not do so. Due to the similarity of the situation described then and that concerning the Commission, I am quoting verbatim the substance of that opinion, which I believe would be equally applicable to the more recent situation, as follows:

> "From my perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. With respect to the capacity to hear what is said at meetings, I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:
>
> > 'It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.'
>
> Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process. While I do not believe that a public body could be compelled to purchase a sound system, when a system exists, in my view, it would be unreasonable to avoid using it if those in attendance cannot hear the public body's discussions and deliberations. In this instance, if the sound system is operational, I believe that the Board must use it or situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do

otherwise would in my opinion be unreasonable and fail to comply with a basic requirement of the Open Meetings Law."

Lastly, although the Commission or its employee could have disclosed the statement to which you referred immediately, I do not believe that there was an obligation to do so. Pursuant to §89(3) of the Freedom of Information Law an agency may require that a request be made in writing, and as you are likely aware, must respond in some manner to a request within five business days of its receipt.

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: Commission on Health Care Facilities in the 21st Century

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16470

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February 21, 2007

Mr. W. Kell Gay, Jr.
Managing Partner
DOCVIEW, LLC
113 Pere Marquette Ste. C
Lansing, MI 48912

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

Dear Mr. Gay:

I have received your letter in which you raised questions relating to the Freedom of Information Law.

You wrote that your company markets TRACView, "an Internet based application and service that was developed to help law enforcement agencies" and others "manage and access traffic accident reports in a more efficient manner", and that consumers can purchase accident reports "on-line for a fee." You wrote that some agencies "are concerned about the current law that requires agencies to sell reports for $.25/page." You asked that I "address that issue" and whether if agencies "continue to offer the $.25/page service can they be compensated more from consumers electing to purchase a report via the Internet or are they limited to only $.25/page compensation?"

In this regard, §87(1)(b)(iii) of the Freedom of Information Law pertains to fees for copies of records and states that:

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

Based on the foregoing, when a request is made for a photocopy of a record maintained by or for an agency, the agency cannot charge more than twenty-five cents, unless a different statute authorizes an agency to charge a higher fee. I do not believe any statute authorizes a municipality or its police or sheriff's department to charge more than twenty-five cents per photocopy when accident reports are requested.

Second, there is nothing in the Freedom of Information Law that requires that agencies post records on the internet. In most instances, agencies do so as a public service, due to public interest in a variety of matters, or for purposes of convenience. Again, however, there is no obligation to make records available online. When agencies choose to do so, I know of no law that precludes an agency from limiting access, i.e., to subscribers to such a service, or from charging a fee different from that envisioned by the Freedom of Information Law. By making records available on line via the internet, I believe that an agency effectively exceeds any requirement imposed by the Freedom of Information Law. That being so, I do not believe that an agency's charge for use of such a service is limited to the fee applicable under the Freedom of Information Law.

Lastly, as you may be aware, a recent amendment to the Freedom of Information Law requires that agencies accept requests made by means of email and transmit records via email when they have the ability to do so. When records are made available by means of email, no copy is made, and in my opinion, no fee may be charged in that instance.

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

February 21, 2007

Ms. Bonnie Barkley
[redacted]

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

Dear Ms. Barkley:

I have received your letter concerning your ability to seek medical records pursuant to the Freedom of Information Law relating to your mother who is now deceased.

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

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

Based on the foregoing, the Freedom of Information Law generally apples to entities of state and local government. It does not apply to non-profit or private organizations.

Second, §18 of the Public Health Law provides rights of access to medical records to the subjects of those records, as well as other "qualified persons." Paragraph (g) subdivision (1) of §18 defines "qualified person" to include:

> "...a distributee of any deceased subject for whom no personal representative, as defined in the estates , powers and trusts law, has been appointed; or an attorney representing a qualified person or the subject's estate who holds a power of attorney from the qualified person or the subject's estate explicitly authorizing the holder to execute a written request for patient information under this section."

If you are a "qualified person", it appears that you would have rights of access to the medical records pertaining to your mother.

To obtain additional information concerning access to medical records it is suggested that you contact:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16472

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

February 23, 2007

[redacted]
KFPC, 6E
Ward's Island
New York, NY 10035

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

Dear [redacted]:

I have received your correspondence in which you indicated that you have made several requests for records from the Kirby Forensic Psychiatric Center and, that 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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 21, 2007

Mr. Matthew Schuerman, Reporter
The New York Observer
915 Broadway, 9th Floor
New York, NY 10010

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

Dear Mr. Schuerman:

I have received your letter and hope that you will accept my apologies for the delay in response. You have sought an advisory opinion concerning the propriety of a denial of access to records by the Empire State Development Corporation (ESDC).

You requested:

> "Any and all memoranda of agreement signed since June 2005 between the Moynihan Station Development Corporation and Vornado Realty Trust and the Related Companies regarding the development of the Farley Post Office, and any subsequent correspondence among the parties or their representatives that pertains to the agreement."

The request was denied initially by ESDC's records access officer and later following your appeal on the basis of §87(2)(c) of the Freedom of Information Law. That provision authorizes an agency to deny access to records to the extent that disclosure "would impair present or imminent contract awards..." For several reasons, it is your view that §87(2)(c) does not justify a denial of access. First, it is your view an award of the contract had "substantially occurred" in July of 2005 when, according to your letter, Vornado and Related were designated the preferred developers." Second, you wrote that "some elements of that arrangement were included in a press release on July 18, 2005, and later in the General Project Plan." And third, in October of 2006, the Public Authorities Control Board rejected the General Project Plan for the project.

You added that:

> "In a letter to Assembly Speaker Sheldon Silver preceding that vote, Governor Pataki wrote that such a rejection would require the ESDC to 'invalidate the existing award and immediately begin a new [bidding] process for a 'bigger development' that might include a new Madison Square Garden.' Subsequent to the PACB rejection, ESDC Chairman Charles Gargano said publicly that the new Governor would need to 'revive' the project. It is therefore inconsistent that the ESDC has rejected my request on the basis that is might imperil 'present or imminent contract awards' when the Governor and the agency's Chairman have stated that there is no imminent contract to be awarded."

In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 ESDC has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. 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 indicated earlier, the provision upon which ESDC 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..." The key word in that provision in my opinion is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers.

As I understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure of those bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor a bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied.

However, in a decision rendered more than twenty-five years ago, it was held that after the deadline for submission of bids or proposals has been reached and a contract has been awarded, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Conversely, the Court of Appeals sustained the assertion of §87(2)(c) in Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], in which the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In the case of your request, an award was apparently made. 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)]. When an agreement was reached and an award determined, the records that you requested, would, in my view, have been available to the public; no longer would disclosure in any way have "impaired" the ability of the ESDC to reach a fair and optimal agreement on behalf of the public.

A denial of access to those same records now is in my view is unjustifiable, for the agreement and award were, as I understand the matter, revoked. Further and significantly, at this juncture, it does not appear that any contract award is either "present or imminent." If that is so, I do not believe that §87(2)(c), the provision upon which ESDC relied to deny access, would be applicable or pertinent.

In an effort to enhance understanding of and compliance with the Freedom of Information Law, copies of these opinions will be forwarded to ESDC.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Anita W. Laremont
Antovk Pidejian

STATE OF NEW YORK
DEPARTMENT OF STATE
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February 26, 2007

Mr. Carl H. Dukes
99-A-0232
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

Dear Mr. Dukes:

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

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the New York Freedom of Information Law. The Committee does not have possession or control of records generally, and we do not maintain any of the records of your interest.

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

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

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

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

Based on the foregoing, insofar as the records sought are maintained by a court, the Freedom of Information Law would not apply.

When records are maintained by New York courts, they are in most instances accessible pursuant to other statutes (see e.g., Judiciary Law, §255). To seek records from a New York court, it is suggested that a request be made to the clerk, citing an applicable provision of law as the basis for the request.

When records are maintained by an agency, a request should be made to the agency's "records access officer." That person has the duty of coordinating the agency's response to requests. The City Clerk, John Marsolais, is the City of Albany's records access officer.

Lastly, the person mentioned who testified against you, Kenneth Wilcox, died in an automobile accident. That being so, I do not believe that §50-a of the Civil Rights Law is pertinent.

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
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FOIL-AO-16475

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February 27, 2007

Mr. William M. Nichols
04-B-1177
Clinton Correctional Facility Main
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. Nichols:

I have received your correspondence in which you referred to attempts to obtain records from attorneys assigned to represent you. Although your trial counsel, the Oneida County Public Defender, indicated that records had been transferred to appellate counsel, the appellate attorney wrote that he did not receive any such records and that they continue to be maintained by the Public Defender. You also referred to an unanswered appeal made to Oneida County.

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

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

As such, the Freedom of Information Law generally applies to records maintained by state and local government; it would not apply to a private organization.

The assigned counsel program involves assignments under "Article 18-B", which encompasses §§722 to 722-f of the County Law. Under §722, the governing body of a county and the City Council in New York City are required to adopt plans for providing counsel to persons "who are financially unable to obtain counsel." Those plans may involve providing representation by a public defender, by a legal aid organization, through a bar association, or by means of a combination of the foregoing.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney or private organization performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

If a bar association, for example, maintains records for a county, I believe that they would constitute county records. The Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

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

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

Under the circumstances, it is suggested that you resubmit your request to the Public Defender. I note, too, that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

With respect to the appeal, §89(4)(a) of the Freedom of Information Law requires that an appeal be determined within ten business days of its receipt, and §89(4)(b) indicates that a failure to do so enables the person denied access to initiate a judicial proceeding to seek review of the denial.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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February 27, 2007

Mr. Eric Harris
03-B-0846
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

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

Dear Mr. Harris:

I have received your letter addressed to Dominic Tocci. As indicated above, the staff of the Committee is authorized to respond on behalf of its members. You referred to and attached a request made to the Seneca County District Attorney for photographs submitted as evidence during your trial. Having reviewed the request, I offer the following comments.

First, even when records might ordinarily be withheld under the Freedom of Information Law, it has been held that there is no basis for denial once the records have been presented in a public judicial proceeding. In Moore v. Santucci, 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 exhibits 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.

Second, 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard E. Swinehart, District Attorney

OML-AO-4340
FOIL-AO-
1/24/77

From: Robert Freeman
To: [redacted]
Date: 2/27/2007 12:44:04 PM
Subject: Dear Mr. Liebrand:

Dear Mr. Liebrand:

I have received your letter in which you referred to action taken by a board of education to approve "Terms and Conditions of Asst. Superintendents which is annexed to the minutes of the meeting." You asked whether those terms and conditions must be included within the minutes.

In my view, there is no such requirement. Section 106 of the Open Meetings Law requires that minutes consist of a record or summary of action taken; it does not require the inclusion of the entirety of an agreement or contract, for example, within the minutes.

Notwithstanding the foregoing, the entirety of the terms and conditions approved by the Board would, in my opinion, clearly be accessible under the Freedom of Information Law. That statute is based on a presumption of access, stating that all agency records of an agency, such as a school district, must be disclosed, unless an exception to rights of access may properly be asserted. In this instance, I do not believe that any of the grounds for denial of access could be cited to withhold the terms and conditions 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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March 5, 2007

E-Mail

TO: Ms. Maria Cudequest

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Cudequest:

I have received your letter in which you asked whether a village board of trustees is permitted to vote during an executive session.

In this regard, §106 of the Open Meetings Law which provides that:

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

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

Notwithstanding the foregoing, I point out that since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although that statute generally pertains to existing records and ordinarily does not require that a record be created or prepared [see Freedom of Information Law, §89(3)], an exception to that rule involves voting by agency members. Specifically, §87(3) of the Freedom of Information Law has long required that:

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

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

To comply with the Freedom of Information Law, I believe that a record must be prepared and maintained indicating how each member cast his or her vote. In most instances, a record of votes of the members appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-16479

From: Robert Freeman
To: Connie Sowards
Date: 3/6/2007 10:16:45 AM
Subject: Re: question

Hi Connie - -

One of the exceptions in FOIL, §87(2)(c), authorizes an agency to withhold records insofar as disclosure "would impair present or imminent contract awards." Since you indicated that disclosure would at this juncture "jeopardize" ongoing contract negotiations, it appears that the Village would have the ability to deny access.

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

Robert J. Freeman
Executive Director
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March 6, 2007

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 received your request for an advisory opinion on December 4, 2006, and a copy of an undated letter addressed to our executive director. In your request you stated "Your opinion of 7/27/06 said that records maintained electronically should be copied to disk. The Village of Horseheads is continuing to refuse to do this, maintaining that it is not within their ability." In the undated letter attached to your request, you stated "Your recent letter stated that if the documents requested are on a computer format, they should be copied to disks. I have requested twice for this to be done and this request is being refused."

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. If you feel you have been denied access to records in violation of the Freedom of Information Law, the recourse afforded to you under the law involves the initiation of a proceeding to review the denial under Article 78 of the Civil Practice Law and Rules.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
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March 6, 2007

Mr. David W. Lagas
06-A-4946
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118-1186

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

Dear Mr. Lagas:

I have received numerous items of correspondence from you, and it appears that you are requesting copies of materials sent to this office by you, the Columbia County Attorney's office, the Columbia County District Attorney's office and the New York State Police. It also appears that you have requested an advisory opinion concerning the time in which agencies must respond to requests.

In this regard, first, enclosed are copies of all correspondence received by this office from you and the Columbia County District Attorney's office. This office has not received any correspondence pertaining to you from the Columbia County Attorney's office or the New York State Police.

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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date

> of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Lastly, having reviewed your correspondence, it appears that you have requested specific laws that relate to the obtaining of DNA. From my perspective, a request for a law that may applicable might not be viewed as a request for a record, but rather an interpretation of law that requires a judgment. Depending on the nature of the matter, any number of provisions might be applicable, and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Further, two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 10 of the Criminal Procedure Law", no interpretation or judgment is necessary, for sections of the law appear numerically and can readily be identified. That kind of request, in my opinion would involve a portion of a record that must be disclosed. Again, a request for laws that might be applicable is not, in my view, a request for a record as envisioned by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 7, 2007

Mr. Peter Melnick
General Manager
Prime-Vendor, inc.
4622 Cedar Avenue, Suite 123
Wilmington, NC 28403

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

Dear Mr. Melnick:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests for records made to the Town of Colonie. You indicated your frustration with the Town's inability to convey records to you by email. In this regard, we offer the following comments.

As you know, the Freedom of Information Law was recently amended to require as follows:

> "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, using forms, to the extent practicable, consistent with the form or forms developed by the Committee on Open Government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some other form."

Based on the foregoing, when an agency has the ability to receive requests for records from the public and transmit records by means of email, it is required to do so. To implement the amendment, we recommend that agencies designate an email address for purposes of receiving requests for records via email.

In consideration of this new provision of law, it is our opinion that if the Town has the ability to transmit or forward publicly accessible records electronically, upon request, it is obligated to do so.

At your request, a copy of this opinion will be forwarded to the Supervisor and the Town Attorney.

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: Supervisor Mary E. Brizzell
Arnis Zilgme

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March 7, 2007

Mr. William A. Witkopf
[redacted]

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

Dear Mr. Witkopf *et al.*:

I have received your letter and hope that you will accept my apologies for the delay in response. You have raised a variety of questions pertaining to the Rushford Lake Recreation District ("the District") and its Board of Commissioners ("the Board") relating to the Open Meetings and Freedom of Information Laws. In this regard, I offer the following comments.

First, in my view, the Board is a public body required to comply with the Open Meetings Law. That statute is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

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

Having reviewed Chapter 78 of the Laws of 1981, the Board is, according to §7, administered by a board consisting of five commissioners; paragraph (f) indicates that three members constitute a quorum, and §11 details the Board's powers and duties, which involve conducting public business and performing a governmental function.

Similarly, I believe that the District is subject to the Freedom of Information Law, which applies to agencies and defines "agency" in §86(3) to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The District is a kind of public corporation (see General Construction Law, §66), and based on §2 of Chapter 78 and the ensuing provisions, it performs a governmental function for the towns of Rushford and Caneadea.

Second, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone, via mail or e-mail. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting 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.

Section102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the Commission, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

The provisions in the Open Meetings Law concerning videoconferencing are newly enacted (Chapter 289 of the Laws of 2000), and in my view, those amendments clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law.

As indicated earlier, the definition of the phrase "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of e-mail.

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the official convening of a public body for the purpose of conducting public business' (Public Officers Law §102[1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions to invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (*Matter of Goodson Todman Enter. v. City of Kingston Common Council*, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner was formal votes (see, *Matter of Orange County Publs. v. Council of City of Newburgh*, 60 AD2d 309, 415 Affd 45 NY2d 947).

> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

If a majority of the members of the 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).

Third, there is no reference in the Open Meetings Law to the ability to enter into executive session to discuss "legal matters." Here I note that the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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.

The provision most analogous to "legal matters" is §105(1)(d), which permits a public body to enter into executive session to discuss "proposed, pending or current litigation." in construing the exception concerning litigation, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument

> would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

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

The emphasis in the passage quoted above on the word "*the*" indicates that when the discussion relates to litigation that has been initiated, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the District." If the Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the District and its residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

Fourth, §106 106 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.

I point out that when a public body conducts an executive session and merely engages in a discussion but takes no action, there is no obligation of prepare minutes of that session. If, however, action is taken, as indicated in §106, minutes reflective of the nature of the action taken, the date and the vote must be prepared and made available in accordance with the Freedom of Information Law within one week.

You asked whether a motion must be made to authorize members of the public to join the Board in an executive session. Pertinent is §105(2) of the Open Meetings Law, which provides that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Therefore, the only people who have the right to attend executive sessions are the members of the public body. A public body may, however, authorize others to attend an executive session. While the Open Meetings Law does not describe the criteria that should be used to determine which persons other than members of a public body might properly attend an executive session, I believe that every law, including the Open Meetings Law, should be carried out in a manner that gives reasonable effect to its intent. Typically, those persons other than members of public bodies who are authorized to attend are the clerk, the public body's attorney, the superintendent in the case of a board of education, or a person who has some special knowledge, expertise or performs a function that relates to the subject of the executive session.

If there is a dispute among the members concerning the attendance of a person other than a member of the Board at an executive session, I believe that the Board could resolve the matter by adopting or rejecting a motion by a member to permit or reject the attendance by a non-member at an executive session.

I note that in Jae v. Board of Education of Pelham Union Free School District (Supreme Court, Westchester County, July 28, 2004), it was held that there is no requirement that a motion be made to authorize the presence of persons other than members of a public body at an executive session. The decision states that:

> "..the Petitioners' contention that the Board of Education must specifically identify any individuals invited to attend executive sessions of the Board, is not supported by law. The Public Officers Law specifically prescribes the manner and method by as well as the purposes for which a public body may enter executive session. The requirements include a motion on the public record; '...identifying the general area or areas of the subject or subjects to be considered,...' (Public Officers Law §105[1]). This section of the law specifically does not require that any individuals invited to attend the meeting be set forth in the motion to go into executive session. The language set forth above is also in sharp contrast to the language describing who may attend executive sessions which simply states: '[a]ttendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body.' (Public Officers Law §105[2]). If the legislature had intended that the identities of those attending executive sessions be memorialized in the public records of the public body's meetings, the legislature wuld [sic] have included the necessary language in sub-section 1 of the statute or sub-section 2 of the statute would have included language similar to that contained in sub-section1. Therefore, the Court agrees with the Respondents that they are not obligated to include the identities of all individuals attending executive sessions of the Board of Education in the motion authorizing the executive session."

With respect to the enforcement of the Open Meetings Law, §107(1) states in relevant part that:

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

In addition, subdivision (2) authorizes a court to award attorney's fees to the successful party.

Lastly, as indicated earlier, the District in my view clearly constitutes an agency subject to the Freedom of Information Law. When a request for records is made, that statute provides direction

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

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

In an effort to enhance compliance with and understanding of open government laws, copies of this response will be sent to the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Rushford Lake Recreation District Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 7, 2007

Mr. William S. Lofquist
[redacted]

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

Dear Mr. Lofquist:

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 Geneseo. Specifically, you inquire as follows:

> "1. Is the Town obligated to provide the affidavit I requested?
>
> 2. Is the Town obligated to contact those parties who created the requested records (e.g. Newman Development Group, Center for Governmental Research) or to whom they were sent to try to retrieve a copy of them if the Town's own records are no longer available? If so, are they obligated to provide me evidence that they have made such requests?
>
> 3. Are there specific recordkeeping requirements imposed on municipal attorneys that are relevant to this matter?
>
> 4. Are there any consequences attached to the Town's failure to protect records that it is legally obligated to protect or to its failure to seek the permission of the necessary authorities for the destruction of these records?"

In response to your question regarding an affidavit, we confirm that when an agency, such as the Town, 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." Since there is no provision

of law that requires the Town to prepare an affidavit, in our opinion, a similar written certification would be sufficient to comply with the law.

In response to questions 2, 3 and 4, we offer the following comments.

First, it is our understanding that the Town contracts with the Center for Governmental Research (the Center) "for the purpose of economic impact analysis of the proposed Geneseo Gateway Town Centre project." It is not clear from your correspondence whether the Newman Development Group has a similar relationship with the Town. Regardless of whether the Town is reimbursed for payment made to the Center, even if the records sought may not be in the physical custody of the Town, based on the nature of the relationship between the Town and the Center, records of communications between the Center and the Town are in our opinion records that fall within the framework of the Freedom of Information Law. That statute pertains to agency records, such as those of a Town, and §86(4) defines the term "record" expansively to mean:

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

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 Center are "kept, held, filed, produced or reproduced...*for* an agency", such as the Town, i.e., for the purpose of providing services that would otherwise be carried out by that entity, we believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform the Center 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.

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.

Although the provision you mention as a basis for denial, §87(2)(g), potentially serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

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

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

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

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

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

Based upon the foregoing, records prepared by a consultant for an agency, i.e., the Center, 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 by an agency for a consultant would be accessible or deniable, in whole or in part, depending on its contents. Similarly, if the record was prepared by the Town's attorney for the consultant, it would be accessible or deniable, in whole or in part, depending on its contents.

You have sought guidance with respect to the Town's responsibility to acquire a record that is no longer in its possession. From our perspective, several provisions of law are pertinent to the matter.

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. Typically, the town clerk is designated by the town board as records access officer. As part of that coordination, we believe that agency officials, employees and consultants are required to cooperate with the records access officer in an effort to comply with these official responsibilities.

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 noted that §30(1) of the Town Law indicates that the town clerk is the legal custodian of all town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

Accordingly, when there is a requirement that a certain record be maintained for a specific period of time and that time period has not yet elapsed, it is our opinion that the town clerk has a responsibility to make a reasonable effort to obtain the record from the Town officials, employees or consultant.

Finally, §89(3) requires that the Town "immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon." Regulations promulgated by the Committee on Open Government, 21 NYCRR §1401.7(g) and (h), require that the Town "transmit to the Committee on Open Government copies of all appeals upon receipt of an appeal" and that "the person or body designated to hear appeals shall inform the appellant and the Committee on Open Government of its determination in writing within ten business days of receipt of an appeal."

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. Jean Bennett
Hon. Weston Kennison

FOIL-AO-1164/85

From: Janet Mercer
To: Phillip G. Steck
Date: 3/8/2007 3:47:29 PM
Subject: Re: Response to FOIL request

Dear Mr. Steck:

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

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

Committee on Open Government
41 State Street
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Phone: (518) 474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16486

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March 8, 2007

Ms. Dorothy A. Purtill
[redacted]

The staff of the Committee 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. Purtill:

As you are aware, I have received your letter and the materials attached to it. You have sought guidance concerning the propriety of a denial of access by the Wappingers Central School District to portions of "bus stop review forms." In response to your request, a District official wrote that :

> "...you were sent copies of the three bus stop reviews with the names of the reviewers and the opinions of the stop blocked out. The information blocked out was done so at the direction of legal counsel. The stop was appealed but the appeal committee does not fill out any forms nor does it take minutes, therefore, no records are available. You were also looking for the review of your previous bus stop. This location was not reviewed and there are no records of any review. You referred to a violation of our policy. To my knowledge there is no policy which requires the appeal committee to fill out any review form."

During our discussion of the matter, you wrote that portions of the form that were withheld involve statements offered by an administrator, a District employee involved with transportation, and a volunteer community member.

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.

From my perspective, the exception of primary significance is §87(2)(g). I note, however, that while that provision potentially serves as a basis for denying access, due to its structure, it often requires disclosure. Specifically, §87(2)(g) authorizes an agency, such as a school district, to withhold records that:

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

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

An initial question is whether those portions deleted reflect a determination upon which the District relies, or merely opinions of the reviewers. If they are reflective of decisions, which appears to be so, I believe that they are accessible to the public, for subparagraph (iii) of §87(2)(g) requires the disclosure of final agency determinations. On the other hand, to the extent that the comments withheld reflect the opinions of the administrator and the other District employee, the redaction would, in my view, be consistent with law. Even if that is so, to the extent that their comments consist of statistical or factual information, those portions should be disclosed pursuant to subparagraph (i). Further, even if the District employees' statements are opinions, the comments offered by the volunteer who is not an employee of the District must be disclosed, irrespective of their content. The Court of Appeals, the state's highest court, has held that §87(2)(g) is intended to enable government officers and employees to express their opinions and recommendations without an obligation to disclose [Gould v. New York City Police Department, 89 NY2d 267, 276 (1996)]. Therefore, comments offered by the volunteer, a member of the public who is not a District employee, would not constitute inter-agency or intra-agency material that could be withheld; on the contrary, I believe that those comments are accessible to the public.

Because there is apparently an appeals committee, it appears that the portions of the forms that were withheld indicate final determinations, unless they are appealed. Consequently, if that is so and there is no appeal, I believe that those determinations must be disclosed pursuant to subparagraph (iii) of §87(2)(g). Similarly, if an appeals committee affirms the finding on the form, the finding would constitute the District's final determination, and again, would, therefore, be available under subparagraph (iii). If the appeals committee rejects or modifies a determination, it

would seem that a record should exist indicating its decision. If such a record has been prepared, I believe that it must be disclosed.

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

Third, I believe that the names of the reviewers, if they appear in records, must be disclosed. Those persons would be identified in relation to the performance of governmental functions. As such, their identities could not, in my opinion, be withheld; disclosure would constitute a permissible, not an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)].

Lastly, when any portion of a request is denied, the person denied access has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

Based on the foregoing, in this instance, an appeal should be determined either by the Board, who, according to the District's form, is the Superintendent.

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing

the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard Powel
William J. Crosson
Hon. Joel Miller

FOIL-AO-1648

From: Robert Freeman
To: esmith@sobelins.com
Date: 3/8/2007 4:40:33 PM
Subject: Dear Ms. Smith:

Dear Ms. Smith:

There is no requirement that a records access officer be present in the same room with a person reviewing records sought under the Freedom of Information Law. However, there is nothing that would prohibit the records access officer or other agency staff person from being present while records are inspected.

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-16488

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March 9, 2007

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, as I understand your question, you asked whether you have the right to know the amount that a town has contributed to a person's retirement.

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 my perspective, those portions of records that reflect the amounts that an agency, such as a town, contributes toward a person's retirement or pension must be disclosed, for none of the grounds for denial of access would apply.

You also asked whether the New York State Retirement System "must adhere to foil requests." The Retirement System is part of the Department of Audit and Control, also known as the Office of the State Comptroller. Because the Department is a governmental entity, it constitutes an"agency" subject to the Freedom of Information Law [see definition of "agency", §86(3)]. Therefore, the records of the Retirement System clearly fall within the coverage of that statute.

I hope that I have been of assistance.

RJF:tt

cc: Lori Mithen

FOIL-AO-16489

From: Camille JobinDavis
To: Anthony Falco
Date: 3/9/2007 4:52:33 PM
Subject: Re: follow up letter to Dutchess County

Mr. Falco:

At your request I reviewed the attached March 7 letter addressed to Mr. Wozniak. In addition to your request for the remaining documents, you may also wish to consider the following:

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." Depending on how the County responds, you may choose to seek such a certification.

Further, we note that the March 7 letter requests further "information". As you may be aware, 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.

I hope this is helpful to you. Should you require further assistance, please do not hesitate to contact me again.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
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STATE OF NEW YORK
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FOIL-AO-1604/90

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March 12, 2007

Mr. Raymond T. Schweiger
[redacted]

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

Dear Mr. Schweiger:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Ithaca Police Department. Specifically, you requested records pertaining to the interviews and appointments of three investigators by the Department, including "reviewed questions sheets where replies of the questions asked were taken down, personal notes taken during the interview process ....and forms or certificates the candidates provided as certifications." In this regard, based on the judicial interpretation of the Freedom of Information Law, as well as the Civil Rights Law, it is unlikely that the records must be disclosed.

As you point out, the Freedom of Information Law is based upon a presumption of access, and there are other provisions of law that require the disclosure of some records or portions of records relating to public employees. Based on judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others. Section 87(2)(a) of the Freedom of Information Law, however, pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used "to evaluate performance toward continued employment or promotion" are confidential.

The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d

190, 191 (1988)]. The Court in an opinion rendered in 1999 reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)].

To acquire the records that fall within the coverage of §50-a, there must be a court order issued in accordance with other provisions in that statute that state that:

> "2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.
>
> 3. If, after such hearing, the judge concludes there is a sufficient basis he shall sign an order requiring that the personnel records in question be sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting."

Based on the language of §50-a of the Civil Rights Law, the records that you have requested appear to be exempt from disclosure in their entirety. It would be difficult to envision any portion of those records that are not used "to evaluate performance toward continued employment or promotion".

Finally, based on the records you attached to your request, it is not clear when you sent your request or your appeal, or whether the Department responded in writing. In this regard, the Freedom

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

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

If neither a response to a request 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: Khandi Sokoni

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1104/91

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March 12, 2007

Mr. Mark A. Dixson
County Attorney
Tioga County Law Department
County Office Building, 56 Main Street
Owego, NY 13827

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

Dear Mr. Dixson:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Unified Court System. Specifically, you requested records of agreements with various contractors engaged in cleaning and performing environmental services at the Tioga County Court Annex and other Court facilities. In response, by correspondence dated January 5, 2007, you were informed that "we are in the process of reviewing our files to determine which of our records, if any, are responsive to your request and are subject to disclosure under FOIL. We anticipate being able to complete this process within the next few weeks." As of the date of your letter to this office, the Unified Court System had not submitted a further response to you.

As you may be aware, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

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

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

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

If the records in which you are interested are maintained by a court and can be characterized as court records, the Freedom of Information Law would not apply. 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).

It is more likely in our view that the records can be characterized as administrative, and maintained by the Office of Court Administration. If this is the case, we would reach a different conclusion, for it has been determined that the Office of Court Administration is not a court, but rather an "agency" and, therefore, that its records are subject to the Freedom of Information Law [see Babigian v. Evans, 427 NYS2d 699, aff'd 97 AD2d 827 (1984) and Quirk v. Evans, 455 NYS2d 918, 97 AD2d 992 (1983)]. As you are aware, the Office of Court Administration is the administrative arm of the court system, established by and functioning under the auspices of the Chief Administrative Judge, who also oversees the Unified Court System. Records maintained by the Office of Court Administration are subject to the Freedom of Information Law analysis.

Assuming the records are subject 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 (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 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 [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 our 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 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 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 has been reached and a contract has been awarded, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

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 our view, the nature of the record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate. In our view, only those portions of a contract may be withheld under §87(2)(d) which if disclosed would cause *substantial injury* to the competitive position of a commercial enterprise.

With respect to the timeliness of the Court System's response to your request, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request 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 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.

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: Shawn Kerby

STATE OF NEW YORK
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March 12, 2007

E-Mail

TO: Mr. Jeffrey K. 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 information presented in your correspondence.

Dear Mr. Branch:

As you are aware, I have received your letter concerning a request for records apparently made to the Department of Correctional Services. You were informed that the Department "does not maintain the records in the format that you request" and that the records "are not maintained in a manner which allows this department to search for or locate these records." You asked what your options might be.

In this regard, I offer the following comments.

The primary issue may relate to §89(3) of the Freedom of Information Law, which states in part that an applicant must "reasonably describe" the records sought. In considering that requirement, the Court of Appeals, the state's highest court, has indicated that whether or the extent to which a request meets the standard may be dependent on the nature of an agency's filing, indexing or records retrieval mechanisms [see Konigsburg v. Coughlin, 68 NY2d 245 (1986)]. When an agency has the ability to locate and identify records sought in conjunction with its filing, indexing and retrieval mechanisms, it was found that a request meets the requirement of reasonably describing the records sought, irrespective of the volume of the request. By stating, however, that an agency is not required to follow "a path not already trodden" (id., 250) in its attempts to locate records, I believe that the Court determined, in essence, that agency officials are not required to search through the haystack for a needle, even if they know or surmise that the needle may be there.

For purposes of further illustration, assuming that the Department maintains a telephone directory and that you request portions of the directory identifying those persons whose last name is "Branch", 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 Branches, the

request would be valid. But what if you request those listings in the directory identifying all of those persons whose first name is "Jeffrey?" 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 Jeffrey 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.

It is suggested that you contact the Department's records access officer to discuss the matter. 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 state in part that he or she 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 the records" [21 NYCRR §1401.2(b)(2)]."

I hope that I have been of assistance.

RJF:jm

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March 13, 2007

E-Mail

TO: Terry Goodwin

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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./Mr. Goodwin:

I have received your letter in which you asked whether the "public school systems fall under the FOIL."

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

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

Based upon the foregoing, it is clear that a public school system or school district constitutes an agency required to comply with the Freedom of Information Law.

It is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. From my perspective, the record to which you referred, a teacher's contract, is clearly accessible, for none of the grounds for denial would be applicable.

I hope that I have been of assistance.

RJF:jm

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March 13, 2007

Mr. James Folts
NYS Archives
Cultural Education Center
Albany, NY 12230

Dear Jim:

Thank you for permitting me to address the recent gathering of New York State Archives employees. I enjoyed meeting you and your colleagues and hope that my presentation was helpful.

In response to the questions regarding copyright and the case of County of Suffolk v. Experian Information Solutions, Inc., I offer the following collected from our 2006 Annual Report to the Governor and the State Legislature, and from advisory opinions of the Committee on Open Government:

What happens when a request for a record is made under FOIL, the agency grants access to the record, and the recipient is then informed that the record is copyrighted and cannot be used without the government agency's consent or the payment of a royalty? Should state and local government have the authority to copyright records they produce?

In a village that developed a website and made various records available online, a copyright was claimed with respect to all such records, even those that had been available to any person, for any reason, for decades. In a school district that videotaped open meetings of its board of education, the recipient of a copy of the tape acquired following a request made under the FOIL was given the following warning:

> "The provision of this tape-recording of the April 4, 2000 Board of Education meeting is provided pursuant to your FOIL request. Providing this tape to you is not to be construed as authorization by this district for you to air or republish the contents of this tape. Additionally, the provision of such tape is not authorization by any of the individuals depicted in such tape for you to air and/or republish said tape and/or its likeness.

> "Please be advised that the contents of such tape are copyrighted and, with respect to the individuals depicted in any such tape, any re-airing or publication without their express permission may be construed as a violation of those individual's civil rights pursuant to the New York State Civil Rights Law. Any airing or rebroadcasting of the contents of this tape without the express written permission of the Utica City School District is a violation of the United States Copywrite [sic] Laws and will be prosecuted to the fullest extent of the law."

In our opinion, unless a person's name or likeness is used for a commercial purpose without his or her consent, the provision of the Civil Rights Law to which the memorandum referred would be inapplicable (Civil Rights Law, §51). Similarly, we believe that the rebroadcast of a videotape of an open meeting on public access television or for any use other than commercial would represent a "fair use" under the Copyright Act (17 USC §107). Nevertheless, the threat of prosecution could effectively have precluded the recipient of the videotape from using it for a completely valid purpose. Even though the possibility of a successful prosecution regarding the use of the videotape would, in the Committee's view, be nil, the threat itself has a chilling effect on the recipient, and the cost of defending in a lawsuit could be more than most could bear.

In March 2000, the Committee was asked to prepare an advisory opinion by a small upstate company that prepares maps. The company sought copies of maps from the State Department of Transportation, which made them available pursuant to a FOIL request, but informed the company that the maps were copyrighted and could not be used by the company for its commercial purposes without paying a royalty. As in the scenario described above, the company did not want to face the possibility of being sued in federal court based on a claim of copyright infringement. Nor did the company feel that it was fair to pay a royalty for copies of records for which the taxpayers, collectively, had already paid. Further, the imposition of an additional fee in the nature of the royalty would be financially damaging to the company.

The opinion focused on the intent of FOIL and copyright, and it was noted that every state has enacted a statute granting access to government records, and that no judicial decision could be found that dealt with the situation in which records prepared by a government agency were made available under an access law but were restricted in their use due to a claim of copyright. In short, FOIL's statement of intent indicates that the public good is best served when records made available under that statute are disclosed as widely as possible and without impediment. Moreover, it has been held judicially that records accessible under the FOIL should be made "equally available to any person, notwithstanding status or interest" [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976) and M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)]. "Interest", according to the opinion, relates to the intended use of records. Citing a legal scholar, it was also suggested that:

> "[m]ost state statutes, like the federal FOIA, do not allow for interest balancing or assessing the reason for access. The mere fact that an individual or entity may obtain income from an activity that serves a public purpose does not negate the public nature of the activity.

> When a commercial publisher disseminates public information, it is serving a public purpose -- the very purpose that is central justification for FOIA's" [Perritt, Should Local Governments Sell Local Spatial Databases Through State Monopolies, 35 Jurimetrics Journal, 449, 45, Summer, 1995].

With respect to copyright, the opinion states as follows:

> "The basis of copyright protection is Article 1, §8 of the United States Constitution, which indicates the framer's intent: 'To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries.' In construing the 'copyright clause,' the United States Supreme Court has stated that its purpose is as follows: 'The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and Useful Arts.'' [Mazer v. Stain, 347 U.S. 201, 219 (1954)].
>
> "At heart [sic] of copyright protection therefore, is 'personal gain,' an economic incentive, and several decisions support that principle."

In the case of the request for the maps, they were prepared based on a statutory requirement imposed on the Department of Transportation. Due to its legal obligation to prepare maps, the Department's function could not be equated with works of authors and creators. Moreover, in view of that statutory obligation, it was advised that the Department had no "commercial interest" in preparing them, and the opinion concluded by suggesting that the assertion of copyright by the Department was contrary to the intent of both the FOIL and the Copyright Act.

The essential elements of the advisory opinion rendered by the Committee were cited in the decision rendered by the United District Court, Southern District of New York, in County of Suffolk v. Experian Information Solutions, Inc. and referenced at our March 8, 2007 gathering. The case involved tax maps that were prepared by law by Suffolk County that were used by Experian for its commercial purposes. The County brought suit based on a claim of copyright infringement, and the Court initially sustained the claim. However, based on the Committee's opinion, the Court reversed its earlier holding and determined that the County's claim should be dismissed (NYLJ, August 1, 2000). The decision was appealed and reversed, and the U.S. Court of Appeals found that since there is no legal prohibition, state and local governments may copyright records that they produce. Although the case was remanded to the District Court to determine whether the County engaged in the requisite creativity to validly claim copyright protection, a settlement was reached before a determination could be made.

In discussions with a representative of the company seeking the maps from the Department of Transportation, it was contended that paying royalties or some similar fee as a condition precedent

to using records produced by the state served as an impediment to the growth of the company. From the Committee's perspective, the issue involves a question of public policy relating to the interest of the state in economic growth and development. If, for example, a company has the capacity to acquire maps from a state agency under FOIL for the actual cost of reproduction, rather than paying royalties, it may be able to grow its business and, thereby, benefit the state. By adding one employee who is paid $50,000, that person would pay state income tax, as well as a variety of other taxes relating to purchases, real property, etc. At a rate of 7%, a person who resides in New York making $50,000 would pay $3,500 in state income tax. Additionally, when company profits increase, more revenue is generated. Those monies that inure to the state would likely be greater than the royalties paid to the Department of Transportation in conjunction with its copyright, and they would be paid year after year. In short, it would be more sensible and better public policy to charge a minimal fee based on the actual cost of reproduction to a company using the maps than to establish restrictions or charge a royalty or copyright fee.

The experience in other jurisdictions suggests that the more accessible government information is, the greater is the benefit to society. In response to a question posed to state governments by the State of Indiana regarding the use of "cost recovery models for making data available", several responded by indicating that making the data readily accessible at low cost achieves a greater good than selling it. One respondent wrote that "charging for data has proven disastrous for California." In considering the economic effects of charging, he wrote that:

> "Since most of the value of a data set comes from analysis and value added by those other than the entity that produced the data, it's economically efficient to have a large number of data users. It is interesting to note that in countries where the government has a free data policy there are many value added information companies. In countries where the government sells information the ability to value add is cut off at the root...
>
> "Bottom line, if your State charges for information it risks...cutting off partnerships with your own companies and creating a number of strange incentives within your State government. We have been there and done that, its time to move on. Charging for data isn't 'creative' - its playing Russian roulette with your State's mapping systems."

We recognize that government records, particularly those available in electronic media, have value and may be used commercially for profit. Further, it is a given that government agencies expend substantial amounts of money to acquire, develop and use information technology. Nevertheless, that money would be expended as part of running the government even if there was no FOIL, and even if nobody ever requested the records. In short, we do not believe that government should be charging more than the actual cost of reproducing records or discouraging the dissemination of public information. To do so, in our view, serves as a disincentive to the private sector at a time when New York is attempting to increase opportunities for economic growth.

The Committee also recognizes that there may be instances in which government agencies may validly assert copyright protection, i.e., those in which the historical elements of copyright are present: artistic creativity and academic or scientific research. We believe that original works involving scholarly or artistic creation may properly be copyrighted. In an effort to gauge the extent to which state agencies may have claimed copyright, we conducted a survey in 2005 that was answered by more than forty state agencies. Most do not copyright any of their works. Some referred to copyright for software developed in partnership with private entities. Others indicated that their web pages were copyrighted. Copyright was also claimed for a logo, for advertisements (by the MTA), and by the Department of Environmental Conservation for its magazine, *The Conservationist*. The Office of General Services, represented on the Committee by its Commissioner, referred to the publication of a book regarding works of art in the Empire State Plaza, and it was agreed that a publication of that nature historically has been and should continue to be subject to copyright protection. The proposed legislation would preserve that protection. The Department of Health, whose laboratories develop drugs and other medical products, patents those products. We note, too, that the State University has patented products that have been developed through scientific research, thereby giving government adequate protection for its creative work, as well as fair compensation.

We believe that copyright and similar protections, such as patents, are, in the circumstances described, justifiable and consistent with the typical assertion of copyright protection. We do not believe, however, that copyright should be claimed when an agency is obligated by law to prepare a record, as in the case of the maps prepared by the Department of Transportation or Suffolk County, or minutes of meetings prepared by a village board of trustees. Similarly, we do not believe that copyright should be asserted when the records involve the accountability of government and promote the public's understanding of government functions and activities, as in the case of a videotape of a meeting held by a board of education.

Earlier this year, legislation was proposed in both the Assembly and the Senate relative to this issue (A.5472/S.2385, copy attached). Based on language drafted by the Committee on Open Government, this bill would give agencies the discretionary authority to waive copyright protection regarding certain kinds of records. Perhaps more importantly, it would require agencies to waive copyright protections "except where the record reflects artistic creation, or scientific or academic research"and "whenever further reproduction and dissemination of the record sought shall substantially aid public oversight and accountability of government." We are optimistic that this bill will be enacted.

I hope that this is helpful to you and your colleagues. Please let me know if you have any further questions.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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March 14, 2007

Ms. Margaret Sobel
[redacted]

The staff of the Committee on 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. Sobel:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to the Meeting Hall Exploratory Committee of the Village of Old Field, as well as various related materials submitted by Ms. Donna Deedy. Specifically, you inquired whether the Open Meetings Law applies to meetings of the Exploratory Committee. Based on the materials provided, the Exploratory Committee was created by the Village Board of Trustees "to consider the advisability and feasibility of building a Village meeting house", and it will "presumably will make recommendations to the Board of Trustees". There are nine members of the Exploratory Committee, including the Mayor and one Village Trustee. In an effort to address all of the questions raised by you and Ms. Deedy, we offer the following comments.

First, in our view, the Meeting Hall Exploratory Committee is not subject to the Open Meetings Law. In this regard, and by way of background, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on the foregoing, a public body is, in our view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, it constitutes a public body [see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d

898 (1993)]. For instance, in the case of a legislative body consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that entity designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

Several judicial decisions, however, indicate generally that advisory bodies, other than those consisting of members of a particular governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [GoodsonTodman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In one of the decisions, Poughkeepsie Newspaper, supra, a task force was designated by then Mayor Koch consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (id., 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law..."(id.). We note, too, that the decision concerning the Town of Milan cited above involved the status of a "Zoning Revision Committee" designated by the Town Board to recommend changes in the zoning ordinance.

In the context of your inquiry, assuming that the Committee has no authority to take any final and binding action for or on behalf of the Village, we do not believe that it constitutes a public body or, therefore, is obliged to comply with the Open Meetings Law.

Second, however, the foregoing is not intended to suggest that the committee cannot hold open meetings. On the contrary, it may choose to conduct meetings in public, and similar entities have done so, even though the Open Meetings Law does not require that they do so.

Further, we believe that the Village Board, the governing body, has the authority to direct that a committee that it has created must give effect to the Open Meetings Law. As you may be aware, §4-412 of the Village Law confers general powers on the board of trustees, "[t]he board of trustees may create or abolish by resolution offices, boards, agencies and commissions and delegate to said offices, boards, agencies and commissions so much of its powers, duties and functions as it shall deem necessary for effectuating or administering the board of trustees duties and functions."
In our view, since the Board has the power to create the committee, it is implicit that it has the power to require that the committee function in a certain way, in this instance, in accordance with the Open Meetings Law.

Section 110 of the Open Meetings Law entitled "Construction with other laws" provides in subdivision (1) that any local enactment that is "more restrictive with respect to public access...shall be deemed superseded" by the Open Meetings Law to the extent that it grants lesser access than that statute. However, subdivision (2) provides that any such enactment or "rule" that is "less restrictive with respect to public access...shall not be deemed superseded..." That being so, we believe that the Village Board could by local law or rule require the committee to grant public access to its meetings in a manner consistent with the Open Meetings Law.

Further, and with respect to records prepared by the Committee for the Village Board, the Freedom of Information Law is the governing provision of law. That statute is broad in its scope, for it pertains to all records of an agency, such as a village, and defines the term "record" to mean:

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

Based on the foregoing, records produced or acquired by the Committee constitute Village records subject to rights conferred by the Freedom of Information Law. Further, it is our view that such records would be accessible pursuant to the Freedom of Information Law.

Finally, please accept my apologies for initially providing a different opinion to Ms. Deedy. As I explained to her, since my discussion with her I have researched the matter more fully and confirmed my opinion with our executive director.

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: Donna Deedy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16496

41 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 14, 2007

E-Mail

TO: Mr. Bob Huml

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Huml:

I have received your inquiry in which you asked whether a request made under the Freedom of Information Law is itself accessible.

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 my perspective, with the exception of portions of certain kinds of requests, the records in question would be accessible to the public under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a community board, or an agency's contract to purchase goods or services,

the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, Nay 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

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

FOIL-AO-16497

From: Camille JobinDavis
To: petra.larsen@oprhp.state.ny.us
Date: 3/15/2007 12:54:35 PM
Subject: Freedom of Information Law - tax returns

Petra,

There are many provisions of the New York State Tax Law that prohibit the release of information filed with the Tax Department. Corporate returns are protected under section 202(1). Personal income returns are protected under section 697(e). It is my opinion that these prohibitions only apply to the Department of Tax and Finance, not other state agencies.

The following is a link to an advisory opinion with respect to information received by the Internal Revenue Service - please note the last few paragraphs: http://www.dos.state.ny.us/coog/ftext/f15856.htm

I believe that in response to a request, Parks would be required to release corporate returns in its possession only to the extent that disclosure would not cause substantial competitive injury to the corporate entity.

Camille

Camille S. Jobin-Davis, Esq.
Assistant 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-16498

From: Robert Freeman
To: Christopher Prior
Date: 3/20/2007 8:10:54 AM
Subject: Re: List of e-mail addresses

Hi - -

I believe that individuals' email addresses may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. If accessible under FOIL, an email address could be used in a variety of unforeseen ways, i.e., to transmit viruses or disable computers.

I hope that this will be helpful.

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-16499

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

March 20, 2007

Mr. Edwin Camacho
06-A-2769
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. Camacho:

I have received your letter in which you complained that you submitted a Freedom of Information Law request to the New York City Police Department and that, as of the date of your letter to this office, 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Also, enclosed is a copy of an explanatory brochure concerning the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16500

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 19, 2007

Ms. Genevieve Lane Lopresti
[redacted]

The staff of the Committee on 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. Lopresti:

I have received your letter in which you asked whether a political party is required to comply with the Freedom of Information Law.

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

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

Based on the provision quoted above, the Freedom of Information Law generally applies to records of entities of state and local government. It does not apply to private entities, and, therefore, in my view, political parties fall beyond its coverage.

Notwithstanding the foregoing, there may be other provisions of law that require disclosure by political parties to agencies, such as boards of elections. When that is so and records pertaining to political parties are maintained by agencies, the agencies are required to disclose the records in accordance with the Freedom of Information Law and perhaps other statutes.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

From: Robert Freeman
To: [redacted]
Date: 3/21/2007 8:48:37 AM
Subject: Dear Ms. Proper:

Dear Ms. Proper:

I have received your inquiry concerning the placement of minutes of a planning board. In this regard, I know of no law specifying where those records must be kept. However, it is noted that §30 of the Town Law states that the town clerk is the custodian of all town records, irrespective of where they are kept. Additionally, the clerk, by law, is the records management officer for the town and in most instances is also designated as records access officer. A records access officer has the duty of coordinating the town's response to requests for records made under the Freedom of Information Law. In consideration of the foregoing, it is suggested that you confer with the clerk concerning the placement of the minutes and the manner in which they are preserved.

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-16502

From: Robert Freeman
To: monica@disabilitynewsradio.com
Date: 3/21/2007 9:26:50 AM
Subject: Dear Ms. Moshenko:

Dear Ms. Moshenko:

I have received your letter and will respond briefly.

First, there are no particular criteria involving the selection of a FOIL appeals officer. The provisions dealing with the designation of an appeals officer or body can be found in §1401.7 of the regulations promulgated by the Committee on Open Government, which are available on our website.

Second, the Committee offers advice and opinions, both orally and in writing, to any person having questions relating to the FOIL. Although opinions rendered by this office are not binding, it is our hope that they are educational and persuasive, and that they enhance compliance with law.

Third, with respect to the Committee's role in implementation of the law, the regulations to which reference was made earlier have the force and effect of law, and §87(1) of the FOIL requires each agency to promulgate its own regulations consistent with those adopted by the Committee and the FOIL.

Lastly, there is no agency authorized to enforce the FOIL. If an applicant for records has been denied access, and his or her appeal is denied as well, a judicial proceeding may be initiated under Article 78 of the Civil Practice Law and Rules for review of the agency's determination.

I hope that I have been of assistance.

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

FOIL-AO-16503

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

March 21, 2007

E-MAIL

TO: Mark Eldridge

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Eldridge:

I have received your inquiry concerning rights of access to the resumes of applicants for teaching or coaching positions in public schools.

In this regard, first, it is noted that §89(7) of the Freedom of Information Law states in part that the identity of an applicant for appointment to public employment need not be disclosed. Assuming that resumes pertain to applicants who have been hired and are employed by an agency, such as a school district, 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. As suggested in the response to your request, relevant to the matter is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

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

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

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

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16504

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 21, 2007

E-MAIL

TO: Geoffrey 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 asked whether you are "allowed to bring in [your] camera and take digital photos of any records that [you are] inspecting" and whether you can "be prohibited from taking notes while viewing records."

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

In short, there is no prohibition concerning the ability to copy the contents of records by hand. Further, your use of a camera, due to its size and independent power source, would not involve any use of agency resources or disruption of its activities different from inspection of records.

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

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-334
FOIL-AO-1650

41 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 23, 2007

E-Mail

TO: To whom it may concern

FROM: Robert J. Freeman, Executive Director RJF

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

To whom it may concern:

I have received your inquiry concerning access to copies of your "NEW YORK state employment history records."

In this regard, the functions of this office pertains to rights of access to government agency records. The statute that generally deals with rights of access to those records is the Freedom of Information Law, and §86(3) of that law defines the term "agency" to mean:

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

If your interest involves employment records involving private organizations, the Freedom of Information Law would not apply. Further, I know of no provision of law that would require a private employer to disclose personnel records to you.

If you were employed by a unit of local government, 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 (j) of the Law.

In most instances, personnel records pertaining to an individual will be accessible under the Freedom of Information Law to that person. There may, however, be exceptions to rights of access.

For instance, if personnel records identify individuals other than yourself, it is possible that disclosure would result in an unwarranted invasion of their privacy. In addition, in some instances internal agency communications might properly be withheld.

If you were employed by a state agency, also pertinent is the Personal Privacy Protection Law. In general, that statute provides rights of access to the subjects of those records. Again, insofar as disclosure would constitute an unwarranted invasion of personal privacy regarding persons other than yourself, I believe that an agency may deny access.

Guides describing the Freedom of Information Law and the Personal Privacy Protection Law are accessible on our website. They are, respectively, "Your Right to Know" and "You Should Know."

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16506

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

March 23, 2007

Mr. Eric Egan
75-A-1502
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. Egan:

I have received your letter in which you complained regarding the timeliness of a response to your Freedom of Information Law request directed to the New York County Office of the District Attorney. You also indicated that you were informed that the record did not exist and asked why the Office of the District Attorney did not answer the questions that you raised.

In this regard, I offer the following comments.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in

> writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

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

Therefore, agency officials in my view would not be obliged to provide 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.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16507

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

March 26, 2007

E-Mail

TO: Ms. Rosemarie Hewig

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee 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. Hewig:

As you aware, I have received your letter in which you sought an advisory opinion relating to a matter that was considered in an earlier opinion.

The issue that you raised was precipitated by your review of an opinion rendered by this office prepared for an individual who submitted a request pursuant to the Freedom of Information Law to the Teachers' Retirement System seeking a copy of a request made by a different person. In brief, it was advised that requests made under the Freedom of Information Law are themselves accessible, except in rare circumstances in which disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Due to your familiarity with the situation, it is your belief that disclosure would indeed result in an unwarranted invasion of the privacy of the applicant for the record. The details that you offered need not be reiterated here, except to indicate your belief that disclosure of the applicant's identity "would have an adverse impact....[on] his professional and economic capacities."

During our discussion of the matter, you likened the situation to that more typically associated with complaints. In that 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.

In the context of questions involving access to complaints, 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, one of which pertains to:

> "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it..." [§89(2)(b)(iv)].

If, based on the unique circumstances with which you are familiar, it is your view that disclosure of the identity of the applicant for records of the System would "result in economic or personal hardship", a denial of access would appear to be appropriate. It is noted that when a person denied access by an agency seeks judicial review of the denial, the agency bears the burden of justifying its determination. Therefore, in such a challenge, the System would be required to demonstrate that disclosure would indeed result in the harmful effects of disclosure described in §89(2)(b(iv) in order to prevail.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16508

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

March 27, 2007

E-MAIL

TO: Linda Dillon

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee 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. Dillon:

As you aware, I have received your letter as well as documentation relating to it. The materials indicate that Prime Vendor, Inc., a company based in North Carolina, requested bid documents from Oneida County that are accessible through the County's website. The records, however, are maintained for the County by BidNet and are available only by registering and agreeing to terms developed by BidNet. One of the conditions that must be met prior to gaining access is that the information at issue "cannot be resold to a third party." Additionally, the "Vendor Registration Agreement" that appears on the County's website but which is "Powered by BidNet's E-Procurement System" states that: "If your company is a reseller of bid information, you may not register on this system."

In this regard, I offer the following comments.

First, while the records at issue may not be in the physical custody of the County, based on the nature of the relationship between the County and BidNet, I believe that they are County records that fall within the framework of the Freedom of Information Law. That statute pertains to agency records, such as those of a county, and §86(4) defines the term "record" expansively to mean:

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

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

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

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

Insofar as records maintained by BidNet are "kept, held, filed, produced or reproduced...*for* an agency", such as the County, i.e., for the purpose of providing services that would otherwise be carried out by the County, I believe that they 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 BidNet into an agency required to comply with the Freedom of Information Law, but rather that the records that it maintains for the County are County records.

Second, I believe that the conditions imposed by BidNet are inconsistent with law and unenforceable.

From my perspective, a person seeking records under the Freedom of Information Law from an agency, 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 has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not

> confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

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

In sum, it is my view that the records maintained by BidNet for the County that are accessible under the Freedom of Information Law must be made unconditionally available to any person.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16509

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

March 28, 2007

Mr. Houston Douglas
06-A-2860
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. Douglas:

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 you Freedom of Information Law request directed to 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 (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.

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-1651O

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

March 30, 2007

Mr. Jeffrey Williams
04-A-1222
Cape Vincent Correctional Facility
P.O. Box 739
Cape Vincent, NY 13618

Dear Mr. Williams:

I have received your letter in which you appealed a denial of access to your medical records by two drug program clinics.

In this regard, the Committee on Open Government is authorized to provide advice 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. However, I offer the following comments.

First, 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."

Second, 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 applies to entities of state and local government. It is unclear whether the entities maintaining the records of your interest are "agencies." If they are not, the Freedom of Information Law would not apply.

When it is applicable, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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, §18 of the Public Health Law deals specifically with access to patient records, whether they are maintained by a government agency or a private facility or physician. 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."

As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you renew your request and make specific reference to §18 of the Public Health Law in any request for medical records.

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:

Mr. Peter Farr
NYS Department of Health
Hedley Park, Suite 303
Troy, NY 12180.

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

OML-AO-4351
FOIL-AO-16511

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March 30, 2007

E-MAIL

TO: Diane Benczkowski

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Benczkowski:

I have received your letter in which you raised issues relating to the Depew Board of Education, upon which you serve as a member. You referred to a situation in which "the Board met in Executive Session...to discuss legal issues and access to the legal bills [you] had in question." You added that:

> "At that time, the entire Board took a vote and agreed to keep an ongoing file in the District Clerk's office of legal bills that a board member could view at any time. At our next regular meeting, on February 6, in Executive Session, the Board President, Susan Wagner, presented all of the board members with the attached Confidentiality Agreement that she wanted us to sign before we could view the legal bills. Myself and 3 of the 7 member board refused to sign the agreement."

The proposed "Confidentiality Agreement for Review of Un-Redacted Legal Bills by Board of Education Members" states as follows:

> "1. Members in their individual capacities are entitled to review the bills for professional services rendered by the school attorney to the District under the New York State Freedom of Information Law in a redacted form; and
>
> 2. The District seeks to allow Members access to these bills in an un-redacted form and without having to file the required Freedom of Information Request with the District; and

3. These bills will be maintained in a binder with the District Clerk and the Member's signature seeking review of these bills will be required on a sign-in sheet prior to the Member's review of these bills; and

4. By signing below the Member agrees in exchange for reviewing said bills in the form described in this Agreement, that all information contained in these bills will remain strictly confidential and only be discussed by Members in an Executive Session of a Board of Education Meeting; and

5. If a Member fails to adhere to the sign-in procedure or the confidentiality requirements of this agreement, said access to the documents described in this agreement will be denied.

6. Any new Member of the Board of Education will be required to sign a copy of this Agreement prior to obtaining access to the bills described herein under the terms described herein.

7. By signing below you accept and agree to adhere to all the requirements set forth in this Agreement."

From my perspective, the proposed agreement is overbroad and, in some respects, inconsistent with law. In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a school district, are 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)].

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 government attorney to his or her clients, government 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 school district 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.

One of the difficulties with the proposed agreement is that some elements of the records at issue must, based on judicial precedent, be made available to any person pursuant to the Freedom of Information Law.

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 opinion, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, I believe that references identifiable to students may properly be deleted. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privileged.

Section 4 of the proposed agreement states that, by signing, a member of the Board, in exchange for having the opportunity to inspect the bills in their entirety, promises to keep "all information contained in these bills...strictly confidential" and that they may only be discussed by Board members during an executive session. Similarly, section 5 states that a failure to abide by the "sign-in procedure" would eliminate any access to the records. For the reasons described above, I believe that those provisions are contrary to law. It has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. The proposed agreement would eliminate the rights of Board members as members of the public. Some portions of the bills are accessible to anyone under the Freedom of Information Law, including Board members, irrespective of whether they sign the agreement. I do not believe the agreement could validly restrict or diminish rights of access conferred upon members of the public who happen to be members of a board of education. Further and equally important, while there may be a basis for entry into executive session to discuss some bills or certain aspects of them, there would likely be no basis for entry into executive session in consideration of others.

In my opinion, the agreement would be valid insofar as the bills include information that is indeed confidential by statute based on the proper assertion of the attorney-client privilege or perhaps a different statute that forbids disclosure, such as the Family Educational Rights and Privacy Act. Other aspects of the records likely would not be exempted from disclosure by statute or, therefore, be confidential. I note that if a member of the Board obtains information subject to the attorney-client privilege, that person, acting unilaterally, would not have the authority to waive the privilege on behalf of the Board; only a majority of the Board would have the authority to do so..

Lastly, there are issues relating to the Open Meetings Law that merit comment, and your description of the manner in which the proposed agreement was developed suggests a failure to comply with both that law and the Education Law. According to your letter, the Board conducted

an executive session to discuss access to the legal bills and "took a vote and agreed to keep ongoing file in the District Clerk's office of legal bills that a board member could review at any time." I do not believe that the Board could have properly discussed that procedure or policy during an executive session.

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings must be conducted in public, except to the extent that an executive session may properly be convened in accordance with §105(1). Paragraphs (a) through (h) of that provision specify and limit the subjects that may properly be discussed in executive session. In my view, consideration of an adoption of policy concerning Board members' access to legal bills would not fall within any of the grounds for entry into executive session, and that issue should have been discussed in public.

Moreover, judicial decisions indicate that the Board could not have voted in private to adopt the policy. 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.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

FOIL-AO-16512

From: JobinDavis, Camille (DOS)
Sent: Mon 4/2/2007 3:46 PM
To:
Subject: RE: North Bellmore FOIL Appeal Cancellation

Dania, I am not at work this afternoon, so this will be brief, but I think you should try to inspect these documents this week before school lets out. I do not believe you can be restricted to inspection of records between the hours of 10 and 2 PM, normal business hours is required by regulations of the Committee. Reference the advisory opinion at the following webpage: http://www.dos.state.ny.us/coog/ftext/f9209.htm

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director, Committee on Open Government
518/474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16513

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April 2, 2007

Mr. Eric Harris
03-B-0846
P.O. Box 149
Attica, NY 14011-0149

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

Dear Mr. Harris:

I have received your letter addressed to Mr. Dominic Tocci. As indicated above, the staff of the Committee is authorized to render advisory opinions on its behalf. You referred to a request made to a town court pursuant to the Freedom of Information Law.

In this regard, I do not believe that records maintained by court or court clerks fall within the coverage of the Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

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

Since the records in question are maintained by a justice court, I believe that the governing statute concerning access to the records at issue is §2019.a of the Uniform Justice Court Act. That statute provides in relevant part that: "The records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..." As I understand §2019-a, unless a different provision of law specifies that records maintained by a justice court are confidential, the records are accessible to the public. Examples of confidential records would involve instances in which criminal charges are dismissed in favor of an accessed, in which case records are typically sealed pursuant to §160.50 of the Criminal Procedure Law. Another would deal with proceedings relating to youthful offenders in which records are automatically sealed pursuant to §720.15 of the Criminal Procedure Law or sealed by order of the court pursuant to §720.35.

I hope that 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

FOIL-AO-1654

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

April 2, 2007

Ms. Mary Gross-Ferraro
[redacted]

Dear Ms. Gross-Ferraro:

We were unable to contact you via telephone. In response to your request of March 20, 2007, please note that the Freedom of Information Law does not require that elected officials respond to questions in response to requests for information; rather that statute pertains to requests for existing records. Similarly, we know of no law that requires officials to respond to questions posed at public hearings. Accordingly, it is our opinion that the March 12 response from the Town's attorney is adequate.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Richard F. Liberth

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16515

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

April 4, 2007

Mr. Joaquin Winfield
97-A-5399
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14901-0500

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

Dear Mr. Winfield:

I have received your recent correspondence in which you asked that this office intervene with respect to your difficulty in obtaining responses to your inquiries directed to the Suffolk County Police Department.

In this regard, 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 an agency to grant or deny access to records.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the

> event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

cc: Suffolk County Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16516

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

April 4, 2007

Mr. JiSun Allah
06-R-0622
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. Allah:

I have received your letter in which you complained that your request for grand jury minutes was 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.

I note that the first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

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

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

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-16517

-----Original Message-----
From: Jobin-Davis, Camille
Sent: Wednesday, April 04, 2007 9:37 AM
To: 'robmcewan@mcewanlaw.com'
Subject: RE: Trade Secrets

Rob,

Yes, the opinion expressed in AO-11740, quoted in your email, is still our current view, and it has not been amended or retreated from in any material way.

This provision of law makes a lot of sense to me, that when a state agency cannot determine, for whatever reason, whether disclosure will cause substantial injury to the competitive position of the submitting commercial entity, the commercial entity should bear the burden of defending the position, as permitted within the 15 day window set out in section 89(5).

My apologies for the delay.

Camille

PLEASE NOTE: Effective immediately, my email address has changed to: camille.jobin-davis@dos.state.ny.us

Mercer, Janet (DOS) FOIL-AO-16518

From: Freeman, Robert (DOS)
Sent: Tuesday, April 10, 2007 8:29 AM
To: Mercer, Janet (DOS)
Subject: FW: Opinion: Yonkers Public Access Officer FOIL Requirments

This brief response to him is an ao. Please attach it to his correspondence and put at the bottom of the stack.

Thanks

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

From: Freeman, Robert (DOS)
Sent: Tuesday, April 10, 2007 7:25 AM
To: [redacted]
Subject: RE: Opinion: Yonkers Public Access Officer FOIL Requirments

Dear Mr. Gorman:

I have received the correspondence to which you referred. Please note that we have a substantial backlog of requests for written opinions and that it may be some time before a complete response can be prepared.

However, to attempt to offer guidance now, 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. That being so, while an agency may choose to provide information in response to questions, it is not required by that statute to do so. Similarly, a request for an "explanation" of the reason for certain actions is not a request for a record. Again, an agency may choose to explain it actions, but it not required to do so if that would involve the creation of a new record.

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

Tefft, Teshanna (DOS) FOIL-AO-16519

From: Freeman, Robert (DOS)
Sent: Tuesday, April 10, 2007 11:16 AM
To: Tefft, Teshanna (DOS)
Subject: FW: School Board members access to payroll information

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

From: Freeman, Robert (DOS)
Sent: Tuesday, April 10, 2007 8:25 AM
To: 'wkeeler@alexandriacentral.org'
Subject: School Board members access to payroll information

Dear Mr. Keeler:

I have received your inquiry concerning access by members of a board of education to payroll records that may indicate that a school district employee is a garnishee. In this regard, in general, it has been held that portions of personnel records that are unrelated to the performance of a public employee's official duties may be withheld from the public on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. However, when a request is made by the board in the performance of its official duties, the request could not, in my view, be equated with a request by a member of the public under the Freedom of Information Law. When a request is made by the Board in order to carry out its duties, the records at issue may be disclosed, because the law is permissive. Stated differently, the Freedom of Information Law permits an agency to deny access in certain circumstances, but it does not require that the agency do so.

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

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

Tefft, Teshanna (DOS) FOIL-AO-16520

From: Freeman, Robert (DOS)
Sent: Tuesday, April 10, 2007 11:09 AM
To: [redacted]
Subject: Emailing: Welcome to the Committee on Open Government.htm

Dear Mr. Warnecke:

I have received your inquiry. In short, when an agency, such as a school district, has the ability to transmit records that have been requested under the Freedom of Information Law by means of email, it is now required to do so.

This response is linked to our website, which in the "What's New" section includes a variety of information concerning requests made via email and agencies' obligations regarding their responses.

I hope that I have been of assistance.

NEW YORK STATE

Department of State

Dos Homepage | Corporations | Licensing | Local Government | Fire Prevention & Control | Commissions

Committee on Open Government

What's New with the Committee on Open Government?

What's New?

• Requesting and Obtaining Records via Email

The Governor recently approved legislation (Chapter 182) to amend the Freedom of Information Law that requires the Committee on Open Government "to develop a form, which shall be made available on the internet, that may be used by the public to request a record". The new law further requires as follows:

> "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, using forms, to the extent practicable, consistent with the form or forms developed by the Committee on Open Government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some other form."

This means that if an agency has the ability to receive requests for records from the public and transmit records by means of email, it will be required to do so. Therefore, to implement the amendment, agencies should designate an email address for purposes of receiving requests for records via email.

Forms for requesting records and responding to requests for records via email are available below.

Email Request Form

Tefft, Teshanna (DOS) FOIL-AO-16521

From: Freeman, Robert (DOS)
ent: Tuesday, April 10, 2007 9:01 AM
To: [redacted]
Subject: Personnel records of former police officer
Attachments: image001.gif

Dear Ms. Kendall:

Attached is an advisory opinion dealing with access to personnel records pertaining to former police officers. To request the records of your interest, it is suggested that you contact the clerk of the agency that maintains the records and ask for the name of the "records access officer." The records access officer has the duty to coordinate the agency's response to requests for records, and the request should be made to him/her. When seeking records, an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records of your interest.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOIL-AO-15991

May 31, 2006

E-Mail

TO:

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16522

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

April 10, 2007

Mr. Eric Harris
03-B-0846
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

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

Dear Mr. Harris:

I have received your letter addressed to Mr. John Cape concerning unanswered requests for records. Please be advised that Mr. Cape is no longer a member of the Committee and that, as indicated above, the staff is authorized to respond on behalf of its members.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-16523

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

April 10, 2007

Mr. David Sonachansingh
06-A-2286
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. Sonachansingh:

I have received your letter in which you complained that you received no response to an appeal sent to Counsel at the Department of Correctional Services concerning a denial of access to records indicating "legal visits" during your incarceration at the Schenectady County Jail.

In this regard, the records of your interest would not be maintained by the Department of Correctional Services. Because that agency did not deny your request, the appeal should not have been directed to its Counsel. Rather, since the request involved records of an agency of Schenectady County, I believe that your appeal should have been made to the head of that agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16524

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

April 10, 2007

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 facts presented in your correspondence.

Dear Mr. Fitzgerald:

I have received your letter concerning your contention that voting machines constitute records that fall within the requirements of the Freedom of Information Law.

Based on judicial precedent, that would not be so. That statute is applicable to agency records, and §86(4) of the Law defines the term "record" to mean:

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

In consideration of the foregoing, 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)].

While a voting machine might contain information, I do not believe that the machine itself could be characterized as a "record" subject to rights conferred by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-16524A

From: Freeman, Robert (DOS)
Sent: Tuesday, April 10, 2007 7:25 AM
To: [redacted]
Subject: RE: Opinion: Yonkers Public Access Officer FOIL Requirments

Dear Mr. Gorman:

I have received the correspondence to which you referred. Please note that we have a substantial backlog of requests for written opinions and that it may be some time before a complete response can be prepared.

However, to attempt to offer guidance now, 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. That being so, while an agency may choose to provide information in response to questions, it is not required by that statute to do so. Similarly, a request for an "explanation" of the reason for certain actions is not a request for a record. Again, an agency may choose to explain it actions, but it not required to do so if that would involve the creation of a new record.

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

FOIL-AO-16534B

From: Freeman, Robert (DOS)

Sent: Tuesday, April 10, 2007 11:09 AM

To: [redacted]

Subject: Emailing: Welcome to the Committee on Open Government.htm

Dear Mr. Warnecke:

I have received your inquiry. In short, when an agency, such as a school district, has the ability to transmit records that have been requested under the Freedom of Information Law by means of email, it is now required to do so.

This response is linked to our website, which in the "What's New" section includes a variety of information concerning requests made via email and agencies' obligations regarding their responses.

I hope that I have been of assistance.

Committee on Open Government

What's New with the Committee on Open Government?

What's New?

• Requesting and Obtaining Records via Email

The Governor recently approved legislation (Chapter 182) to amend the Freedom of Information Law that requires the Committee on Open Government "to develop a form, which shall be made available on the internet, that may be used by the public to request a record". The new law further requires as follows:

> "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, using forms, to the extent practicable, consistent with the form or forms developed by the Committee on Open Government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some other form."

This means that if an agency has the ability to receive requests for records from the public and transmit records by means of email, it will be required to do so. Therefore, to implement the amendment, agencies should designate an email address for purposes of receiving requests for records via email.

Forms for requesting records and responding to requests for records via email are available below.

Email Request Form

Form for Response to email requests

• Scanning Records in Response to a Request

It is our view that if an agency has the ability to scan records in order to transmit them via email and doing so will not involve any effort additional to an alternative method of responding, it is required to do so. 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. In that instance, transferring a paper record into electronic format would eliminate any need to collect and account for money owed or paid for preparing paper copies, as well as tasks that would otherwise be carried out. In addition, when a paper record is converted into a digital image, it remains available in electronic format for future use.

In sum, when an 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, in our opinion, the agency must do so to comply with the Freedom of Information Law.

• Awarding Attorney's Fees Under the Freedom of Information Law

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).

While the law has generally been properly implemented, situations arose in which denials of access to records were unreasonable or in which those seeking records faced inordinate delays. The problem was that, if a lawsuit was initiated, a condition precedent to the award of attorney's fees involved the need for a court to find that the records sought were of clearly significant interest to the general public. Often, however, the records at issue might have affected one or perhaps few members of the public, and in those cases, there was no possibility that those persons could recover the cost of going to court, even if an agency failed to comply with law.

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.

This legislation, coupled with last year's amendments involving the time for responding to requests (see explanation of new time limits for response below), as well as the legislation involving the use of email to seek and obtain records, will enhance compliance with the Freedom of Information Law and the public's right to know.

• Summary of amendments to the Freedom of Information Law concerning time limits for response

• Explanation of new time limits for response

• Regulations of the Committee on Open Government

• Model Regulations

FOIL-AO-16526

From: Freeman, Robert (DOS)
Sent: Tuesday, April 10, 2007 8:25 AM
To: 'wkeeler@alexandriacentral.org'
Subject: School Board members access to payroll information

Dear Mr. Keeler:

I have received your inquiry concerning access by members of a board of education to payroll records that may indicate that a school district employee is a garnishee. In this regard, in general, it has been held that portions of personnel records that are unrelated to the performance of a public employee's official duties may be withheld from the public on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. However, when a request is made by the board in the performance of its official duties, the request could not, in my view, be equated with a request by a member of the public under the Freedom of Information Law. When a request is made by the Board in order to carry out its duties, the records at issue may be disclosed, because the law is permissive. Stated differently, the Freedom of Information Law permits an agency to deny access in certain circumstances, but it does not require that the agency do so.

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

Robert J. Freeman

Executive Director

NYS Committee on Open Government

41 State Street

Albany, NY 12231

(518) 474-2518

(518) 474-1927 - fax

www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-16525

From: Freeman, Robert (DOS)

Sent: Tuesday, April 10, 2007 9:01 AM

To: [redacted]

Subject: Personnel records of former police officer

Dear Ms. Kendall:

Attached is an advisory opinion dealing with access to personnel records pertaining to former police officers. To request the records of your interest, it is suggested that you contact the clerk of the agency that maintains the records and ask for the name of the "records access officer." The records access officer has the duty to coordinate the agency's response to requests for records, and the request should be made to him/her. When seeking records, an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records of your interest.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4360
FOIL-AO-16520

41 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 12, 2007

Mr. Neil Marcus
[redacted]

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

Dear Mr. Marcus:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information and Open Meetings Laws to requests made to and actions taken by the Village of Wesley Hills. In your correspondence, you raised many issues, all of which we will attempt to address with the following comments.

First, by way of background, the Freedom of Information Law governs access to records maintained by an agency, such as a village. The Open Meetings Law applies to meetings of public bodies, public access to meetings, notice of meetings, and minutes. While the Committee on Open Government is authorized to issue advisory opinions concerning application of these laws, this office has no authority to enforce or compel an entity to comply with those statutes. It is our hope that these opinions are educational and persuasive, and that they serve to resolve village problems and promote understanding of and compliance with the law.

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

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

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

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

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

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

In short, insofar as records sought are maintained for the Village, we believe that the Village would be required to direct the person who possesses them to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

Further, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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, perhaps some of the grounds for denial could properly be asserted to withhold some of the records in question.

Third, the transmittal or possession of records by the Village's attorney would not alter the character of the records or necessarily bring them within the scope of the attorney-client privilege. The first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For 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 may be considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

Nevertheless, correspondence between the Village Attorney and the applicant's attorney, if it exists, although in possession of the Village's attorney, does not consist of privileged communications. 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 Village is the client of the Village attorney; the applicant's attorney is not. Consequently, communications in possession of the Village attorney transmitted to and from the applicant's attorney would not fall within the coverage of the attorney-client privilege. On the contrary, we believe that they would constitute agency records that must be disclosed, for none of the grounds for denial would appear to be pertinent or applicable.

Turning to the issues raised with respect to the Open Meetings Law, you referred to the Village's denial of your request for access to minutes of a particular executive session on the ground that no such minutes exist. As you may be aware the Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements pertaining to their contents. Specifically, §106 states that:

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

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session except to appropriate public moneys [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.

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)].

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, 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).

If the Board reached a "consensus" that is reflective of its final determination of an issue during an executive session, 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, 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, we believe that the exception is intended to permit a public body to discuss its litigation strategy and related settlement 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 our view, therefore, only to the extent that the Board discusses its litigation strategy and related settlement strategy could an executive session be properly held under §105(1)(d).

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

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

With respect to the assertion of the attorney-client privilege, relevant is §108(3), which exempts from the Open Meetings Law:

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

When an attorney-client relationship has been invoked, it is considered confidential under §4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged

relationship, the communications made pursuant to that relationship would in our 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 our 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, we 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.

We 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 our 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, we believe that the attorney-client privilege has ended and that the body should return to an open meeting.

While it is not our 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. Since a motion to enter into executive session must be made during an open meeting, and since §106(1) requires that minutes include references to all motions, the minutes of an open meeting must always include an indication that an executive session

was held, as well as the reason for the executive session. 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.

Finally, in contrast to the comment you attribute to the records access officer, that her job is to protect the Village's interests, the Freedom of Information Law and ensuing regulations require that the records access officer coordinate the Village's response to requests for records.

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.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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." From my perspective, every law must be implemented in a manner that gives reasonable effect to itsIt is our, an that I point out that in its statement of legislative intent, §84 of the 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: Hon. Julie Pagliaroli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16507

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April 13, 2007

Mr. John L. Minogue
[redacted]

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

Dear Mr. Minogue:

I have received your letter and apologize for the delay in response. Although you referred to correspondence sent to the Nassau County Executive attached to your letter, I note that no such document was included among the materials that you sent to this office.

You wrote to the Nassau County Executive and requested records "used to arrive at the 2008, 2009 and 2010 revenue projections regarding red light cameras in the multi-year plan." The County's budget director responded, indicating that the item to which you referred cannot be implemented without both state and local legislative approval, and added that "[t]he basis for the County's revenue estimate is the assumption that cameras would be installed at 50 locations with each one recording 30 violations per day." He indicated that "[t]hese are preliminary estimates, and...will be refined if legislative approval grows more certain and it is likely that such revenues can be incorporated into the 2008 Budget." The Budget Director did not send any records, however, in response to your request.

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency, such as the County, is not required to create a record in response to a request. I would conjecture that the County does not maintain detailed records serving as the basis for its revenue projections. If that is so, and if no such records exist, the County would not be obliged to prepare new records containing the information sought on your behalf.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mark Young

FOIL-AO-16528

From: Freeman, Robert (DOS)
Sent: Friday, April 13, 2007 2:21 PM
To: [redacted]
Subject: name of emailer

Dear Sir/Madam:

As a general matter, when seeking records via email, there is no obligation in my opinion imposed on the person making the request to include his/her name. However, in situations in which tbat person is seeking records pertaining to him/herself that would be accessible under the Freedom of Information Law to no other person, he/she may be required to provide reasonable proof of his/her identity.

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-16509

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

April 16, 2007

Ms. Kathleen Polcari
[redacted]

The staff of the Committee on 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. Polcari:

I have received your letter and hope that you will accept our apologies for the delay in response.

You referred to unsuccessful efforts in obtaining "a video recording of an operation performed at Mr. Sinai Hospital" and information relating to complaints made by you and others to the New York State Department of Health and its Office of Professional Medical Conduct.

In this regard, I offer the following comments.

First, the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, pertains to agency records, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, as a general matter, the Freedom of Information Law is applicable to entities of state and local government in New York. It does not apply to private entities, such as Mt. Sinai Hospital.

Second, notwithstanding the foregoing, a different provision of law specifies that the subjects of medical records have rights of access to those records that are maintained by a provider of medical services, including private hospitals or physicians. When seeking medical reeords, it is suggested that you do so by referring specifically to §18 of the Public Health Law.

Lastly, although the Department of Health is an agency and the Freedom of Information Law is based on a presumption of access, relevant in the context of your efforts is §87(2)(a). That provision pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 230(9) of the Public Health Law concerning the functions of the Office of Professional Conduct and its committees created to investigate complaints provides that:

> "Notwithstanding any other provisions of law, neither the proceedings nor the records of any such committee shall be subject to disclosure under article thirty-one of the civil practice law and rules except as herein-after provided..."

The Court of Appeals, the state's highest court, has held that the above-cited section "is a statute exempting information from disclosure within the meaning of Section 87 (subd 2, par [a]) of the Public Officers Law" [Matter of John P. v. Whalen, 54 NY 2d 89, 97]. Therefore, unless and until there is a determination indicating that a physician has engaged in misconduct, the records pertaining to a complaint are confidential and cannot be disclosed.

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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FOIL-AO-16530

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April 16, 2007

E-MAIL

TO: 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 facts presented in your correspondence.

Dear Mr. Pavalow:

I have received your letter and hope that you will accept my apologies for the delay in response.

You indicated that you are a member of the Katonah-Lewisboro Board of Education and that the Westchester County Department of Civil Service last year ordered a "a study investigating the 'senior typist' civil service positions to confirm that these individuals' job responsibilities matched the Civil Service titles." The Department issued two reports indicating its findings, and a resident asked the President of the Board at a Board meeting when the District would receive the report. The President responded, stating that "we are discussing this in executive session and I can't say anything because of that." When the resident pressed the issue and asked: "Have we received a report?", the President reiterated that "this is an executive session, we cannot speak of it and these are personnel matters..."

You expressed an understanding that reports in the nature of those issued are confidential, but that you "don't understand how it is breaking confidentiality by telling the public that Westchester County Civil Service completed their investigation and issued a report on the subject."

In consideration of the foregoing, you have sought an advisory opinion involving the following:

> "1) Is it breaking confidentiality to tell the public that the Westchester County Civil Service department's study/investigation has been concluded and that two reports were provided to the Superintendent and Board of Education members,

2) Is the Civil Service report a FOIL'able document?"

From my perspective, the statements offered by the Board President, as well as your understanding of confidentiality, are erroneous and based on misconceptions. In this regard, I offer the following comments.

Misconception # 1 - Confidentiality

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 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 "confidential" or "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 are likely aware, the federal Family Educational Rights and Privacy Act, "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.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 the context of the situation that you described, neither the reports prepared by the County Department of Civil Service nor their consideration or discussion by the Board of Education would be "confidential", for there is no statute specifying that the records must be withheld or that a discussion relating to them must be held in private. It is possible that portions of the report *may* be withheld under the Freedom of Information Law, or that certain elements of the Board's discussions *may* be discussed in executive session. However, there is no obligation to withhold those reports or to conduct an executive session to discuss their contents.

Misconception # 2 - - Personnel

It is emphasized 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 considering the kinds of records to which you alluded, I believe that two of the grounds for denial are pertinent. Section 87(2)(b) permits an agency to deny access to records insofar as 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].

A possible issue in relation to the matter described involves whether incumbents of certain positions were qualified to hold their positions. In this regard, judicial precedent indicates that several aspects of a resume or application for employment are accessible, including those portions pertaining to a person's qualifications for a position.

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

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, again, the characterization of documents as personnel records is meaningless. Rather, according to judicial decisions, the details within those records that are irrelevant to the performance of one's duties may generally be withheld. However, those portions of such records 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.

Also of possible significance may be an "eligible list" that identifies those who passed a civil service examination. Section 71.3 of the regulations promulgated by the State Department of Civil Service, which is entitled "Publication of eligible lists", states in relevant part that:

> "Eligible lists may be published with the standing of the persons named in them, but under no circumstances shall the names of persons who failed examinations be published nor shall their examination papers be exhibited or any information given about them..."

Based upon the foregoing, an eligible list identifies those who passed an exam and, therefore, are "eligible" for placement in a position, and such list is clearly public.

With respect to the report prepared by the County Civil Service Department, most pertinent is §87(2)(g) concerning "inter-agency or intra-agency materials." While that provision potentially permits a denial of access to those materials, due to its structure it may require that portions be disclosed. The cited provision authorizes an agency, such as a school district or a county, to withhold records that:

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

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

Insofar as a report consists of opinions or recommendations, I believe that it may be withheld. However, to the extent that it consists of factual information or is reflective of a final determination or statement of policy, it must be disclosed pursuant, respectively to subparagraphs (i) and (iii) of §87(2)(g). If, for example, the report contains a determination that certain employees hold "improper titles", I believe that the determination would be accessible to the public. Even though it may name

certain employees, a disclosure of that nature would be relevant to the duties of those employees and, therefore, would, in my view, result in a permissible invasion of privacy.

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the functions, creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters

do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

In sum, while there may be instances in which portions of personnel records may be withheld or in which discussions focusing on "particular persons" may be discussed in executive session, there are many others in which those records must be disclosed and in which discussions relating to personnel matters must be discussed in public. To characterize those records or issues as "confidential" in blanket fashion is, in my opinion, contrary to law.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 17, 2007

E-MAIL

TO: Albert Burkhart

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. Burkhart:

I have received your letter and apologize for the delay in response. You referred to a denial of access to records by a New York City agency "because it was determined that they were not 'final' Agency documents..."

In this regard, first, the Freedom of Information Law pertains to all records maintained by or for an agency, and I note 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."

Based on the foregoing, that a document is not final or a draft is not determinative of rights of access. Any document maintained by or for an agency would constitute a "record" that falls within the coverage of the law.

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

As you may be aware, §87(2)(g) enables an agency to withhold records that:

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

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

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

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

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

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the

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

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I emphasize that the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

I hope that I have been of assistance.

RJF:tt

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April 17, 2007

Mr. Nicholas Deegan
[redacted]

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

Dear Mr. Deegan:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Mattituck Park District for copies of voter sign in sheets from a November 16, 2006 election. While we are not experts on the subject of park districts, it appears that the information you have requested must be disclosed. In this regard, we offer the following comments.

First, park districts are creations of towns and defined specifically in §1471 of the Unconsolidated Laws. They are unique entities, separate from the towns in which they are located, and governed by a board of park commissioners which "shall have entire charge, control and management of the establishment, maintenance, operation and improvement" of the park district (see §1486). It is our understanding that park districts, like the towns in which they are located, are subject to the provisions of the Election Law. The following analysis is based on this assumption.

We note initially that the voter list maintained and published 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.

Next, the reasons for which a request is made and an applicant's potential use of records are generally irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 62 NYS 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. However, §89(2)(h)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such list would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses may be relevant, and case law indicates that an agency can ask that an applicant certify that the list would not be used for commercial purposes as a condition precedent to disclosure [see Golbert v. Suffolk

County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980); also, Siegel Fenchel and Peddy v. Central Pine Barrens Joint Planning and Policy Commission, Sup. Cty., Suffolk Cty., NYLJ, October 16, 1996].

Nevertheless, §89(6) of the Freedom of Information Law states that:

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

As such, if records are available as a right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access [see e.g., Szikszay v. Buelow, 436 NYS 2d 558, 583 (1981)].

Relevant in this instance is §5-602 of the Election Law, entitled "Lists of registered voters; publication of", which states that voter registration lists are public. Specifically, subdivision (1) of that statute provides in part that a "board of elections shall cause to be published a complete list of names and residence addresses of the registered voters for each election district over which the board has jurisdiction"; subdivision (2) states that "The board of elections shall cause a list to be published for each election district over which it has jurisdiction"; subdivision (3) requires that at least fifty copies of such lists shall be prepared, that at least five copies be kept "for public inspection at each main office or branch of the board", and that "other copies shall be sold at a charge not exceeding the cost of publication." As such, §5-602 of the Election Law directs that lists of registered voters be prepared, made available for inspection, and that copies shall be sold. There is no language in that statute that imposes restrictions upon access in conjunction with the purpose for which a list is sought or its intended use.

Since §5-602 of the Election Law confers unrestricted public rights of access to voter registration lists, in 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.

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 a county board. 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 list of those who voted in the Mattituck Park District, regardless of the intended use of the list.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

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April 17, 2007

Mr. Shaun D. Grimm
04-A-5212
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. Grimm:

We are in receipt of your correspondence dated April 12 in which you state that you "sent a F.O.I.L. request to the New York State Police in Liberty on March 25, 2007" and as of the date of your letter, you have 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-16534

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

April 18, 2007

Mr. Terril Ellis
96-A-0430
Cape Vincent Correctional Facility
P.O. Box 599
Cape Vincent, NY 13618

Dear Mr. Ellis:

I have received your letter in which you requested from this office a copy of an accident report prepared by the State Police.

In this regard, 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 does not maintain records generally and, as such, does not maintain possession of the record of your interest. It is suggested that you direct your request to the New York State Police.

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 NYS2d 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 of the Public Officers Laws would apply to require production of accident reports.

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-16535

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

April 18, 2007

Mr. Vincent Steward
[redacted]

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

Dear Mr. Steward:

I have received your letter concerning unanswered requests for certain 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to

have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Attached are copies of advisory opinions that relate to the records of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16536

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

April 18, 2007

Mr. John Cimisi
[redacted]

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

Dear Mr. Cimisi:

I have received your letter in which you complained that two agencies have 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, 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, copies of this response will be sent to the records access officers at the agencies to which you made requests.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, NYS OTDA
Records Access Officer, NYC HRA

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1653

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

April 18, 2007

Mr. Keith Donohue
[redacted]

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

Dear Mr. Donahue:

I have received your letter and the correspondence attached to it. You complained that the Gananda Central School District has failed to respond to your request made under the Freedom of Information Law.

In this regard, first, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request for information. For instance, in one aspect of your request, you asked why a certain action was taken. If there is a record indicating the reason for the action, it would likely be accessible. However, if no such record exists, there would he no requirement that the District prepare a new record on your behalf offering an explanation for its action.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Patricia Roach
D. Stonemetz

FOIL-AO-16538

From: Freeman, Robert (DOS)
Sent: Wednesday, April 18, 2007 10:42 AM
To: MULLEN, VICTORIA
Subject: RE:

Hi - -

Assuming that a planning or zoning board is seeking legal advice and that its attorney is rendering legal advice, the communications would be subject to the attorney-client privilege and, therefore, exempt from disclosure under the Freedom of Information Law, §87(2)(a). Those kinds of communications would also consist of "intra-agency materials" falling within §87(2)(g). When those materials consist of questions, recommendations, opinions or advice, they may be withheld under that provision as well.

Hope all is well.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16539

41 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, 2007

Mr. Carl H. Dukes
99-A-0232
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. Dukes:

Your letter addressed to the State Commission of Investigation has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the Freedom of Information Law.

The matter involves an alleged failure by the City of Albany to respond to a request for records, particularly those involving disciplinary action, pertaining to police officer Kenneth J. Wilcox.

Please note that Officer Wilcox was killed in a motor vehicle accident. That fact in my view has an effect on rights of access to the records of your interest. 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 initial ground for denial of access, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. However, its language and judicial construction indicate that it is not applicable in the situation that you described. That statute exempts from disclosure personnel records pertaining to police officers that are used "to evaluate performance toward continued employment or promotion." However, it has been held that §50-a cannot be asserted when an individual is no longer employed as a police officer [Village of Brockport v. Calandra, 745 NYS2d 662, 191 Misc. 2d 718 (2002); aff'd 758 NYS2d 877, 305 AD2d 1030 (2003)]. Because §50-a of the Civil Rights Law does not apply, I believe that the Freedom of Information Law would govern rights of access. I note in this regard

that there is nothing in that statute the deals specifically with personnel records. As is so in most instances, the content of those records and the effects of disclosure are the crucial factors in determining rights of access and, conversely, the ability of an agency to deny access to records.

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

Also pertinent is §87(2)(g). That provision permits an agency to withhold records that:

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

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

When a record pertaining to a public employee reflects a final determination indicating a finding or admission of misconduct, several of the decisions cited above specify that such a determination is accessible under the Freedom of Information Law. In that circumstance, because such a record is relevant to the performance of a public employee's duties, I believe that disclosure would constitute a permissible, not an unwarranted invasion of personal privacy. Further, as a final determination, it would be accessible under §87(2)(g)(iii).

Lastly, the regulations promulgated by the Committee on Open Government (21 NYCRR 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests. The records access officer for the City of Albany is the City Clerk. If you have not done so, it is suggested that a request be made to the City Clerk.

When such 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-1654O

41 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, 2007

Mr. Benjamin Grimes
00-A-1447
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582

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

Dear Mr. Grimes:

I have received your letter in which you complained that your request made under the Freedom of Information Law to the New York Law Journal has not been answered.

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

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

Based upon the foregoing, in brief, the Freedom of Information Law is generally applicable to entities of state and local government. It does not apply to private entities, such as newspapers.

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16511

41 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, 2007

Mr. Henry Silverman
267 Peconic Bay Boulevard
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, unless otherwise indicated.

Dear Mr. Silverman:

As you know, I have received a variety of materials from you relating to your efforts in obtaining a certificate of occupancy from the Town of Riverhead, as well as various records sought pursuant to the Freedom of Information Law. You also asked that I "investigate" the matter.

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions pertaining to the Freedom of Information Law. The Committee has neither the resources nor the jurisdiction to conduct investigations. Nevertheless, in an effort to offer guidance and assistance, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. Insofar as the Town does not maintain records of your interest, it would not be required to prepare new records 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.

Second, when seeking records under the Freedom of Information Law, your interest, intended use or motivation for seeking them are irrelevant. It was held more than three decades ago that when records are accessible pursuant to the Freedom of Information Law, they must be made equally available to any person, without regard to one's status or interest [see Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 164 (1976)]. Moreover, 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" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

Third, you indicated during a telephone conversation that a Town building inspector permitted you to inspect certain records, but precluded you from copying them. Based on the introductory language of §87(2), when records are available for inspection, they must also be available for copying. Additionally, §89(3) requires that an agency make copies of records available upon payment of the requisite fee.

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

There are several instances in which you were denied access to records, such as permits, certificates of occupancy and those indicating violations. In response to those requests, you were informed that the records "are exempt from disclosure pursuant to §87(2)(b) and (e)(i)"; reference was also made to §89(2). In short, I disagree with the Town's denial of access to those kind of records.

Section 87(2)(b) authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Section 89(2) offers a series of examples of unwarranted invasions of personal privacy. From my perspective, records in the nature of permits, certificates of occupancy and violations cannot justifiably be withheld based on a contention that disclosure would result in an unwarranted invasion of personal privacy. In considering that standard,

the Court of Appeals referred to items of a highly personal or intimate nature the disclosure of which would be offensive to a reasonable person or ordinary sensibilities [see Hanig v. NYS Department of Motor Vehicles, 79 NY2d 106 (1992)]. In my view, permits, licenses and certificates of occupancy relate to structures; they do not contain intimate personal information. Further, when they are issued, disclosure enables the public to know that there is compliance with applicable laws, codes or rules.

When a violation has been found, a record indicating such funding represents a government agency's determination that there has been a failure to comply with law. Records reflective of failures to comply with law have long been accessible, and the Court of Appeals has determined that those records must be disclosed, unless and until a charge has been dismissed [see Johnson Newspapers Corp. v. Stainkamp, 94 AD2d 825, 61 NY2d 958 (1984); also Planned Parenthood of Westchester, Inc. v. Town Board of Town of Greenburgh, 587 NYS2d 461 (1992)].

Section 87(2)(e)(i) authorizes an agency to withhold records "compiled for law enforcement purposes" insofar as disclosure would "interfere with law enforcement investigations or judicial proceedings..." It was held under the Freedom of Information Law as originally enacted that the predecessor to §87(2)(e) could not properly be asserted with respect to records relating to building code enforcement [see Young v. Town of Huntington, 388 NYS2d 978 (1976)]. Further, once a notice of violation has been issued, even if such record could be characterized as having been "compiled for law enforcement purposes", because the notice would have been served upon the violator, I do not believe that it could be demonstrated that disclosure would interfere with an investigation or judicial proceeding.

Lastly, and in a related vein, although the courts are not subject to the Freedom of Information Law [see definition of "agency", §86(3), and "judiciary", §86(1), respectively], records maintained by courts are generally accessible pursuant to other provisions of law (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a). Again, unless records have been sealed pursuant to §§160.50 or 160.55 of the Criminal Procedure Law, the records of your interest maintained by a court would appear to be available from the clerk of a court. Moreover, if the Town has duplicates of those records, the Court of Appeals has held that they become agency records that fall withing the coverage of the Freedom of Information Law [see Newsday v. Empire State Development Corporation, 98 NY2d 746, 359 NYS2d 855 (2002)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Dawn Thomas
Kathleen Schroeher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1651

41 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, 2007

Mr. Henry Silverman
[redacted]

The staff of the Committee 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. Silverman:

As you know, I have received a variety of materials from you relating to your efforts in obtaining a certificate of occupancy from the Town of Riverhead, as well as various records sought pursuant to the Freedom of Information Law. You also asked that I "investigate" the matter.

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions pertaining to the Freedom of Information Law. The Committee has neither the resources nor the jurisdiction to conduct investigations. Nevertheless, in an effort to offer guidance and assistance, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. Insofar as the Town does not maintain records of your interest, it would not be required to prepare new records 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.

Second, when seeking records under the Freedom of Information Law, your interest, intended use or motivation for seeking them are irrelevant. It was held more than three decades ago that when records are accessible pursuant to the Freedom of Information Law, they must be made equally available to any person, without regard to one's status or interest [see Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 164 (1976)]. Moreover, 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" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

Third, you indicated during a telephone conversation that a Town building inspector permitted you to inspect certain records, but precluded you from copying them. Based on the introductory language of §87(2), when records are available for inspection, they must also be available for copying. Additionally, §89(3) requires that an agency make copies of records available upon payment of the requisite fee.

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

There are several instances in which you were denied access to records, such as permits, certificates of occupancy and those indicating violations. In response to those requests, you were informed that the records "are exempt from disclosure pursuant to §87(2)(b) and (e)(i)"; reference was also made to §89(2). In short, I disagree with the Town's denial of access to those kind of records.

Section 87(2)(b) authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Section 89(2) offers a series of examples of unwarranted invasions of personal privacy. From my perspective, records in the nature of permits, certificates of occupancy and violations cannot justifiably be withheld based on a contention that disclosure would result in an unwarranted invasion of personal privacy. In considering that standard,

the Court of Appeals referred to items of a highly personal or intimate nature the disclosure of which would be offensive to a reasonable person or ordinary sensibilities [see Hanig v. NYS Department of Motor Vehicles, 79 NY2d 106 (1992)]. In my view, permits, licenses and certificates of occupancy relate to structures; they do not contain intimate personal information. Further, when they are issued, disclosure enables the public to know that there is compliance with applicable laws, codes or rules.

When a violation has been found, a record indicating such funding represents a government agency's determination that there has been a failure to comply with law. Records reflective of failures to comply with law have long been accessible, and the Court of Appeals has determined that those records must be disclosed, unless and until a charge has been dismissed [see Johnson Newspapers Corp. v. Stainkamp, 94 AD2d 825, 61 NY2d 958 (1984); also Planned Parenthood of Westchester, Inc. v. Town Board of Town of Greenburgh, 587 NYS2d 461 (1992)].

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Lastly, and in a related vein, although the courts are not subject to the Freedom of Information Law [see definition of "agency", §86(3), and "judiciary", §86(1), respectively], records maintained by courts are generally accessible pursuant to other provisions of law (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a). Again, unless records have been sealed pursuant to §§160.50 or 160.55 of the Criminal Procedure Law, the records of your interest maintained by a court would appear to be available from the clerk of a court. Moreover, if the Town has duplicates of those records, the Court of Appeals has held that they become agency records that fall withing the coverage of the Freedom of Information Law [see Newsday v. Empire State Development Corporation, 98 NY2d 746, 359 NYS2d 855 (2002)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Dawn Thomas
Kathleen Schroeher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-4373
FOIL-AO-16512

41 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, 2007

E-MAIL

TO: Diane Cirillo

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Cirillo:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to a "long standing practice" of the Seaford Board of Education to permit public comments during its meetings, and that the Board recently "announced that public comments will be restricted to three minutes." You also referred to §1709 of the Education Law, which authorizes boards of education "to adopt by-laws and rules for its government."

In order to do so, you asked whether a board of education must "conduct a formal vote and memorialize same in the form of minutes" and whether "changing the public comments time from no time limit to three minutes require[s] a Board vote."

In this regard, from my perspective, a board of education may adopt rules or by-laws only during a meeting by means of an affirmative vote of a majority of its total membership (see §41, General Construction Law concerning "Quorum and majority"). In any instance in which action of that nature is taken, I believe that minutes must be prepared in accordance with §106(1) of the Open Meetings Law. That provision 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."

Since only a board of education may adopt rules and by-laws, I believe that only the board may alter or amend rules or by-laws that it initially approved. Accomplishing any such change or

amendment would in my opinion represent an action taken by the board. Again, when a board takes such action, it may do so in my opinion only at a meeting held open to the public by means of an affirmative vote of a majority of its total membership. Further, any such action must be memorialized in minutes prepared pursuant to §106(1) of the Open Meetings Law.

Lastly, it is also noted that the Freedom of Information Law requires that a record be maintained whenever a final action is taken that indicates the manner in which each member cast his or her vote. Specifically, §87(3) states in relevant 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."

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4374
FOIL-AO-16543

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

April 25, 2007

Mr. James P. Langton
[redacted]

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

Dear Mr. Langton:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to a situation in which a member of the Newfane Board of Education resigned and asked that those interested in filling the vacancy to submit their names. Your request for the names of those seeking to become a member of the Board was denied on the ground that disclosure would result in "an unwarranted invasion of personal privacy." You have sought a "ruling" on the matter.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. Neither the Committee nor its staff is empowered to issue a binding determination. That being so, the following remarks should be viewed as an advisory opinion.

In short, it has consistently been advised that the names of those who seek to fill a vacancy in what would normally be an elective office must be disclosed to comply with the Freedom of Information Law.

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

In typical circumstances, a person seeking to fill an elective position attempts to make his or her name known in order to attract the interest and support of voters. To suggest that names of those seeking to fill the same position that has become vacant and which may be filled by means of an appointment made by an elective body would in my view be an anomaly. I am not suggesting that personal details of individuals' lives must be disclosed. Nevertheless, in my opinion, disclosure of

the names of candidates for a vacant elective position could not be characterized as "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

Further, although §89(7) of the Freedom of Information Law states in part that nothing in that statute requires the disclosure of the name "of an applicant for appointment to public employment", an applicant for a position on a board of education would not be a prospective employee seeking employment.

In a judicial decision dealt in part with a discussion in executive session concerning those under consideration to fill a vacant elective position on a public body, it was held that an executive session could not properly have been held. The court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994).

Based on the foregoing, it is clear in my view the names of candidates who seek to fill vacant elective positions must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

FOIL-AO-16544

Mercer, Janet (DOS)

From: Jobin-Davis, Camille
Sent: Thursday, April 26, 2007 4:37 PM
To: Mercer, Janet (DOS)
Subject: FW: Freedom of Information Law (FOIL)

An AO. Thanks.

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
41 State Street
Albany NY 12231
(518) 474-2518
(518) 474-1927 fax
http://www.dos.state.ny.us/coog/coogwww.html

From: Jobin-Davis, Camille
Sent: Thursday, April 26, 2007 4:37 PM
To: 'Debbie Sherman'
Subject: RE: Freedom of Information Law (FOIL)

Debbie,

My apologies for not directly addressing your question about application of section 2116 of the Education Law the first time.

Typically, when we receive questions about the status of an applicant and how that affects the responsibility of an agency to respond, we refer to the following cases:

Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75 (1984); Burke v. Yudelson, 51 AD 2d 673 (1976); Duncan v. Bradford Central School District, 394 NY 2d 362 (1976).

When we receive questions about whether or not the FOIL applies, we reiterate that the FOIL applies only to agency records, and refer to section 86(3) of the FOIL which defines the term "agency." Schools and school districts are clearly "agencies" subject to FOIL.

Although I was able to locate only one advisory opinion that addresses a residency requirement (imposed by a Village): http://www.dos.state.ny.us/coog/ftext/f8054.htm, it is my opinion that the same provisions would apply to require the school district to provide access to records regardless of a persons's citizenship or residency or "qualified voter" status as indicated in the Education Law.

I hope this answers your questions and those of your attorney. As you may know, our office issues written advisory opinions on such issues. If you would like an in-depth written opinion on this issue, please let me know in writing. Thank you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
41 State Street
Albany NY 12231
(518) 474-2518
(518) 474-1927 fax
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16545

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

April 27, 2007

Mr. Robert Thomas
05-A-3102
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. Thomas:

I have received your letter and the materials attached to it. While the facts are not completely clear, I offer the following comments.

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

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-16546

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

April 27, 2007

Mr. Randall Hillyard
03-B-2933
Groveland Correctional Facility
7000 Sonyea Road, Dorm:L-1
Sonyea, NY 14556

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

Dear Mr. Hillyard:

I have received your letter as well as a copy of your April 5 request for records submitted to the City of Rochester Police Department. You have asked this office to "take whatever action may be necessary to elicit a response..."

In this regard, first, the Committee on Open Government is authorized to provide advice and guidance concerning access to government information. This office is not empowered to compel an agency to grant or deny access to records or to comply 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain

> within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chief Moore

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16517

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

April 27, 2007

Leon J. Campo
Deputy Superintendent of Schools
East Meadow School District
718 The Plain Road
Westbury, NY 11590

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

Dear Mr. Campo:

As you are aware, I have received your letter, which was prepared in your capacity as "the Freedom of Information Official for the East Meadow Union Free School District." You have sought an advisory opinion concerning a request for a copy of a document maintained by the District "that was produced by the Supreme Court of the State of New York." The document at issue "indicates that the defendant, who was a former School Board member, pleaded guilty to the crime of grand larceny in 2004." That person "resigned from the school board some time ago."

Based on the language of the Freedom of Information Law and judicial precedent, I believe that the document must be disclosed. In this regard, I offer the following comments.

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

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

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

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

Based on the provisions quoted above, although a school district is an "agency", 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.

Second, assuming that they have not been sealed, it has been determined by the Court of Appeals, the state's highest court, 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 District constitute agency records that fall within the coverage of the Freedom of Information Law.

Third, when records 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.

Lastly, court records reflective of the conviction of an adult have long been available from the courts. Moreover, pursuant to Chapter 62 of the laws of 2003, the Office of Court Administration discloses records indicating an individual's history of convictions throughout the state upon payment of a fee.

In sum, I believe that the record in question must be disclosed by the District.

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-16548

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

May 1, 2007

Mr. Jeff Noble
01-A-5507
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. Noble:

I have received your letter concerning the "deadline" for 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-16549

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May 3, 2007

Mr. Ken Weatherly
05-A-4759
Hudson Correctional Facility
P.O. Box 576
Hudson, NY 12534

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

Dear Mr. Weatherly:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request for your pre-sentence report to the Orange County Supreme Court and were denied access.

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. Other statutes may deal with access to court records. However, 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.

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 has been 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

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May 4, 2007

Mr. William Paul Rezey II
05-A-6145
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442-4580

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

Dear Mr. Rezey:

I have received your letter in which you seek guidance on how to proceed with an appeal when receiving no response to a Freedom of Information Law request.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mr. Jeff Buell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16551

41 State Street, Albany, New York 12231
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May 4, 2007

Mr. Patrice Smith
02-A-6058
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. Smith:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request to the Kings County Criminal Court that has not been answered. You asked to whom you may appeal.

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.

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 4, 2007

Mr. John O'Brien
Reporter
The Post-Standard
Clinton Square
P.O. Box 4915
Syracuse, NY 13221-4915

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

Dear Mr. O'Brien:

I have received your letter in which you sought an advisory opinion concerning a denial of a request made pursuant to the Freedom of Information Law for records maintained by the Division of State Police (hereafter "the State Police").

The request involved "copies of all state police reports related to the Sept. 23, 2006, homicide-suicide of Wendy and James Dirk at their home..." in Cicero, NY. You wrote that State Police investigators initially indicated that "they didn't want to disclose the records because they didn't want to become embroiled in a dispute between two families involved in the case, and that the records access officer later denied the request in writing on the ground that disclosure would result in an "unwarranted invasion of personal privacy of those concerned." In response to your appeal of the denial, the State Police appeals officer concurred with the response by the records access officer and added that:

> "...these are records which were compiled for law enforcement purposes and which, if disclosed, would reveal non-routine criminal investigative techniques and procedures. Portions are also exempt by state statute, specifically, the County Law §677(3)(b)."

From my perspective, based on the language of the Freedom of Information Law and its judicial interpretation, particularly by the Court of Appeals, the state's highest court, the denial of your request in its entirety is inconsistent with law. In this regard, I offer the following comments.

First, relevant to the analysis in my view is the reality that the event to which the records relate generated substantial public interest and was the subject of numerous accounts and commentaries by the news media and others. In short, the records sought pertain to an incident, which is frequently described as involving domestic violence, that was determined to have resulted in a murder and a suicide, and that is well known in the Syracuse area and beyond. In general, when more information pertaining to an incident becomes known to the public, an agency's ability to deny access to records relating to the incident diminishes.

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

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

In the context of your request, the State Police have 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 State Police for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In sum, I believe that the bases for the denial of your appeal do not justify a blanket denial of the request. I note that New York City Department of Investigation was criticized in Lewis v. Giuliani (Supreme Court, New York County, NYLJ, May 1, 1997) for a denial of access also based merely on a reiteration of the statutory language of an exception, stating that "DOI may not engage in mantra-like invocation of the personal privacy exemption in an effort to 'have carte blanche to withhold any information it pleases'". In this and other responses by the State Police, the privacy and the "law enforcement purposes" exceptions have been used in much the same manner.

The exception cited by both the records access and appeals officers pertains to the authority to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. The individuals primarily involved in the incident are both deceased, one via homicide and other via suicide. Based on the direction offered by the Court of Appeals, the specific content of records and the effects of disclosure are the key factors in determining whether or the extent to which the exception concerning privacy might properly be asserted.

The Court of Appeals 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 consideration of the details that have already been published and made widely known to the public, it seems unlikely that records or portions of records pertaining directly to either of the deceased persons would, if disclosed, constitute an unwarranted invasion of personal privacy. It is possible, however, that some records falling within the scope of your request may identify others, such as family members or persons interviewed by the State Police. In those instances, depending on their contents, i.e., if they are indeed intimate, those records or portions thereof, such as personally identifying details, might properly be redacted prior to disclosure of the remainder of the records.

The other exception upon which the State Police relied involves records compiled for law enforcement purposes which, if disclosed, would "reveal non-routine criminal investigative techniques and procedures" pursuant to §87(2)(e)(iv). As I understand the facts attending the event, the investigation ended quickly, for it was determined quickly that there was a homicide and suicide. While the event might not have been characterized as "routine", it seems unlikely that the entirety of the records compiled or acquired by the State Police falling within the scope of §87(2)(e) would involve "non-routine" criminal investigative techniques or procedures.

The leading decision focusing on §87(2)(e)(iv), Fink v. Lefkowitz, involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to

> significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the investigative techniques or procedures employed in relation to the incident and the ensuing investigation could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described in Fink. In short, to the extent that disclosure would enable a potential lawbreaker to tailor his or her activities in a manner that would enable that person or others to evade effective law enforcement or detection, the records could, in my opinion, justifiably be withheld. If that would not be so, however, I do not believe that the provision upon which the State Police relied to deny access would apply.

Lastly, the denial by the State Police also refers to §677(3)(b) of the County Law. That provision pertains to records, such as autopsy reports, prepared by a coroner or medical examiner and states that they are accessible as of right only to a district attorney and the next of kin of the deceased. While I agree that those records are specifically exempted from disclosure by statute [see Freedom of Information Law, §87(2)(a)], since your request involved "state police reports", I do not believe that the records subject to that statute are included in your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William J. Callahan
Captain Laurie M. Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16553

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May 4, 2007

Mr. Ronald Alston
00-A-3985
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. Alston:

I have received your letter in which you raised a variety of questions concerning the Freedom of Information Law and the functions of this office.

In this regard, enclosed is a copy of "Your Right to Know", which includes a description of the duties of the Committee on Open Government. In general, the Committee provides advice and opinions concerning the Freedom of Information Law. While those opinions are not binding, it is my hope that they are educational and persuasive.

You referred to a form "that is in compliance with 5 USC §552." That citation pertains to the federal Freedom of Information Law, which applies only to federal agencies. The applicable statute relating to your request is the New York Freedom of Information Law. It is noted that the enclosed brochure includes a sample letter of request.

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 acknowledgment 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, which

> shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Finally, 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
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16554

41 State Street, Albany, New York 12231
(518) 474-2518
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May 7, 2007

E-MAIL

TO: [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. [redacted]

I have received your letter and hope that you will accept my apologies for the delay in response. You referred to the placement of your son following the issuance of a PINS petition in a residential treatment facility and the rejection of "a foil request for medical records and any records pertaining to [your] son while in placement."

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

Relevant to the matter is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §501-c of the Executive Law. That provision was initially enacted to pertain to the Division for Youth, but it now applies to its successor that performs functions that had been carried out by that agency, the Office of Children and Family Services. Section 501-c involves files pertaining to youths maintained hy the Division for Youth (or its successor) and states that those records are confidential and may be disclosed only in specified circumstances. That provision states in relevant part that:

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

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

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

I note that the Governor recently signed legislation known as "Jonathan's law", which was prepared in response to the death of an autistic child at a state facility. In brief, it is my understanding that the new law will require that records pertaining to allegations of patient abuse or mistreatment at a mental health facility must be made available to the parents of a child housed at such a facility. Although it is unclear whether that law may be pertinent to your situation, attached is a copy of the legislation.

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

RJF:tt

Enc. - A. 6846-A

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16555

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(518) 474-2518
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May 7, 2007

Ms. Doris F. Ulman
Village Attorney
Village of Grand View-on-Hudson
134 Camp Hill Road
Pomona, NY 10970

The staff of the Committee 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. Ulman:

We are in receipt of your inquiry concerning application of the Freedom of Information Law to requests made by Cablevision to the Village of Grand View-On-Hudson for a statement filed by Verizon to substantiate its fourth quarter 2006 franchise fee paid to the Village. You submitted a copy of a communication from Verizon requesting that the Village maintain this record confidentially under §§87(2)(d) and 89(5) of the Freedom of Information Law and asked whether the Village should release the document to Cablevision. Subsequent to your request, this office received similar requests for advisory opinions from other municipalities, as well as McGuire Woods, counsel to Verizon. In fairness to all parties, and in an effort to address all of the issues raised, we offer the following comments.

First, notwithstanding the following comments with respect to §87(2)(d), commonly known as "the trade secret"exception, as a possible basis for denial of access, we believe that a municipality has the authority to disclose the requested statement.

In our opinion, even when a local government may deny access to such a statement, the Freedom of Information Law would not require the municipality to withhold that record, for that statute is permissive. With one exception, an agency has the discretionary authority to disclose records, even when records or portions thereof fall within one or more of the grounds for denial of access [see Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562 (1986)]. The only instance in which an agency would not have the authority to disclose would involve a situation in which a statute forbids disclosure. We know of no statute that would forbid disclosure in this instance.

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

that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. Section 87(2)(d) authorizes an agency to withhold records or portions thereof that:

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

Therefore, the question involves the extent to which disclosure would cause substantial injury to Verizon's competitive position in the cable television market.

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 the decision cited by Verizon's attorneys in which the Court of Appeals, for the first time, considered the phrase "substantial competitive injury." In Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, [87 NY2d 410 (1995)], the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of the 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).

In Verizon's words, the report requested from the Village shows, "for each of the three months of the fourth quarter of 2006, Verizon's revenues for monthly recurring cable service charges, usage-based charges, and certain other miscellaneous revenues. Also shown, as offsets, are sales taxes collected, if any, and any uncollectibles and deferrals." The breakdown of the information in this report shows how Verizon's customer base in the Village changed over the course of three months, the mix of services that it sold, and the revenues it derived from those sales. In sum, this report contains geographically limited sales information, apparently not available through any other source.

In further support of its opinion that disclosure of such material would cause substantial injury to Verizon's competitive position, Verizon relies on federal case law, cases from other state jurisdictions, and a New York case, NYS Electric & Gas Corp. v. NYS Energy Planning Board, 221 AD2d 121, 645 NYS2d 145 (3d Dept 1996), in which the Appellate Division, Third Department, upheld the agency's denial of access to records. The court in NYS Electric & Gas determined that disclosure of production and efficiency data could result in the ability to infer essential aspects of a commercial entity's production costs fundamental to projecting future costs. In an environment where the potential for competition is evident, release of such data could cause competitive damage, the court ruled, upholding the denial of access. In our opinion, the ability to predict future costs of a competitor, albeit advantageous, is not analogous to possible predictions or advantages gained from information pertaining to recent sales in the cable television industry.

We note a recent decision, Markowitz v. Serio, New York County Supreme Court, April 5, 2007, in which the court determined that the NYS Insurance Department could deny access to reports containing an insurer's market share and growth trend data by ZIP code, that was not otherwise available to the insurer's competitors. Information submitted in the reports included lists of insurance policies issued, received, not renewed or cancelled within each zip code as well as any applications for which the company refused to issue a policy. Disclosure, the court found, could permit competitors to target areas where the reporting insurer was most vulnerable while avoiding areas where the insurer was strongest, thus causing substantial injury to the competitive position of the reporting insurer. Although at first glance this ruling would seem to support Verizon's request for non-disclosure, we believe that the markets involved in the two situations can be distinguished, and that the decision may be of little significance here.

The cable television industry is rapidly changing, and aggressive marketing tactics are employed not only within the cable television market, but also in relation to satellite and perhaps internet service providers. On a daily basis, the public is subject to radio, television, internet and direct mail advertising, which likely has varying degrees of impact and success. Unlike insurance plans, it is our understanding that cable television subscriptions may be purchased on a month-to-month basis, coupled with incentives offered to switch providers at no cost and/or perhaps with credits or rebates. The opportunity to take advantage of an offer is not prohibited by annual or even biannual subscription contracts, and a flexibility exists in that area of commerce that is not available from insurance carriers. The ongoing offers, made on an almost continual basis, in our opinion, indicates the lack of harm that may result from providers ascertaining actual sales. That being so, Verizon in our view has not offered clearly persuasive evidence that disclosure would result in substantial competitive harm to itself or any one particular provider.

Very simply, because we are not experts concerning the cable television market or the effects of disclosing the records at issue, we cannot advise either that the records must be disclosed, or that a municipality could meet the burden of proving that disclosure would indeed cause "substantial injury" to Verizon's competitive position.

Third, we note that the provisions, time frames, and appeal mechanisms available to commercial entities that submit records to state agencies pursuant to §89(5) of the Freedom of Information Law do not apply when those entities submit records to municipalities, such as villages or towns. Section 89(5)(a)(1) specifically pertains to records submitted "to any state agency". This is not to suggest that a commercial entity could not request that a municipality take into consideration the entity's views when determining whether to disclose, but rather that the obligation to deny access to records, and the time frames and appeal mechanisms set forth in §89(5) do not apply to an entity submitting records to a municipality. In short, §89(5) provides standing to a commercial entity to attempt to preclude a state agency from disclosing. There is no similar vehicle that may be cited enabling such an entity to forbid a municipality from disclosing.

We are mindful of the decision rendered in 2005, Verizon New York, Inc. v. Bradbury [803 NYS2d 409 (2005)] in which Verizon initiated a proceeding pursuant to Article 78 to prohibit the Village of Rye Brook from disclosing documents that the Village sought to make available to the public. The court did not explain in any detail the means by which Verizon had standing to bring suit. Further, the court cited §89(5), stating that:

> "Given the public interest in disclosure, the courts place the burden of proof on the party seeking to invoke the exemptions to prove entitlement thereto (Public Officers Law §89[5][e]..." (Id., 415).

While it is true that a commercial enterprise may have the burden of defending a denial of access at the conclusion of the procedure described in §89(5), it is emphasized that §89(5) is applicable only with respect to records submitted to state agencies; no similar procedure exists in the case of records submitted to local government agencies. In Verizon, there was no denial of access. While the issue of standing was apparently not considered by the court in Verizon, since §89(5) does not apply when records are submitted to local government agencies, it is questionable in our opinion whether the matter would have gone forward had the issue of standing been raised.

Based on the foregoing, "except as provided in subdivision five" of §89,it is reiterated that the Freedom of Information Law is permissive, and that the Court of Appeals and other courts have so held. Even when agencies may have the ability to deny access to records, they are not required to do so and may assert their discretionary authority to disclose.

Lastly, as you may be aware, the Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available. In Washington Post v. Insurance Department [61 NY2d 557 (1984)], the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court of Appeals reversed a finding that the documents were not "records" subject to the Freedom of Information Law, thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Moreover, it was determined that:

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

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: Marshal Beil
Kevin Crawford
Ellen Schaffer
Ann Leber
Matthew Jacobowski

FOIL-AO-16556

From: Mercer, Janet (DOS)
Sent: Tuesday, May 08, 2007 10:32 AM
To: 'john barbelet'
Subject: RE: foil 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see (89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with (89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Janet M. Mercer
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - Fax
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16557

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May 9, 2007

E-MAIL

TO: James Whalen

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. Whalen:

We are in receipt of your inquiry: "are 911 calls included in the NYS Foil Law?" In response, and because it is not clear whether your request concerns records of 911 calls made in New York City, we offer the following comments in an effort to address all possible scenarios.

Whether a tape recording or transcript of a 911 call must be disclosed may involve location and content. 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 (j) of the Law.

Although there is no mention in the Freedom of Information Law of "911 calls", relevant is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308(4) of the County Law, which states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

Based on the foregoing, "records...of calls" means either a recording or a transcript of the communication between a person making a 911 emergency call, and the employee of the municipality who receives the call. Records of that nature are, in our view, exempted from disclosure by statute.

We note although the term "municipality" most often would include a town, city or village, that is not so in this context. Section 301 of the County Law contains a series of definitions for application in Article 6, and subdivision (1) defines "municipality" to mean "any county except a county wholly contained within a city and any city having a population of one million or more persons." Further, it is our understanding that E911 systems are maintained by counties only, except in New York City. Accordingly, the E911 system(s) operating in New York City would be the only E911 system not subject to the confidentiality provisions of County Law §308.

With respect to records of 911 calls in New York City, most pertinent is §87(2)(b), which states that an agency may withhold records insofar as disclosure would constitute an "unwarranted invasion of personal privacy." Clearly, if you sought a record pertaining to a call you made to 911, you could not invade your own privacy. However, it is possible that disclosure of a tape recording or transcript of a 911 call made by a person other than yourself, or perhaps related records, might result in an unwarranted invasion of that person's privacy. To that extent, records may properly be withheld.

Lastly, even if §308 of the County Law is applicable, we do not believe that §308(4) can be construed to mean records regarding or *relating* to a 911 call. If that were so, innumerable police and fire reports, including arrest reports and police blotter entries, would be exempt from disclosure in their entirety.

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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May 9, 2007

E-MAIL

TO: Pamela Greenbaum

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. Greenbaum:

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 school district for a "list of the FOIL requests" of your school district. Specifically, you asked "[d]o the names of the persons that FOILed the information have to be redacted?" 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 (j) of the Law. If the record you have requested exists, if a list of the FOIL requests has already been compiled, we believe that it should be made available to you, perhaps in part. Similarly, if your request involved copies of all FOIL requests made in the past six months, we believe the school district would be required to provide access to copies, at least in part.

In our view, there are only two instances in which the records at issue may be withheld in part. The first would involve situations in which, due to the nature of their contents, disclosure would be prohibited by state or federal law, and the second would involve situations in which disclosure would constitute an "unwarranted invasion of personal privacy".

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." Here, the statute that may serve as a basis for denying access in part 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' or parents' names or other aspects of records that would make a student's identity "easily traceable" must in our view be withheld from the public in order to comply with federal law.

Even if FERPA had not been enacted, we believe that personally identifiable information relating to students could be withheld under §87(2)(b) on the ground that disclosure would result in an unwarranted invasion of students' privacy.

Further, and for purposes of illustration, 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 school board, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, Nay 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

Lastly, the Freedom of Information Law is permissive; even in situations in which an agency *may* withhold records or portions of records, it is not obliged to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. Therefore, even if the school district could withhold the records

on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see §87(2)(b)], it would not be required to do so.

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-16559

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May 9, 2007

Mr. Corey Jackson
94-A-2928
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. Jackson:

I have received your letter and the attached correspondence. You referred to a request to the courts for certain documentation, but upon review of your Freedom of Information Law request attached, we note that the request is addressed to the Bronx District Attorney's Office.

In this regard, we 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."

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

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

Based on the foregoing, the courts are not subject to the Freedom of Information Law, but records maintained by a district attorneys office are subject to that statute.

With respect to the records requested, enclosed are copies of advisory opinions previously rendered that address the issues that you raised.

I hope that the enclosed opinions will be useful to you. Should questions arise, please feel free to contact this office.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Encs. (FOIL-AOs-9369, 12702, 12579,15572)

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16560

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May 9, 2007

Hon. Thomas G. Clingan
Albany County Clerk
32 North Russell Road
Albany, NY 12296-1324

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

Dear Mr. Clingan:

As you are aware, I have received your letter in which you sought an advisory opinion concerning a situation in which DataTrace, "a land records company", has expressed an interest in purchasing "copies of [y]our land records in electronic form." You specified that DataTrace is not asking that "extensive programming" be carried out, but rather that it is merely seeking copies of existing records. You indicated that the volume of the records is substantial, involving "close to 5 million images of deeds and mortgages, plus the indices to said records."

You have asked whether a request for the records made pursuant to the Freedom of Information Law must be honored, even though a small number among them may contain "personal identifying information (e.g., social security numbers)." You added that there are several legislative proposals that may address the treatment of intimate personal information appearing in the records, but that, to date, you know of none that have been approved, and that it is your belief that you have no authority under existing law "to redact any such public record."

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law that limits the number or volume of records that may be requested. I note that there is precedent sustaining the propriety of a denial of a request for millions of paper records, which, if granted, "would bring in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already heavily burdened bureaucracy" (Fisher & Fisher v. Davison, Supreme Court, New York County, October 6, 1988). Your remarks suggest, however, that the records at issue in this instance are maintained electronically, that no time consuming or onerous programming would be necessary to satisfy the request, and that, therefore, the burden of transferring the records from one electronic storage medium to another would not significantly interfere with the work of your office. If that is so, the volume of the material requested would, in my opinion, be of no relevance. I point out, too, that

requests, particularly by news media organizations, involving millions of items of data have been made and honored.

Second, it is emphasized that the Freedom of Information Law is permissive. Although an agency may withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals has held that the agency is not obliged to do so and may choose to disclose. As stated in that unanimous decision: "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

There is judicial precedent specifically indicating 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 or prohibited from disclosing social security numbers. Specifically, it was found that:

> "The injunctive relief granted by the IAS Court was based upon Public Officers Law §92 (1), part of this State's Personal Privacy Protection Law. That law by its own terms excepts the judiciary, the State Legislature, and 'any unit of local government' from its purview. Consequently, the relief granted against the respondents was improper" (id., 299).

I 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 currently required to do so.

In short, based on my understanding of the situation that you described, it appears that a county clerk is required to make the electronic records at issue available to DataTrace or to any person.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16561

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

May 9, 2007

Mr. Matthew Williams
05-A-0135
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. Williams:

I have received your letter in which you complained that you have requested records from the New York City Police Department, but that it has not responded to your requests.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

The person designated to determine appeals by the New York City Police Department is Jonathan David, Records Access Appeals Officer.

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-16562

From: Freeman, Robert (DOS)
Sent: Friday, May 11, 2007 8:29 AM
To: ABurkhart@dca.nyc.gov

Dear Mr. Burkhart:

I have received your note in which you expressed confusion concerning an opinion previously rendered. In short, internal governmental communications may be withheld to the extent that they consist of advice, opinions, recommendations and the like. However, other portions of those records that consist of statistical or factual information, instructions to staff that affect the public or agency policies must ordinarily be disclosed, even if the documentation does not relate to anything that is final.

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
(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16563

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

May 11, 2007

Mr. Glenn Kessler
87-A-7059
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. Kessler:

I have received your letter and 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, although the Freedom of Information Law applies to records maintained by a district attorney or the office of a county sheriff, for example, it does not apply to the Legal Aid Society, a private attorney, or a court.

Second, the Freedom of Information Law pertains to existing records maintained by an agency. If records have been discarded and no longer exist, that statute is no longer applicable.

Finally, when a request is made for agency 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance. If additional questions arise, you may contact this office.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16304

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

May 11, 2007

E-MAIL

TO: Judy Bayer

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. Bayer:

We are in receipt of your request for an advisory opinion concerning a town's responsibility to provide comprehensive information about costs associated with zoning board applications on its website.

In this regard, please be advised that while the Freedom of Information Law would require a town to disclose guidelines or provisions pertaining to such costs in response to a written request, there is no provision of law that requires an agency to post any record on a website.

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-1656

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

May 11, 2007

E-MAIL

TO: Mike Trzeciak

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. Trzeciak:

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 Glenville for information pertaining to a contractor hired by the Town. Specifically, you requested access to records reflecting an assessment firm's insurance or bonding company, its New York State appraisal license, federal employer identification number (FEIN), federal tax identification number, a copy of the contract between the assessment firm and the Town, and records identifying individuals who worked on the revaluation.

In response, the Town provided access to copies of the contract, and identified those who worked on the revaluation project. However, the Town informed you that it "has no record" of the company's insurance or bonding agent, tax identification numbers, or New York state appraisal license number, despite the requirement indicated on all Town contracts, for every contractor to provide a certificate of insurance to the Town. In this regard, we offer the following comments.

First, there are certain records maintained by a contractor that, in our opinion are records that fall within the framework of the Freedom of Information Law. That statute pertains to agency records, such as those of a Town, and §86(4) defines the term "record" expansively to mean:

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

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)].

Therefore, insofar as a record maintained by a contractor is "kept, held, filed, produced or reproduced...*for* an agency", such as the Town, i.e., for the purpose of proving to the Town that it is insured, we believe that it would constitute an "agency record" that falls within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform the contractor 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. Further, this is not to suggest that a professional license obtained during the normal course of business, perhaps when the firm was first established, would be record "kept...for an agency." In that case, we believe that unless the Town requires a contractor to provide a copy of such a license, confirmation of a professional license would be available only from the licensing agency, such as the Department of State.

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. We know of no provision of law that would permit the Town to refuse to disclose a contractor's certificate of insurance and/or a contractor's professional license.

Third, you have sought guidance with respect to the Town's responsibility to acquire a record that, for some reason, is not in its possession. From our perspective, several provisions of law are pertinent to the matter.

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. Typically, the town clerk is designated by a town board as records access officer. As part of that coordination, we believe that agency officials, employees contractors and consultants are required to cooperate with the records access officer in an effort to comply with these official responsibilities.

While others may have physical possession of town records, it is noted that §30(1) of the Town Law indicates that the town clerk is the legal custodian of all town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

Accordingly, when there is a requirement that a certain record be maintained for a specific period of time and that time period has not yet elapsed, it is our opinion that the town clerk has a responsibility to make a reasonable effort to obtain the record from the Town officials, employees or contractor in order to determine rights of access.

Finally, as we discussed, if the requested records do not exist, the only option available under the Freedom of Information Law involves a request that the Town certify that no such records exist. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification. If the Town has already indicated in writing that no such records exist, that would satisfy the requirement.

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-16566

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

May 11, 2007

E-MAIL

TO: Betsy 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 facts presented in your correspondence, unless otherwise indicated.

Dear Ms. Combier:

I have received your correspondence concerning a request for records maintained by the New York City Department of Education. As promised, I spoke with Ms. Susan Holtzman, a Department attorney, in an effort to ascertain the rationale for seeking to assess a fee of $36,000 to obtain the records sought.

One of the areas of commentary offered in the opinion addressed to you in October of last year involved the requirement that an applicant must "reasonably describe" the records sought. Based on my conversation with Ms. Holtzman, the email communications that you requested pertain to a period of several years and would involve a search of thousands of communications in order to locate those falling within the scope of your request. If that is so, and if the records sought cannot be located or retrieved with reasonable effort based on the Department's existing retrieval mechanisms, the request would not, according to the state's highest court, reasonably describe the records [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

From my perspective, an agency may choose to exceed its responsibilities imposed by law, and I would surmise that the figure of $36,000 relates to the possibility that the Department could engage in a search for the records at issue, even though it is not required to do so. In that kind of situation, when an agency exceeds its legal responsibilities, I do not believe that the provisions concerning fees appearing in the Freedom of Information Law would apply, and that an agency may seek to charge what, in essence, the market will bear.

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

RJF:tt

cc: Susan Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16367

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

May 11, 2007

Ms. Lynda B. LaMountain
[redacted]

The staff of the Committee on 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. LaMountain:

I have received your correspondence, as well as a variety of material related to it, and hope that you will accept my apologies for the delay in response. In brief, you referred to a series of difficulties in obtaining information from the Town of Peru. Based on a review of the documentation, I offer the following comments.

First, the title of the Freedom of Information Law may be somewhat misleading, for that statute does not require the disclosure of information *per se*; rather, it pertains to existing records maintained by or for a government agency. That being so, while agency officials may choose to provide information by answering questions or offering explanations, they are not required to do so. Similarly, §89(3) states in part that an agency need not create a record in response to a request.

Second, in terms of procedure, the regulations promulgated by the Committee on Open Government require that the governing body of a municipality, i.e., a town board, must designate one or more persons as "records access officer" (21 NYCRR §1401.2). The records access officer has the duty of coordinating the agency's response to requests, and requests should generally be made to that person. In most towns, the clerk is the records access officer.

Third, insofar as a request involves existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. As I understand your requests, they deal with the assessment of real property and records pertaining to zoning in relation to property that you own. If that is so, it is unlikely that any of the grounds for denial of access would apply.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Lastly, it appears that you raised questions at meetings of the Town Board or perhaps the Zoning Board of Appeals. Here I point out that 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, such as town boards. 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, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. In short, 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, ask questions and express opinions about the conduct of public business before or after meetings. 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 or to answer questions during meetings. On the other hand, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16568

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

May 11, 2007

Lynn Marsh, President
Advocates for Cherry Valley
P.O. Box 147
Cherry Valley, NY 13320

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

Dear Ms. Marsh:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Cherry Valley Town Clerk. Please accept my apologies for the delay in responding.

Based on your submissions, you requested copies of all comments received by the Town with respect to "the proposed local law on wind energy conversion systems (turbines)", including letters, emails and petitions. The response was "less than satisfactory", and you indicated that you have reason to believe that all records were not provided in response to your request, despite written assurance from the Town Clerk that she contacted all Town Board members and the co-chairmen of the Planning Commission to confirm that "there are no further correspondences." Specifically, you indicated that a comparison of similar records regarding this local law maintained by the local library evidence a lack of comprehensiveness in the Town's response to your request. Further, you contended that the records were not redacted consistently. Based on my recollection of our telephone conversation, the nature of the temporary office space may be a contributing factor to the confusion over what has not yet been produced, despite your efforts to compare records during designated business hours.

Nevertheless, the following comments are offered in an effort to lend guidance to you and the Town with respect to these issues.

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 our view, when those persons communicate with one another in writing in their capacities as Town officials, or with others, such as developers, any such communications constitute agency records that fall within the

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, 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

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 your question about the redaction of identifying information from some correspondence but not others, we note that 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 or the comment, i.e., whether or not it has merit and irrespective of the identity of author. The identity of the person who made the comment is often irrelevant to the work of the agency, and in most circumstances, we believe that identifying details may be deleted. When the Town releases records of comments submitted on a particular issue, in our opinion, it should make a determination whether to release individually identifying information prior to the release of such records, and remain consistent in its efforts. In our opinion, if a town were to redact names of some persons and not others, it would in effect be waiving it's authority to deny access and would not be able to sustain challenge to such arbitrary non-disclosure.

Further, when a person identifies him/herself at a public meeting to offer written and/or verbal comments, we see no basis for later redacting identifying information from his/her correspondence. The identity of a person made known at a public meeting is, in our opinion, public information.

Finally, you indicated that the Town Supervisor has not yet responded to your request to certify that there are no additional records that are responsive to your request. As previously advised, when an agency such as the Town indicates that it does not maintain any further records or cannot find a requested 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." Again, it is our opinion that this provision requires the

Supervisor or other Town official to certify, upon your request, that no additional records that are responsive to your request exist, or that any such records cannot be located after having made a diligent search.

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-16569

From: Freeman, Robert (DOS)
Sent: Monday, May 14, 2007 8:01 AM
To: Connie Sowards
Subject: RE: question

Good morning - -

While I understand your reluctance, the fact that documents are incomplete or that they relate to an incomplete work or project is not determinative of rights of access. The records sought are intra-agency materials subject to §87(2)(g) of the FOIL. Based on that provision, those portions of the records consisting of advice, opinion, recommendations and the like that appear in narrative form may be withheld. However, the same provision requires that "statistical or factual tabulations or data" contained within those materials must be disclosed. Further, the courts have held that numbers consisting of statistical tabulations that are available, even though they may be estimates, projections, subject to modification or do not reflect "objective reality." In short, I believe that those portions of the records at issue that consist of statistical or factual information are accessible.

It has been suggested in similar situations that, if disclosed, the records might be marked as "draft" or "preliminary", for example, so that the recipient is made aware that the contents are subject to change.

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
(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-16570

From: Freeman, Robert (DOS)
Sent: Monday, May 14, 2007 3:55 PM
To: [redacted]
Subject:

Dear Mr. Liebrand:

Attached is an advisory opinion which I believe indicates principles relevant to your inquiry. In short, insofar as disclosure would make a student's identity easily traceable, the school district may deny access. However, if names or other identifying details are redacted in a manner that precludes the identification of a particular student, the remainder of a record would likely be accessible.

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

FOIL-AO-16571

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

May 14, 2007

Mr. Norman H. Gross
Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC
5010 Campuswood Drive
East Syracuse, NY 13057

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

Dear Mr. Gross:

As you are aware, I have received your letter, and I hope that you will accept my apologies for the delay in response.

You wrote that several school districts that you represent have received requests pursuant to the Freedom of Information Law for "legal bills" to be transmitted "in e-mail form." However, portions of those records may include information that is subject to the attorney-client privilege or the provisions of the Family Educational Rights and Privacy Act and, therefore, are exempted from disclosure [see Freedom of Information Law, §87(2)(a)]. That being so, you indicated that: "In order to provide this information, the districts must make paper copies of these bills in order to redact information that is made privileged or confidential...before scanning redacted information for e-mail purposes."

You have requested an advisory opinion confirming the advice offered verbally by Ms. Jobin-Davis of this office, that an agency "is entitled to charge the requestor the statutory fee of 25 cents per page for copying costs in connection with complying" with such a request.

In this regard, as you are aware, the Freedom of Information Law was recently amended, stating in relevant part that: "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..." Based on the new provision, agencies, such as school districts, are required to transmit requested records via email, when they reasonably have the ability to do so.

As I understand the situation that you described, the records at issue include information that must be disclosed, as well in some instances as information that is exempted from disclosure by statute. Further, in those instances, the only method of transmitting those portions that are accessible

to the public would involve the preparation of a photocopy, from which the appropriate redactions would be made, and then transmitting the remaining portions via mail. If that is so, and if a photocopy must first be made in order to transmit the accessible portions of a document by means of email, I believe that an agency has the authority to charge a fee for photocopying. As you are aware, §87(1)(b)(iii) authorizes an agency to charge up to twenty-five cents for a photocopy as large as nine by fourteen inches.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-16572

To: Stephen Hughes
Sent: May 16, 2007
Subject: RE: Requesting paper records in electronic format

It is our view that if an agency has the ability to scan records in order to transmit them via email and doing so will not involve any effort additional to an alternative method of responding, it is required to do so. 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. In that instance, transferring a paper record into electronic format would eliminate any need to collect and account for money owed or paid for preparing paper copies, as well as tasks that would otherwise be carried out. In addition, when a paper record is converted into a digital image, it remains available in electronic format for future use.

In sum, when an 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, in our opinion, the agency must do so to comply with the Freedom of Information Law.

I hope that I have been of assistance.

Janet M. Mercer
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - Fax
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-16572A

From: Freeman, Robert (DOS)
Sent: Wednesday, May 16, 2007 10:38 AM
To: [redacted]
Cc: AGarvar@Lynbrook.k12.ny.us
Subject: RE: Committee on Open Government F.O.I.L Sub committee annual review complete transcript

Dear Ms. Moffatt:

Please be advised that the Freedom of Information Law includes all government agency records within its coverage, such as those of a school district. If the District maintains a transcript of the meeting to which you referred, the transcript constitutes a "record" that falls within the scope of that statute [see definition of "record", §86(4)].

Also pertinent is the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). In brief, FERPA provides parents of students under the age of 18 years with rights of access to education records pertaining to their children. Therefore, if a transcript of the meeting exists, I believe that it must be made available to pursuant to FERPA.

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-16573

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

May 17, 2007

E-Mail

TO: Ms. Anna M. Tilley

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 information presented in your correspondence.

Dear Ms. Tilley:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a "private, not-for-profit agency". Specifically, you described a "local prevention council", "that receives the majority of its funds" from the New York State Office of Alcoholism and Substance Abuse Services. You questioned whether the public may gain access to survey results if the local prevention council administers a "confidential" survey. In our view, the results may be required to be made available in part, and we offer the following comments.

It appears that the entity to which you refer is a drug abuse prevention council (a "council") created by a county, city, town, village or community board, based on General Municipal Law §239-u. Specifically, "[s]uch council shall consist of not less than three nor more than seven members who shall be appointed by the local legislative body or community board ..." (GML §239-u[2]). A council is required to, among other things, develop and implement community drug abuse prevention programs; recruit, train, and utilize volunteers from the community to serve without charge in its programs; authorize persons approved by the council to contact and counsel persons within the community suspected of using narcotics and/or dangerous drugs or those persons allegedly having knowledge of such usage (GML §239-u[1][a], [b] and [e]); and to employ such clerks and other employees as it may from time to time require with the approval of the local legislative body (GML §239-u[3]). Further, "the council may, with the approval of the local legislative body, apply to the local agency designated to prepare and implement the special grants for local volunteer programs which conform to and are included within the comprehensive plan" (GML §239-u[3]).

Opinions of the State Comptroller confirm that councils are not autonomous or independent bodies. The authority to create a council denotes "the general power and control over the fiscal affairs and expenditures" of a council (Op. St. Comptroller No. 71-603). For example, the creating

affairs and expenditures" of a council (Op. St. Comptroller No. 71-603). For example, the creating municipality has the authority to fix a schedule of fees to be paid by individuals requesting a particular service (Op. St. Comptroller No. 70-369); and to control moneys raised in the private sector contributed directly to a council or to a municipality for council purposes (Op. St. Comptroller No. 71-106).

Based on the foregoing, because a local drug abuse prevention council is a creation of the General Municipal Law, it is our opinion that local drug abuse prevention councils constitute "agencies" whose records fall within the coverage of the Freedom of Information Law.

Second, with respect to your underlying substantive request regarding the accessibility of "confidential survey results", we note that access to the results would depend in large part on the format the results are presented. Without knowledge of the content of the survey, or the method in which the results might be recorded, we are unable to render a comprehensive opinion. Nevertheless we offer the following comments as guidance.

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 (j) of the Law.

Perhaps §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy" would apply to such survey results In turn, §89(2)(b) includes examples of unwarranted invasions of privacy, the first two of which make reference to medical information. Most pertinent perhaps is a decision rendered by the State's highest court, Hanig v. Department of Motor Vehicles [79 NY2d 106 (1992)], in which it was found that records containing details in the nature of medical information could be withheld, even if they were not prepared by a health care provider or involved treatment.

From our perspective, if release of the survey results would identify persons participating in a drug treatment program, for example, the council could likely deny access to the identities of such persons based on §89(2)(b). On the other hand, if the results contain nothing more than aggregate numbers of persons attending programs or requesting services, most likely disclosure would not result in an unwarranted invasion of personal privacy.

Finally, because we are not familiar with the type of survey at issue, we note that if there is a provision of state or federal law that makes certain information confidential, such provision of law may prohibit the council and/or the authorizing agency from releasing the material. However, we note that an assertion of a confidentiality that is not based on a statute is largely meaningless. Based on several 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 our view serve to enable an agency to withhold a record.

If the entity about which you write is not a drug abuse prevention council pursuant to General Municipal Law, §239-u, please advise. On behalf of the Committee on Open Government we hope this is helpful to you.

CSJ:jm

FOIL-AO-16574

From: Freeman, Robert (DOS)
Sent: Friday, May 18, 2007 9:39 AM
To: MULLEN, VICTORIA

Good morning - -

Please accept my apologies for the delay in response.

In short, FOIL includes all agency records within its coverage and defines the term "record" broadly to include any information in any physical form whatsoever that is kept, held, filed, produced or reproduced by with or for an agency. Therefore, the applications to which you referred that are filed with a municipality by a developer constitute agency records as soon as they come into the possession of the municipality. Further, based on a review of the exceptions to rights of access, I do not believe that any would apply. On the contrary, in my view, the records at issue, even though preliminary, would be accessible under FOIL.

I hope that this serves to clarify your understanding.

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

OML-AO- 4381
FOIL-AO - 16575

From: Freeman, Robert (DOS)
Sent: Friday, May 18, 2007 10:27 AM
To: [redacted]
Subject: Open Meetings/FOIL Question
Attachments: f14815.wpd

Dear Mr. Duncan:

I am unaware of any opinion focusing on the issue that you raised. However, I believe that requesting records pursuant to FOIL on the basis of information acquired during an executive session is valid and reflects an intelligent use of the law.

I would conjecture that members of the public have used FOIL in a manner that is somewhat analogous. By means of example, the courts have held that a motion for entry into executive to discuss litigation strategy must identify the case being discussed by name [see Daily Gazette v. Town Board, 444 NYS2d 44 (1981)]. Although a board could discuss its strategy relating to the litigation during a valid executive session, knowledge of the motion would enable any person to request records concerning the litigation pursuant to the FOIL. Further, once records are made available under FOIL, the recipient may do with the records as he/she sees fit (see attached opinion).

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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www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-16576

From: Freeman, Robert (DOS)
Sent: Monday, May 21, 2007 12:09 PM
To: [redacted]
Subject: exception to disclosure for security reasons

Dear Mr. Zemelis:

I have received your inquiry. In short, to the extent that records include information which if disclosed could endanger the life or safety of any person, it may deny access, irrespective of whether the records were authored by a government agency or by a person or entity outside of government.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance. If there are additional questions, please feel free to contact me.

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

FOIL-AO-16577

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

May 21, 2007

Mr. Robert Cabeza
93-A-6681
Sullivan Correctional Facility
325 Riverside Drive
Fallsburg, NY 12733-0116

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

Dear Mr. Cabeza:

I have received your letter in which you questioned the status of the Police Benevolent Association of the City of New York, Inc. under the Freedom of Information Law.

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

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

Based on the foregoing, the Freedom of Information Law generally applies to entities of state and local government. Although the entity in question may consist largely of government employees, I believe that it is a private organization. That being so, I do not believe that it is subject to or required to comply with the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16578

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

May 21, 2007

Mr. Charles Gonzalez
05-A-4404
Bare Hill Correctional Facility
Caller Box 20
181 Brand Road
Malone, NY 12953

Dear Mr. Gonzalez:

I have received your letter in which you indicated that you had not received a response to your request for records from the inmate records coordinator at your facility. You appealed to this office and asked that the records be sent to 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. The Committee is not empowered to determine appeals and cannot compel an agency to grant or deny access to records. However, I offer the following comments.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in

> writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16529

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

May 21, 2007

Mr. Herbert Lewis
#441-07-02334
AMKC C-95
18-18 Hazen Street
East Elmhurst, NY 11370

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

Dear Mr. Lewis:

I have received your letter in which you indicated that you have made numerous requests for records of the NYS Division of Parole but have 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I point out that the person designated by the Division to determine appeals is Terrence X. Tracy, Counsel to the Division whose address is 97 Central Avenue, Albany, NY 12206

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16580

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(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 22, 2007

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 facts presented in your correspondence.

Dear Mr. Bly:

I have received your latest letter and the correspondence associated with it. Please accept my apologies for the delay in response.

Once again, the matter relates to murder that occurred in Westchester County in 1952. Based on a review of the correspondence, I offer the following brief remarks.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the records of your interest no longer exist, an agency would not be required to prepare or recreate new records on your behalf. Similarly, because the law deals with existing records, although agency staff may choose to supply information in response to questions, there is no obligation to do so. For instance, in your letter of July 25 addressed to Mr. Carmody, you sought information by raising a series of questions. From my perspective, that was not a request for records, and there would have been no obligation that Mr. Carmody treat it as a request made pursuant to the Freedom of Information Law.

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

Lastly, when an agency does not maintain requested records, it is not obliged to contact a different agency to obtain records or to ascertain whether the other agency possesses the records. In short, if you believe that an agency other than the office of the District Attorney may maintain records of your interest, it is suggested that you direct a request to the records access officer at that agency.

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

FOIL-AO-16581

From: Robert J. Freeman
Sent: Tuesday, May 22, 2007
To: Mr. Bonne, Gateway Management
cc: jpace@townofpoundridge.com
Subject: Town of Pound Ridge & FOIL

Dear Mr. Bonne:

The Freedom of Information Law was amended last fall to require government agencies to accept requests and transmit requested records via email when they have the ability to do so. Based on that amendment to the law, a request made by means of email must be treated in the same manner as the traditional paper request that is delivered or sent through the US Postal Service.

In an effort to enhance compliance, a copy of this response will be sent to the Town Clerk.

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
(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16582

41 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 22, 2007

Ms. Terri McAleer
[redacted]

The staff of the Committee on 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. McAleer:

Senator Bonacic has forwarded your inquiry concerning fees charged by various county boards of elections for data files reproduced in "CD format" to this office. The Committee on Open Government, a unit of the Department of State, is authorized to provide advice and opinions concerning rights of access to government records, primarily in relation to the New York Freedom of Information Law.

Having reviewed your questions, I offer the following comments.

First, the Freedom of Information Law pertains to entities of state and local government, including county boards of elections. Boards of elections are also equally subject to provisions in the Election Law. That being so, I believe that the standards under which they establish fees for the duplication of records should be consistent.

Second, with specific respect to fees, §87(1)(b)(iii) of the Freedom of Information Law authorizes agencies to charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing other records (i.e., those that cannot be photocopied, such as the contents of databases, tape recordings, etc.), unless a different fee is prescribed by statute.

The amount of fees permitted to be charged for a computerized voter registration list was considered at length in Schultz v. New York State Board of Elections (Supreme Court, Albany County, September 7, 1995). The court determined the issue by viewing both the Freedom of Information Law and sections of the Election Law, stating that:

> 'The language of the Freedom of Information Law (Public Officers Law, sct. 87 (1)(b)(iii), which limits charges for requested public records to 'the actual cost of reproducing' [emphasis added], is

> elucidating. 'Actual cost' would reasonably seem to mean more finite, direct and less inclusive than'[indirect] cost', which is a concept as infinite and expandable as the mind of man. 'Reproducing' a record certainly does not include 'producing' a record in the first place -i.e., compiling the information from which the record is produces. The purpose and intention of the Freedom of Information Law is to further the concept of open government. For this reason charges for public records must be kept to a minimum. In a sense the information compiled by counties under election Law 5-602 and 5-604 is a part of that concept and charges for that information must be kept to a minimum so as to maximize access thereto."

Further, using the standard of "actual cost of reproduction", it was stated that:

> "Where the record is a computerized record the charge shall be limited to the cost of a diskette or other computerized tape and a reasonable amount for the salary of the employee downloading said diskette or tape during the time such diskette or tape is being downloaded."

When reproduction of a voter list involves a simple transfer of data from one storage medium to another, i.e., from a computer to one or more tapes or disks, I believe that the time and effort to do so would be minimal. If that is so, the "actual cost" would involve computer time plus the cost of a tape or CD, which, as you know, is generally inexpensive.

On the basis of the foregoing, it appears that the fees to which you referred are likely inconsistent with law.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. John J. Bonacic

FOIL-AO-16583

From: Tefft, Teshanna (DOS)
Sent: Wednesday, May 23, 2007 1:40 PM
To: [redacted]
Subject: Advisory Opinion

A request made under the Freedom of Information Law should be made to the agency's "records access officer", the person who has the duty of coordinating the agency's response to requests. The request must "reasonably describe" the record sought. Therefore, a request need not identify with specificity the record requested.

In this instance, a request might be made for records or portions of records indicating the salary accorded to the Superintendent in 2006 and 2007. I note, too, that FOIL 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, the information sought is clearly accessible to the public.

You might also review our guide, "Your Right to Know", which is available on our website and includes a sample request letter.

I hope that I have been of assistance.

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

OML-AO - 4384
FOIL-AO - 16584

From: Freeman, Robert (DOS)
Sent: Friday, May 25, 2007 12:08 PM
To: Kelly Vadney
Subject: RE: question
Attachments: O2565.wpd

Hi Kelly - -

Although the language of the Open Meetings Law indicates that an executive session may be held to discuss "matters leading to the appointment...of a particular person...", in the only judicial decision of which I am aware that dealt with filling a vacancy in an elective office, the court found that there is no basis for conducting an executive session. Attached is an expansive opinion that focuses on the issue and includes the passage from the decision indicating that an executive session was improperly held. Further, while the Freedom of Information Law states that an agency is not required to disclose name of an applicant for appointment to public employment, the position of town board member is not that of an employee. Again, because the names involve those who seek to fill a vacancy in an elective office, I believe that FOIL requires that their names be disclosed. When considering names of those who might fill the unexpired term of what otherwise would be an elective office, it is our view that disclosure would result in a permissible, not an unwarranted invasion of personal privacy.

I hope that this will be of use to you.

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-16585

41 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, 2007

Hon. Deborah Bjorkman
Town Clerk's Office
Town of Pleasant Valley
1554 Main Street
Pleasant Valley, NY 12569

The staff of the Committee on 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. Bjorkman:

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 Pleasant Valley for a copy of correspondence between the then Town Attorney and the Town Board. As you described it, the correspondence, marked "PRIVILEGED AND CONFIDENTIAL", indicates the attorney's legal advice regarding application of the Town zoning law to a particular parcel of land, namely an existing quarry. We agree with the Town Supervisor's denial of access to the record. In this regard, it is our opinion that typically, a record memorializing legal advice rendered from an attorney to his or her client is confidential, and we offer the following comments.

As you are likely 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 (j) 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, 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 client, in the context of your inquiry, in our view is the Town Board. We do not believe that any one member of the Board, 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.

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 record in question consists of an expression of opinion. If that is so, it could be withheld under §87(2)(g).

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-16586

From: Freeman, Robert (DOS)
Sent: Tuesday, May 29, 2007 3:19 PM
To: [redacted]

Dear Ms. Bonnen:

There is no central source of government information pertaining to individuals, and records about you and others might be maintained by a variety of agencies, such as federal or state agencies, cities, counties, towns, school districts, etc. If you believe that records are maintained by a federal agency, you may write to that agency's freedom of information officer. If you feel that records are maintained by an entity of government in New York, a request should be directed to the agency's "records access officer". He/she has the duty of coordinating the agency's response to requests for records. Under both state and federal law, an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records of your interest.

I note that the right to attempt to amend or correct a record exists in some but not all circumstances. Federal agencies are subject to federal Privacy Act; state agencies in New York are subject to the Personal Privacy Protection Law; school districts and many colleges and universities fall within the federal Family Educational Rights and Privacy Act. In each of those instances, those laws include provisions concerning the amendment or correction of records. Many other government agencies are not subject to those kinds of provisions.

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
(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1687

41 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 29, 2007

Howard M. Aison, Esq.
[redacted]

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

Dear Mr. Aison:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Hudson River Black River Regulating District, specifically, for "a list of the names and addresses of all permit holders who possess permits to use the Sacandaga Park Beach and Swimming Area." The District agreed to release the list to you upon receipt of "a sworn written statement that you would not use the personal information within a list of permit holders who possess permits to use the Sacandaga Park Beach and Swimming area for commercial or fundraising purposes." You questioned whether the District has the authority to require such a statement from you but not another person who made a similar request. In this instance, we believe that the District can choose from whom it requires a sworn statement. In this regard, we offer the following comments.

First, as you may know, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 (j) of the Law.

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

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not

> confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

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

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

As indicated earlier, the status of an applicant and the purposes for which a request is made are irrelevant to rights of access, and an agency cannot ordinarily inquire as to the intended use of records. Due to the language of §89(2)(b)(iii), however, rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Department, 73 NY2d 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 assurance that a list of names and addresses will not be used for commercial or fund-raising purposes. In that decision, it was stated that:

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

In addition, it was held that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a

> certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgement for that of the respondents" (id.).

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses. However, when a request is made for a list of names and addresses, there is no requirement that an agency must seek written reassurance prior to disclosure. In situations where the agency has reason to believe that the request is not made for a business or commercial purpose, it is likely the agency would not require 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: Glen A. LaFave
William L. Busler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16588

41 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 29, 2007

Mr. James Dorsey
06-A-2454
Eastern Correctional Facility
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. Dorsey:

I have received your letter concerning difficulty relating to a request made under the Freedom of Information Law.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

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: Pilar McDermott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL - AO - 16589

41 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 29, 2007

Mr. Randolph Scott
84-B-0381
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Dear Mr. Scott:

Your request of May 21 addressed to the Syracuse Regional office of the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinion concerning the New York Freedom of Information Law. Based on review of your request, I offer the following comments.

First, you referred to both the federal Freedom of Information and Privacy Acts, which apply only to federal agencies. Access to records of entities and local government in New York are governed by the New York Freedom of Information Law.

Second, under that law, requests should be made to "records access officer" at the agency or agencies that would likely have possession of the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. In consideration of the facts that you presented, much of the information of your interest would likely be maintained by the City of Syracuse Police Department. If that is so, a request should be directed to the City's records access officer. Since the autopsy would have been performed by the Onondaga County Coroner, it is likely that other records of your interest would be maintained by the County and that a request might be made to its records access officer.

Third, in your letter, you sought information by asking questions (i.e., who was the chief medical examiner..."). Here I point out that the Freedom of Information Law pertains to existing records and does not require agency officials to answer questions. In the future, it is recommended that you request records (i.e., the record identifying the person who performed the autopsy).

Lastly, although the federal Freedom of Information Act contains provisions pertaining to fee waivers, there is no such provision in the New York Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16590

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

May 29, 2007

Mr. Paul Roach
98-A-4346
Attica Correctional Facility
Box 149
Attica, NY 14011

Dear Mr. Roach:

I have received your letter concerning an unanswered appeal following a denial of access to records maintained by the office of the Inspector General at the Department of Correctional Services.

In this regard, first, having reviewed our files of appeals, I do not believe that this office received an appeal or other materials relating to your request. As you suggested, §89(4)(a) of the Freedom of Information Law requires that an agency must determine an appeal within ten business days of the receipt of the appeal. While I am not recommending that you do so, you may consider the appeal to have been denied if more than ten days have elapsed since its receipt by the Department and, therefore, may initiate a judicial proceeding seeking review of the denial.

With respect to access to the records, without knowledge of their contents or the effects of disclosure, I cannot conjecture as to the propriety of the denial of your request. I note, however, 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 (j) of the Law. Often several of the grounds for denial may be pertinent in determining whether or the extent to which records maintained or prepared by inspectors general must be disclosed, or conversely, may be withheld.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-16591

From: Freeman, Robert (DOS)
Sent: Wednesday, May 30, 2007 4:52 PM
To: davisa@rochester.rr.com
Subject: FOIL of your stenopad

I have received your inquiry concerning rights of access to the notes that you take that serve as the basis for the preparation of minutes of Town Board meetings.

There is in fact a judicial decision dealing with the issue, Warder v. Board of Regents, 410 NYS2d 742 (1978). In brief, the court found that the notes constituted "records" that fell within the coverage of the Freedom of Information Law and that they were "intra-agency materials". Insofar as those materials reflect opinions or advice, for example, they may be withheld. However, those portions consisting of statistical or factual information generally must be disclosed. The court reviewed the notes and determined that they consisted of a factual rendition of events occurring at open meetings and, therefore, were accessible to the public.

I point out that if your notes are in shorthand or unreadable to anyone but yourself, you may be obliged to disclose them, but there would be no obligation to explain or "translate" their contents.

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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16592

41 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 30, 2007

E-MAIL

TO: Luba Katz

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Katz:

I have received your letter concerning your efforts in obtaining information from the Bureau of Comparative Education at the State Education Department. In consideration of your remarks, I offer the following comments.

First, the primary function of the Committee on Open Government involves offering advice and opinions pertaining to the Freedom of Information Law. That statute enables any member of the public to request and, in most instances, gain access to records maintained by entities of state and local government in New York. That law and the duties of this office are unrelated to the time in which it may take an agency to process an application for certification or a license.

Second, the regulations promulgated by the Committee require that each agency, such as the State Education Department, is required to designate one or more persons as "records access officer" (21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records sought pursuant to the Freedom of Information Law. If you want to request records involving any unit within the State Education Department, or if any request for records is pending, it is suggested that you contact the Department's records access officer, Ms. Nellie Perez. Ms. Perez can be reached in writing at the Department or by phone at (518)474-5836.

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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16593

41 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, 2007

Mr. Alvin Ingram
06-A-3247
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. Ingram:

I have received your letter in which you indicated that you have unsuccessfully attempted to gain access to records from various agencies"due to a number of reasons, such as no responses, denials such as 'we will answer such on or around September 26th, 2007', and no responses again."

In this regard, I offer the following comments.

Having reviewed your correspondence, it appears that several of your requests were directed to Kings County Criminal Court. I point out that the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

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

With respect to your requests directed to the New York City Police Department and the Kings County District Attorney's Office, both of which are "agencies", the Freedom of Information Law provides direction concerning the time and manner in which they must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

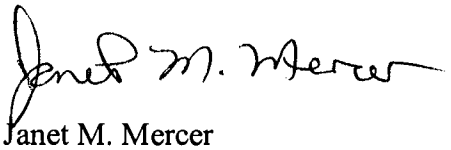
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance,

the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Jonathan David
Charles Hynes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1659

41 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, 2007

Mr. Nathan McBride
95-A-6015
Great Meadows Correctional Facility
Box 51
Comstock, NY 12821-0051

Dear Mr. McBride:

I have received your letter in which you appealed a "constructive denial of access and timeliness of access regarding [your] request" made to the New York City Police Department.

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning access to government information, primarily under the state's Freedom of Information Law. This office is not empowered to determine appeals or compel agencies to grant or deny access to records. However, I offer the following comments.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

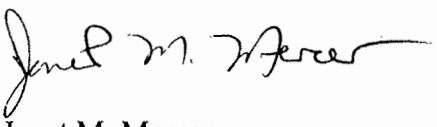
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

The person designated by the New York City Police Department to determine appeals is Jonathan David.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

OML-AO-4388
FOIL-AO-16595

From: Freeman, Robert (DOS)
Sent: Friday, June 01, 2007 9:39 AM
To: Tedra L. Cobb
Subject: Your recommendations

Hi - -

Since it seems unlikely that we'll have the opportunity any time soon, I'd like to offer brief comments regarding your recommendations.

First, in the recommendations regarding motions for entry into executive session, we have suggested that the term "personnel" not be used because it can have numerous meanings, some of which would justify holding an executive session, while others would not. The language of the so-called "personnel" exception, §105(1)(f), permits a public body to enter into executive session to discuss:

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

This office has advised and the courts have agreed that a motion under that provision should include two elements: reference to the term "particular" and to one of the qualifiers. Therefore, a proper motion might be: "I move to enter into executive session to discuss the employment history of a particular person." That person need not be named.

Second, also in the recommendations involving motions for executive session, the last refers in part to "contract negotiations." The only reference in the Open Meetings Law to contract negotiations pertains to collective bargaining negotiations involving a public employee union, §105(1)(e). Therefore, not all contract negotiations fall within that provision. I note that often when considering whether to employ or terminate a contractor or firm, the language within §105(1)(f) may apply, for it encompasses certain matters as they relate to a particular person or corporation.

Lastly, the final recommendation involves the designation of a "Records Access Coordinator" who would respond to FOIL requests. I would conjecture that such a person has already been designated. The regulations promulgated by the Committee on Open Government, which are available on our website, have long required that the governing body of public corporation, such as a county legislature, adopt procedure that include the designation of one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests. It is suggested that you contact the clerk of Legislature to ascertain whether a records access officer has indeed been designated.

I hope that the foregoing serves to clarify. If I can be of further assistance, please feel free to get in touch.

Hope to speak with you soon.
Bob

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16596

41 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, 2007

E-MAIL

TO: Levon Bedrosian

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Bedrosian:

I have received your letter in which you raised issues concerning the "financial reporting of our Special Parks District." You indicated that the report made available to you was difficult to understand, and that additional material disclosed to you contained minimal information. You have sought guidance in the matter.

In this regard, first, the regulations promulgated by the Committee on Open Government, require that each agency, such as a town, must designate at least one person as "records access officer" (21 NYCRR §1401.2). The records access officer has the duty of coordinating the agency's response to requests for records, and requests should generally be made to him/her. In most towns, the town clerk is designated as records access officer.

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, to the extent that information in which you are interested does not exist in the form of a record or records, the town would not be required to create new records on your behalf.

Third, however, the Freedom of Information Law is expansive in its scope, for it pertains to all agency records and defines the term "record" in §86(4) to mean:

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

Based on the foregoing, insofar as the town maintains information in some physical form, i.e., on paper or stored electronically, that may include detail in addition to the material that you have already received, any such material would constitute a "record" falls within the coverage of the Law.

Next, when requesting records, §89(3) requires that an applicant must "reasonably describe" the records sought. He/she is not required to identify records with particularity; rather, the request must include detail sufficient to enable agency staff to locate the records. Often the extent to which a request reasonably describes records is dependent on the nature of an agency's filing or recordkeeping systems. Consequently, it may be worthwhile to inquire regarding the manner in which records concerning income and expenses are maintained and retrieved.

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 (j) of the Law.

One of the exceptions would appear to be pertinent to an analysis of rights of access. However, due to its structure, I believe that it would require disclosure of the kinds of records of your interest insofar as such records exist. 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.

From my perspective, existing records in the nature of those of your interest would likely constitute intra-agency materials. Their content, however, would likely consist of statistical or factual information that must be made available pursuant to §87(2)(g)(i).

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

RJF:tt

FOIL-AO-16597

From: Freeman, Robert (DOS)
Sent: Friday, June 01, 2007 11:03 AM
To: dschneider@pressconnects.com

Doug - -

I recently received a copy of the determination of your appeal to the State Police. You might want to know that §87(1)(b)(iii) of the Freedom of Information Law limits the fees for reproducing records by means other than photocopying to the actual cost of reproduction. Unless it actually costs the State Police $25.00 to reproduce the negatives, the fee imposed in response to your appeal is inconsistent with law. Further, §87(2) indicates that accessible records must be made available for inspection and copying. No fee may be charged for the inspection of records.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - fax

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16598

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

June 4, 2007

E-Mail

TO: Mr. Robert S. Guiffreda

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Guiffreda:

This is in response to the situation that you described concerning your right to obtain the grades in a class taught by a professor at SUNY/Brockport. You specified that you are not interested in grades given to any particular student.

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.

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 inquiry, 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 prior to disclosure [Kryston v. East Ramapo School District, 77 AD 2d 896 (1980)]. In my view, SUNY/Brockport is required to disclose the grades in a manner in which students' identities are protected. Stated differently, the grades must be disclosed, but any identifying details pertaining to students must, in my view, be withheld. Further, if the students' grades appear alphabetically, as directed by the Appellate Division, SUNY would be required to scramble the content of the record or records in order that no student could be identified.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16599

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

June 4, 2007

Mr. Joel Rodriguez
00-R-0324
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. Rodriguez:

I have received your letter in which you complained that you submitted a Freedom of Information Law request to the New York City Police Department over a month ago and have 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

The person designated by the New York City Police Department to determine appeals is Jonathan David.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16600

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

June 4, 2007

Mr. James Hutchinson
06-A-1450
Butler Correctional Facility
P.O. Box 400
Red Creek, NY 13143

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

Dear Mr. Hutchinson:

I have received your letter in which you referred to a Freedom of Information Law request made to the Long Beach Police Department. The Department acknowledged receipt of your request and indicated that you would receive a response within thirty days. However, you wrote that three months have passed with no further communication from the 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to Lt. Bruce Meyer.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Lt. Bruce Meyer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16601

41 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 5, 2007

E-MAIL

TO: [redacted]

FROM: Robert J. Freeman, Executive Director

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

I have received your letter in which you asked whether a person who attends a meeting of a village board of trustees may tape record the meeting. Similarly, if a board meeting "is taped and transcribed into minutes", you questioned whether a person may "foil both the transcript and a copy of the tape."

In this regard, first, the Open Meetings Law does not deal with the use of audio or video recording devices at open meetings of public bodies. There are, however, several judicial decisions concerning the use of those devices at open meetings. In my view, the decisions consistently apply certain principles. One is that a public body, such as a municipal board, has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the tape recorders at meetings of public bodies, such as town boards. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, the Committee on Open Government advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from tbe deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk

County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division unanimously affirmed a decision which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell.

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and

> remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

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

Second, it is clear that minutes and tape recordings of open meetings must be disclosed. The Freedom of Information Law pertains to agency records, such as those of a unit of local government, 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 (j) 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].

Lastly, I point out that §106 of the Open Meetings Law specifies that minutes of open meetings must be prepared and made available within two weeks.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16602

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

June 5, 2007

Ms. Anne B. Carroll
Vice President & Deputy General Counsel
Daily News, LP
450 West 33rd Street, 3rd Floor
New York, NY 10001

The staff of the Committee on 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. Carroll:

I have received your letter and materials relating to it concerning a "blanket denial of [y]our request for employees' work-related cell phone numbers and e-mail addresses" by the New York City Department of Education. The Department denied the request based on the contention that disclosure would constitute an unwarranted invasion of the privacy of its employees.

In this regard, it has been consistently advised that disclosure of items that related to the performance of public employees' duties must ordinarily be made available to comply with the Freedom of Information Law.

As you are aware, and as indicated in the response by the Department, pertinent is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". 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 ane employees. It is clear that those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found, as a general rule, that 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].

From my perspective, the telephone numbers and email addresses assigned to public employees clearly relate to the performance of their duties and, therefore, there is nothing "personal" or intimate about them. When a public employee makes or receives a telephone call or transmits or receives email at his or her workplace, it can be assumed, in my opinion, that he/she does so in the performance of his/her official duties. In situations that arguably involve more personal information than the telephone number or the email address itself, it has been held that telephone bills indicating numbers called through the use of a public employees cell phone are generally available [Hawley v. Village of Penn Yan, 35 AD2d 1270, 827 NYS2d 390 (2006)], and that email communications stored on a school district's computer are subject to rights conferred by the Freedom of Information Law. In Baynes v. Fairport Central School District (Supreme Court, Monroe County, November 1, 2006), the judge ruled from the bench, stating that:

> "The electronic data generated by these activities are stored in the servers and systems belonging to the District. A separate District Administrative regulation (#53505) which implements Board policy #53500 provides, in effect, that all data stored in such files and servers are District property and that the District may access such files to ensure system integrity. The regulation also states that individuals should not have any expectation of privacy in such records...The Court has examined the record and the applicable law and cannot find any statutory basis for exempting disclosure of the records sought..."

The exceptional circumstance in which a telephone number might be withheld would involve the situation in which a particular number is dedicated to emergency communications associated with public safety or criminal law enforcement. If callers could preclude telephones from being used as intended, it might be contended that disclosure of the numbers could, if disclosed, endanger life or safety and be withheld under §87(2)(f) of the Freedom of Information Law. That, however, would likely be the only circumstance in which the telephone number, whether related to a desk phone or a cell phone, might justifiably be withheld.

With respect to email addresses, as you know, it has been advised in the past that public employees' email addresses could properly be withheld pursuant to §87(2)(i) of the Freedom of Information Law. That provision authorizes an agency to withheld 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." Through

disclosure of email addresses, viruses could be transmitted or other incursions might occur that could result in the harm sought to be avoided by that provision.

While I believe that the advice initially offered was appropriate, the realities of information technology relative to the use of email have changed. Government agencies now typically employ a variety of security measures and anti-virus software to prevent the harm envisioned by §87(2)(i) that might have occurred during the recent past. By means of example, this agency, the Department of State, as well as many other state agencies, now use software which has significantly limited the nature and the amount of unsolicited or junk mail that many of us had received. Further, email addresses are disclosed any time that a public employee transmits email, and the recipient may then share those addresses without limitation. Also significant is that email addresses can often easily be determined. The latter part of a public employee's email address usually indicates the agency's name or abbreviation and is routinely available on the agency's website, numerous publications and directories, or through the use of any number of search engines. To confirm that point, as an experiment, I "googled" the New York City Department of Education, found its website instantly, and more importantly in relation to your request, found that the website includes links to individual employees' email addresses.

In short, email addresses of government employees today, in 2007, cannot in my opinion be characterized as secret. The Court of Appeals held years ago and has confirmed on several occasions that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In consideration of the advances in information technology, the use of security systems and the general proliferation of the use and disclosure of email addresses, I do not believe that the Department could meet the burden of proving that those items may justifiably be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Michael Best
Susan W. Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1606 03

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June 5, 2007

E-Mail

TO: Mr. Ralph R. Hernandez, School Board Member

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee 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. Hernandez:

As you are aware, I have received your letter and the correspondence relating to it. You wrote that you serve as a member of the City of Buffalo Board of Education and "submitted a FOIL to school Superintendent Williams requesting specific information on the Buffalo Public Schools Foundation, a foundation he created without official Board approval." You added that the function of the Foundation "is to raise money for athletic equipment and other supplies not included in the general school budget."

You asked whether it is "legal" for the Superintendent to have created the Foundation, to "circumvent the bid procurement process..." and "to deny the Board of Education full disclosure on the foundation."

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. That being so, the following comments will be limited to matters relating to that statute.

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

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

Based on the foregoing, the Freedom of Information Law generally pertains to entities of state and local government.

The Foundation, as you know based on a review of its certificate incorporation, a copy of which was obtained by this office and sent to you, is a not-for-profit corporation. Although it was created to "provide support to the athletic, physical education, music and art programs for students of the Buffalo Public schools...by providing support to, or for the benefit of, the Beneficiary Organization," the Foundation appears to an entity separate from the Buffalo Public Schools. Further, it does not appear to be under the control of the Buffalo Public Schools or the Board of Education, nor was it created by action taken by government. Consequently, it does not appear to be an "agency" subject to the Freedom of Information Law.

I note that there are judicial decisions that indicate that a not-for-profit entity may be an agency, despite its corporate status, if there is substantial governmental control over its operations. For instance, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, the state's highest court, found that volunteer fire companies, notwithstanding their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered" (id. at 579).

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.

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

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

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations,

> memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Due to the breadth of the definition, when records involving the Foundation come into the possession of a government agency, I believe that they would constitute agency records that fall within the coverage of the Freedom of Information Law. For instance, if the Superintendent or other Buffalo Public Schools officials obtain, via mail or otherwise, at their government offices or in conjunction with their governmental functions, written materials from or pertaining to the activities of the Foundation, I believe that those materials would be agency records that fall within the scope 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

FPPL-AO. 335
FOIL-AO. 16604

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June 6, 2007

Rod Kovel, Esq.
[redacted]

Dear Mr. Kovel:

I have received your letter and the materials attached to it. You referred to a denial by the Town of Oyster Bay of your request for copies of both sides of a check made out to the Town by a property tax payer. The Town relied on an opinion rendered by this office in which it was advised that portions of a check indicating a person's bank account number could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [Freedom of Information Law, §§87(2)(b), 89(2)(b)]. It is your view that the opinion is incorrect and should be reversed. You cited a judicial decision relating to disclosure of the item in question and suggested that the decision "holds that bank records are not private at all" [Norkin v. Hoey, 181 AD2d 248 (1992)].

I continue to believe that disclosure of an individual's personal bank account number may be withheld when requested pursuant to the Freedom of Information Law. The decision that you cited involved the standing of the subject of such a record to challenge disclosure when the record is sought through the issuance of a subpoena. As you know, in general, the recipient of a subpoena has no choice but to disclose unless it is successfully contended that the record sought is not material to a proceeding. The Freedom of Information Law, in contrast, pertains to rights of access conferred upon the public at large or the ability of an agency to withhold records, irrespective of the status or interest of the applicant for the records. 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, there may be instances in which records are accessible pursuant to the Freedom of Information Law but not the disclosure devices associated with litigation, and *vice versa*. Norkin clearly dealt with disclosure of the item at issue in a litigation context and, consequently, I believe that it is irrelevant in considering a request for the same item under the Freedom of Information Law.

With respect to privacy, it is noted that the court in Norkin alluded to an interest in protecting privacy, stating that:

> "While, as indicated, the overwhelming weight of authority in this State holds that a bank customer is without standing to challenge a third-party subpoena, particularly where incidental to a government entity's investigative activities as is here the case, it must be noted that there have been some manifestations of *an underlying discomfort with the facial unfairness of depriving a bank customer of any recourse, including standing, for disclosure of financial information concerning the customer's personal bank accounts which are widely believed to be confidential*" (id., 253; emphasis mine).

Although the court decided the controversy in relation to standing, it clearly recognized that "financial information concerning the customer's personal bank accounts" is ordinarily unavailable, absent a subpoena or other disclosure requirement associated with litigation. From my perspective, that recognition suggests that in other circumstances, disclosure would be "unwarranted." In the context of the Freedom of Information Law, particularly in consideration of the fact that account numbers may serve as codes employed to make deposits, withdrawals or engage in other financial transactions, I reiterate the view that disclosure would constitute an unwarranted invasion of personal privacy for purposes of the Freedom of Information Law.

Lastly, since reference was made to §96 of the Public Officers Law, I note that §96 is part of the Personal Privacy Protection Law, which applies only to state agencies and specifically excludes units of local government from its coverage [see §92(1)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. John Venditto
Frederick Mei

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16605

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 6, 2007

Ms. Marcie Novick
[redacted]

Dear Ms. Novick:

Please be advised that Mr. Ricardo Aguirre, Counsel to the Secretary of State, has forwarded your May 30, 2007 request for assistance to this office. The Committee on Open Government, an office of the Department of State, is authorized to issue advisory opinions concerning the Freedom of Information Law, but it 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.

You wrote that you had difficulty obtaining records from the East Meadow School District, specifically a master list of employees and salaries. It is our opinion that this record must be maintained by the District pursuant to §87(3)(b) of the Freedom of Information Law and made available for your inspection. If it exists in electronic form, it is likely that it can be sent to you via email.

We have enclosed a copy of an advisory opinion previously rendered that addresses the issue that you raised (No. 8739). Further, if the agency has the ability to transmit such record via email, it would be required to do so pursuant to Freedom of Information Law 89(3)(b), a copy of which is enclosed.

We hope that this information will be useful to you. Should questions arise, please feel free to contact this office, or, if you would prefer to have a detailed advisory opinion issued with respect to your particular situation, please advise in writing.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Mr. Ricardo Aguirre
Mr. Leon Campo

Encs:(F8739 and FOIL)

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16606

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 7, 2007

Mr. Joseph Mastropietro
88-B-0811
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. Mastropietro:

I have received your letter concerning a failure to respond to your requests by your facility and a pharmacy in Pennsylvania.

Please note that the Freedom of Information Law and other New York statutes do not apply to Pennsylvania. Consequently, I cannot offer guidance concerning that aspect of your remarks.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

I hope that 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-16607

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June 7, 2007

E-MAIL

TO: Martin McGloin

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. McGloin:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

You questioned the propriety of a policy adopted by the City of Yonkers requiring that "[a]ll e-mail requests must use [its] FOIL request form." In this regard, it has been recommended that agencies create email addresses dedicated to the receipt of requests and that forms may be developed in an effort to expedite the public's ability to request records pursuant to the Freedom of Information Law. Further, as required by §89(3)(b) of the Freedom of Information Law, the Committee on Open Government has created model forms that may be used by the public when requesting records via email and by agencies for use in responding to those requests. However, those forms are merely recommended models or templates, and it has been advised that agencies may choose to adopt the form recommended by the Committee, alter it, or create its own form. Notwithstanding that guidance, there is nothing in the Freedom of Information Law that requires that a person seeking records must use an agency's prescribed form. That being so, although use of the City of Yonkers form would likely be of benefit to a person seeking City records, I do not believe that the City may require those seeking records via email to use the City's form.

I hope that I have been of assistance.

RJF:tt

cc: Corporation Counsel

FOIL-AO-16608

From: Freeman, Robert (DOS)
Sent: Monday, June 11, 2007 8:18 AM
To: Schneider, Doug
Subject: RE: FOIL of "closed" homicide investigation

Hi - -

Much of the material must be disclosed, but it is likely that portions may be withheld. For instance, there may have been individuals interviewed who were not identified during the judicial proceeding, and their identities might be withheld as an unwarranted invasion of personal privacy. There may also be internal communications consisting of advice, opinions, recommendations and the like that may be withheld as "intra-agency materials." However, insofar as records were introduced during a public judicial proceeding, an agency in possession of the same records, according to case law, would have no basis for denying access, even though some might ordinarily be withheld under FOIL. Also, although the courts are not subject to FOIL, court records are generally accessible under other provisions of law. The court would likely be the best source of a complete series of records relevant to the proceeding.

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

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

June 11, 2007

Ms. Patricia M. 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 facts presented in your correspondence.

Dear Ms. Riley:

I have received your letter and the materials attached to it, and I hope that you will accept my apologies for the delay in response. You have sought an advisory opinion concerning the propriety of a restriction imposed by Cayuga County on a form used to request records pursuant to the Freedom of Information Law. Specifically, when a request is made "for a list of names and addresses", the form requires the applicant sign the following statement:

> "I hereby certify that I will not use the above information for commercial or fund-raising purposes. I further certify that I will not sell, give or otherwise transmit the information to any person, organization or entity."

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 section 87(2)(a) through (j) of the Law.

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

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

> person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

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

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

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

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an assurance that a list of names and addresses will not be used for commercial or fund-raising purposes. In that decision, it was stated that:

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

In addition, it was held that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgement for that of the respondents" (id.).

In my opinion, the first sentence of the restriction, that the recipient must certify that he/she would not use a list of names and addresses for commercial or fund-raising purposes, is consistent with law and fully appropriate. However, I believe that the second sentence seeking a certification that the recipient "will not sell, give or otherwise transmit" a list of names and addresses is overbroad. If a list of names and addresses would not be used for a commercial or fund-raising purpose, the recipient may do with the list as he/she sees fit. There are numerous instances in which lists of names and addresses are given, shared and used by persons other than the initial recipient of the lists, i.e., to express positions relating to an election, to build support for or against a community project or development, to attempt to educate concerning particular matters, etc. In short, in those situations in which a list of names and addresses would not be used or distributed for commercial or fund-raising purposes, I do not believe that there can be valid restrictions on its use or dissemination.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Frederick Westphal, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1606/0

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June 11, 2007

E-MAIL

TO: Denise Mumm

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. Mumm:

I have received your letter and apologize for the delay in response. You referred to a situation in which a tentative agreement had been disseminated to 630 teachers, but in which it was contended that public disclosure of that document "is still a dangerous practice as a PERB lawsuit could result..." You have asked for my views on that subject and "background on Sunshine laws."

In this regard, so-called "sunshine laws" were enacted in the United States, in my view, in response to the Watergate scandal and the need to guarantee the public with the right to know what the government is doing. By the early 1980's, each state had enacted some sort of open records and open meetings law. Each state's law is different, and few states have created agencies similar to the Committee on Open Government in New York. The general thrust of sunshine laws is that all government records or meetings of government bodies are presumed to be open to the public, unless disclosure or public discussion would in some way result in harm, perhaps to an individual in terms of his/her privacy, to the government in terms of its ability to serve and carry out its duties in a manner beneficial to the public, or on occasion, to a commercial entity in relation to its competition.

With respect to the possibility of a lawsuit, I am not an expert concerning PERB's practices or the "Taylor Law", the series of statutes in the Civil Service Law that focus on the relationship between public employers and public employee unions. In considering disclosure of a tentative agreement, the provision in the Freedom of Information Law of primary significance, §87(2)(c), authorizes an agency, such as a school district, to deny access to records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." In short, when disclosure would create unfairness in the contracting or collective bargaining process and give an advantage to a party while disadvantaging the other or others, it is likely that disclosure would "impair" process and that records or portions of records may be withheld. For instance, if a school district is required to disclose records indicating its collective bargaining strategy to a union, it would

be placed at a disadvantage at the bargaining table, and disclosure in that instance would "impair" the process, to the detriment of the taxpayers.

In the situation that you described, school officials, union leaders and 630 teachers all would have access to or possession of the same documentation. That being so, because there would be no inequality of the knowledge of the content of the documentation, I do not believe that it could validly be contended that disclosure would "impair...collective bargaining negotiations." I note that the Taylor Law includes provisions concerning "improper employer practices" and states in part in §209-a(1) of the Civil Service that "It shall be an improper practice for a public employer or its agents deliberately...to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them os such rights..." Section 202 deals with the right of employees to join and participate in employee organizations. Again, while I am not an expert with respect to the Taylor Law, it appears doubtful that disclosure of a document known to both parties to the negotiations and widely disseminated would constitute an improper practice.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1606/11

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June 12, 2007

Mr. Willie Brown
93-A-3721
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

Dear Mr. Brown:

I have received your letter in which you complained concerning difficulty in obtaining copies of appellate briefs.

In this regard, first, as you may know, the Freedom of Information Law does not apply to the courts. However, other statutes generally require that courts and court clerks disclose records in their possession (see Judiciary Law, §255).

Second, the problem may be that you requested records from the Office of Albany County Clerk. I believe that the records would be maintained by the Clerk of the Appellate Division, and it is suggested that you direct your request to that office.

Lastly, you indicated that you were informed that the records are "confidential." Without additional information, I do not know why that would be so. If you provide details regarding the nature of the proceeding, perhaps additional guidance could be offered.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16612

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June 12, 2007

Ms. Carolyn Robertson
[redacted]

The staff of the Committee on 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. Robertson:

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 Arlington Central School District. 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.

With respect to your request, you indicated that the school district has failed to respond to your February 13, 2007 request for legal bills pertaining to "issues related to special education for the year 2005 and 2006", and "referenced to Katie Robertson versus the Arlington School District regarding impartial hearing officers Lazan, Nadler, and Saidens"; "current [ex]penditures for impartial hearing in process with Hearing Officer Schacter", and "legal bills incurred through Raymond Kuntz law firm, regarding issues involving special education for the year 2005-2006." Further, you requested records of expenditures "for speech and language therapy, visual therapy, occupational therapy, counseling, TBI consultation" for the academic years, 2004-2005, 2005-2006 and 2006-2007 for which you have not received a response. It is our opinion that these records should be made available to you at least in part, and that the District is required to respond to your requests. 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, such as the District, 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 the substance of your request to the District, we 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 (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 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, we 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. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students other than your own, we agree that references identifiable to students other than your child may properly be deleted. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

With respect to accessibility of records reflecting expenditures for certain professional services provided to students in the school district, again, while there may be portions of the records that are required to be kept confidential, the District would be required to review the records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

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

CSJ:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16613

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June 13, 2007

Mr. Ted Phillips
Reporter
Bond Buyer
One State Street Plaza-267th Floor
New York, NY 10004

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

Dear Mr. Phillips:

As you are aware, I have received your letter in which you sought an advisory opinion relating to a partial denial of a request for records directed to the New York City Industrial Development Agency (NYCIDA), a subsidiary of the New York City Economic Development Corporation.

The records at issue involve the contents of a "board meeting book", which is "roughly the size of a phone book" and is distributed to NYCIDA board members and staff at each meeting. You added that "[t]he board book contains information pertinent to the meeting and is often referred to during discussions and staff presentations at the meeting." Although NYCIDA disclosed some elements of the board book, "[h]aving seen the size of board books at the meetings," you wrote that "know that what was disclosed to [you] is a very small portion of the contents of a board book." The denial of access to the remainder was based on §87(2)(g) of the Freedom of Information Law. You wrote that your "goal is to obtain a complete copy of the board book" and that "[i]f portions of the document are indeed exempt from disclosure [under] FOIL, then [you] want those portions to be redacted rather than withheld in their entirety." You sent copies of materials made available to you, resolutions, minutes of a meeting, financial statements, and a progress report. It appears that other records contained in the board book were withheld in their entirety.

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, the provision upon which the NYCIDA relied, §87(2)(g), potentially serves as a basis for denying access. However, due to its structure, it may require 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.

It cannot be overemphasized 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 confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

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

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

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

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

I point out that one of the contentions offered by the agency in Gould was that certain reports could be withheld because they are not final and because they relate to matters for which no final determination had been made. The Court rejected that finding and stated that:

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

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

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

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

In sum, to the extent that the materials withheld include statistical or factual tabulations or data, as that phrase has been construed in judicial decisions, or any other information required to be disclosed pursuant to subparagraphs (ii), (iii) or (iv) of §87(2)(g), I believe that those portions must be disclosed, unless a separate basis for denial of access may appropriately be asserted.

Lastly, it has been advised on many occasions that insofar as the contents of records are disclosed through discussion at a meeting open to the public, they must be made available in response to a request made under the Freedom of Information Law. In short, I believe that public discussion reflective of the contents of the records results in a waiver of the ability to deny access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Judy Fensterman
David Shelley

FOIL-AO-16614

From: Freeman, Robert (DOS)
Sent: Wednesday, June 13, 2007 1:16 PM
To: 'William Warnecke'
Subject: RE: No Subject

I cannot answer the question concerning the status of school board members as "public officials."

However, there is no general requirement that records, including public officials' email addresses, be posted or otherwise be available on a website; an agency may choose to place various records or other items on their websites, but there is no obligation to do so.

With respect to email addresses, those that pertain exclusively to a public officer or employee are, in my opinion, accessible under the Freedom of Information Law. However, if a board member uses a personal email address for use with his/her home computer, it is likely in my view that a court would determine that disclosure would constitute "an unwarranted invasion of personal privacy." The email address that you used to send a message to me at the Department of State relates exclusively to my functions as a public employee; my personal email address associated with my home computer may, in my opinion, be withheld, even though I may use it on occasion to acquire or transmit information associated with my governmental duties. Nevertheless, the communications that relate to those duties would constitute government agency records subject to rights of access conferred by the Freedom of Information Law, irrespective of their location or that a personal email address might have been used.

From my perspective, it is neither unusual nor contrary to law for communications to come to a central source and then distributed from there to board members.

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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16615

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 13, 2007

E-MAIL

TO: Warren Gross

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. Gross:

As you are aware, I have received your letter concerning the right of a citizen to gain access to records indicating "the amount of overtime spent in a fiscal year", as well as "a breakout of how much of the overtime was spent on teachers extra time for No Child Left Behind." You also asked whether an administrator's resume is accessible to the public.

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, such as a school district, is not required to create a record in response to a request. Therefore, if, for example, there is no breakdown indicating overtime expenditures associated with the No Child Left Behind program, an agency would not be required to prepare a new record containing the information sought.

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.

Insofar as the figures of your interest exist, I believe that they would clearly be accessible. Relevant would be §87(2)(g). Although that provision potentially serves as a basis for denying access, due to its structure, it often requires substantial disclosure. Specifically, that provision authorizes an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

The kinds of information of your interest relating to overtime spent would consist of statistical or factual information that would be available pursuant to §87(2)(g)(i).

Next, records indicating overtime payments to specific employees would, in my opinion, also be accessible. Although the Freedom of Information Law generally does not require that agencies maintain or prepare records, 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. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Moreover, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Based upon the foregoing, it is clear in my view that records reflective of salaries of public employees must be prepared and made available. Similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records in my view would be relevant to the performance of one's official duties. It is noted that one of the decisions cited above, Capital Newspapers v. Burns, supra, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer. The Appellate Division found that those records must be disclosed, and the Court of Appeals affirmed. The decision indicates that the public has both economic and safety reasons for knowing whether public employees perform their duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. 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.

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.

Lastly, while portions of a resume might properly be withheld, others, based on judicial decisions, must be made available. For instance, it has been held by the Appellate Division that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

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

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

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

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

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

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

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

In sum, again, I believe that the details within an employment application that are irrelevant to the performance of one's duties may generally be withheld. However, based on judicial decisions, those portions of such a record or its equivalent detailing one's prior public employment and other

items that are matters of public record, general educational background, licenses and certifications, and items that indicate that an individual has met the requisite criteria to serve in the position, must be disclosed.

I hope that I have been of assistance.

RJF:tt

FOIL-AO-16616

From: Freeman, Robert (DOS)
Sent: Friday, June 15, 2007 4:06 PM
To: [redacted]
Attachments: f15553.wpd; f15915.wpd

Dear Mr. Zakon:

I have received your inquiry and offer the following brief comments.

First, the Freedom of Information Law pertains to existing records. If there is no "listing of the names of the people a police officer issued tickets to, during a particular period", that law would not require that a new list or record must be prepared.

Second, if such a list or other records exist identifying those to whom tickets were issued by a particular police officer, I believe that the list or other records would be accessible, except to the extent that they pertain to persons whose tickets were dismissed. Attached are advisory opinions that deal with that issue more expansively.

Third, each agency subject to the Freedom of Information Law is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and requests may be directed to him/her.

I hope that I have been of assistance.

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

FOIL-AO- 16617

From: Freeman, Robert (DOS)
Sent: Friday, June 15, 2007 9:36 AM
To: [redacted]
Attachments: 113707.wpd

Dear Mr. Cecce:

I have received your inquiry in which asked "what law restricts a School District from identifying the reason for removal of a district employee." You referred to resignations or terminations and being told that district officials "are unable to discuss personnel matters."

There is no such law, and there is no statutory prohibition concerning the discussion of personnel matters. I note that there is no law that requires government officials or staff, including those at a school district, to speak or answer questions. However, they are obligated to disclose records in response to requests made under the Freedom of Information Law. Based on that statute, in brief, settlement or termination agreements or records indicating the reasons for terminations are generally accessible. Attached is an opinion that focuses on the issue in detail and includes reference to numerous judicial decisions on the subject.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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(518) 474-2518
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FOIL-AO-16618

From: Freeman, Robert (DOS)
Sent: Friday, June 15, 2007 9:20 AM
To: jduval@co.genessee.ny.us

Dear Mr. Duval:

I have received your inquiry concerning rights of access to responses of a survey, and I believe that there are several possibilities. If the recipients were informed that their responses would be made available, they would be accessible under the Freedom of Information Law. If the responses are anonymous, they, too, would be available. On the other hand, if respondents were given no indication that their names and/or addresses would be disclosed, and those items are included in the responses, it is likely in my opinion that a court would determine that those or other personally identifying details may be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [Freedom of Information Law, §87(2)(b)].

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-16619

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

June 15, 2007

Mr. Jonathan E. Cohen
President
Genesis Computer Consultants, Inc.
32 Morris Road
Tappan, NY 10983

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

Dear Mr. Cohen:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Department of Finance of the City of New York. Specifically, you requested a "file containing information about all mortgages and deeds filed in the City during the immediate past year." For more than a decade, the City has maintained an electronic file of such information and has provided it in response to yearly requests from your company, Genesis Computer Consultants, Inc. This year, in response to your request, the Department denied your request and indicated: "... we believe that posting information on our Web site constitutes reasonable compliance with our obligation to make our records 'available for public inspection and copying'." You further indicated that "[s]uch data is of little or no use to you unless you have access to the entire file electronically so that you can make lists of various sorts and make comparisons of sets of data." It is our opinion that if the Department continues to have the ability to make one year's worth of data available to you in an electronic file, it is required to do so. In this regard, we 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 our opinion represent the equivalent of creating a new record.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered on a keyboard. While some have contended that those kinds of 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, in our opinion, based on judicial decisions, the Department is required to do so.

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: Gerald S. Koszer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16620

41 State Street, Albany, New York 12231
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June 18, 2007

Mr. Dre Smith
94-A-1634
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. Smith:

I have received your letter in which you indicated that a request was denied on the ground that the item that you sought did not exist.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16621

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

June 18, 2007

Mr. John Vera Moreno
98-A-0175
Green Haven Correctional Facility
P.O. Box 400
Stormville, NY 12582-0010

Dear Mr. Moreno:

I have received your letter in which you requested an advisory opinion and "clarification regarding a variety of issues that relate to judicial proceedings and the duties of court clerks and court reporters.

Please be advised that the functions of the Committee on Open Government relate to the Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts. Consequently, I cannot offer the clarification that you seek.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16622

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

June 18, 2007

Ms. Marcia A. Bessel
Executive Director of Management Services
Mexico Academy and Central School District
40 Academy Street
Mexico, NY 13114

The staff of the Committee on 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. Bessel:

I have received your letter concerning a request that records be emailed to the applicant. However, the records, according to your letter, included names of students and had to be redacted before they could be scanned and transmitted via email.

In this regard, as you may be aware, the Freedom of Information Law was recently amended, stating in relevant part that: "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..." Based on the new provision, agencies, such as school districts, are required to transmit requested records via email, when they reasonably have the ability to do so.

As I understand the situation that you described, the records at issue include information that must be disclosed, as well as information that is exempted from disclosure by statute. Further, in those instances, the only method of transmitting those portions that are accessible to the public would involve the preparation of a photocopy, from which the appropriate redactions would be made, and then transmitting the remaining portions via mail. If that is so, and if a photocopy must first be made in order to transmit the accessible portions of a document by means of email, I believe that an agency has the authority to charge a fee for photocopying, and §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents for a photocopy as large as nine by fourteen inches.

You also referred to an accusation that you delayed disclosure unnecessarily. Here I point out that the Freedom of Information Law requires that agencies create reasonable, self-imposed deadlines within which they must respond to requests. Attached is a detailed explanation of the provisions pertinent to that issue.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Elizabeth Passer

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16623

41 State Street, Albany, New York 12231
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June 18, 2007

Ms. Mary Pasciak
Reporter
The Buffalo News
P.O. Box 100
Buffalo, NY 14240

The staff of the Committee on 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. Pasciak:

I have received your letter in which you sought an advisory opinion concerning the propriety of a denial of access to certain records by the Division of Criminal Justice Services.

By way of background, you requested certificates of relief from disabilities and certificates of good conduct conferred during a specified period. In response, you were informed that the records sought are "part of the criminal history record information (CHRI) maintained by the Division", and that CHRI is exempt from disclosure pursuant to §87(2)(a) of the Freedom of Information Law concerning records that "are specifically exempted from disclosure by state or federal statute." You were also informed that disclosure would constitute "an unwarranted invasion of personal privacy...pursuant to the provisions of 9 New York Code of Rules and Regulations Section 6150.4 (see, POL Section 87[2][b])." The records access officer added that:

> "...only entities qualified under Article 35 of New York's Executive Law are eligible to have access to such records (see Executive Law Sections 837[6] and [8]. Additionally, an individual or the attorney for such individual, upon proper identification, may review his or her own criminal history record for the purpose of challenge or correction. Lastly, access to a person's criminal history record is also permitted when a court determines that such information is relevant to an issue in litigation and issues an order or subpoena for such a record."

Based on the foregoing, it was concluded that "[s]ince the requirements for access to another person's criminal history record have not been met, your request is denied."

It is noted at the outset that I am mindful of the longstanding practices of the Division relative to the disclosure of criminal history records, as well as judicial decisions concerning access to those records. However, I believe that a careful analysis of the law, coupled with advances in information technology and the reality that equivalent records are routinely disclosed, merits a conclusion that those portions of CHRI indicating convictions as well as the issuance of the certificates to which you referred, must be disclosed. In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) 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", and the Division has contended that subdivisions (6) and (8) of §837 of the Executive Law exempt the records at issue from disclosure. Those provisions state, respectively that the Division shall:

> "Establish, through electronic data processing and related procedures, a central data facility with a communication network serving qualified agencies anywhere in the state, so that they may, upon such terms and conditions as the commissioner, and the appropriate officials of such qualified agencies shall agree, contribute information and, except as provided in subdivision two of section 306.2 of the family court act, have access to information contained in the central data facility, which shall include but not limited to such information as criminal record, personal appearance data, fingerprints, photographs, and handwriting samples...
>
> "Adopt appropriate measures to assure the security and privacy of identification and information data."

As I understand subdivision (6), it does not confer confidentiality or address the matter of public access to records. Although subdivision (8) refers to the Division's obligation to "assure the security and privacy of identification and information data", it does not specify that records are confidential or exempt from disclosure. While there may be records or elements of records that may properly be withheld, there does not appear to be justification in the Executive Law for withholding every aspect of CHRI in every situation.

To implement subdivision (8), the regulations promulgated by the Division, state in relevant part that "...the following types of records shall be exempt from public inspection and/or copying....disclosure of information contained in the criminal history file, license and employment file and wanted and missing persons file, maintained by DCJS, including any and all information contained in such files" [9 NYCRR §6150.4(6)].

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. Again, §87 (2)(a) refers to records that are specifically exempted from disclosure by 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 this instance, the regulations promulgated by the Division in my view exempt records from disclosure in a manner that is inconsistent with the Freedom of Information Law. Most significantly, I believe that portions of records indicating convictions should be made available to the public, for disclosure, for reasons to be considered later in this opinion, would not constitute an unwarranted invasion of personal privacy. Further, it is likely that various aspects of "license" and other files must be disclosed. In general, a record indicating that a person or entity has received a license, or has had a license revoked, must be disclosed under the Freedom of Information Law. Moreover, insofar as files include records that have been disclosed during public judicial proceedings, it has been found that those records are accessible pursuant to the Freedom of Information Law [see Moore v. Santucci, 151 AD2d 677 (1989)]. I note, too, that it was determined more than thirty years ago that regulations based on a similar grant of statutory authority could not exempt from disclosure records that were otherwise available under the Freedom of Information Law. In Zuckerman v. Board of Parole, a statute concerning persons "released on parole or conditional release" and a requirement to promulgate "rules as to the privacy of these records", the court found that the regulations were invalid insofar as they excepted records from disclosure that would be accessible pursuant to the Freedom of Information Law (supra, 407).

In short, because the language of the Executive Law does not specify that particular records are exempted from disclosure, the Division's regulations, in my opinion, go beyond the Division's statutory grant of authority by making records confidential in a manner inconsistent with law.

Next, insofar as records indicate that a person has been convicted of a criminal offense, as suggested above, I do not believe that disclosure would constitute "an unwarranted invasion of personal privacy", as contended in response to your request. In good faith, I note that a different conclusion was reached in U.S. Department of Justice v. Reporters Committee for Freedom of the Press [489 U.S. 749 (1989)], which involved a request for "rap sheets", the criminal history records including reference to arrests and convictions, relating to certain individuals. The records sought were located within a database maintained by the FBI. The Supreme Court acknowledged that some of the contents of rap sheets are frequently available, stating that: "Arrests, indictments, convictions, and sentence are public events that are usually documented in court records. In addition, if a person's entire criminal history transpired in a single jurisdiction, all of the elements of his or her rap sheet may be available upon request in that jurisdiction." Nevertheless, the Court also recognized that if those events did not occur in a single jurisdiction, it may be difficult if not impossible to find records comprising the elements of one's criminal history, stating that "Although much rap-sheet information

is a matter of public record, the availability and dissemination of the actual rap sheet to the public is limited." That being so, the Court sought to balance the privacy interest in maintaining the "practical obscurity" of the records against the public interest in disclosure, stating that:

> "the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."

In essence, it appears that the Supreme Court found that if the elements of a record are public but difficult to find, and if those elements are maintained in a computerized government "clearinghouse" of "compiled computerized information", the federal Freedom of Information Act authorizes a federal agency to withhold the data on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Notwithstanding my respect for the Supreme Court, it is difficult in my opinion to justify a conclusion that an item of public information available from one public source, such as a courthouse or police station would, if disclosed result in an unwarranted invasion of privacy if it is sought from another public source that can make the record readily available. From my perspective, it is the nature of the public information that should determine whether or the extent to which it must be disclosed under the New York Freedom of Information Law, not the ease or difficulty of obtaining it. Pertinent is Capital Newspapers v. Poklemba (Supreme Court, Albany County, April 6, 1989), which I believe to be the only state decision that focused in an any detail on the "practical obscurity" or "computerized clearinghouse" concepts referenced by the Supreme Court. To reiterate that aspect of the holding (which was rendered by Judge Kahn, who is now a U.S. District Court judge):

> "...petitioner is correct when it asserts that the transmittal of an otherwise publicly available document to a centralized facility for inclusion in a government computer bank does not *per se* render it immune from disclosure. However, the issue is not whether the records under the control of DCJS **should** be released, but rather whether the provisions of FOIL and the Executive Law, as presently constituted, mandate the result sought by petitioner.
>
> "Certainly, the Legislature has the authority to provide for public access from a centralized location. It is equally clear that, unless otherwise sealed, a conviction record is a public document. Much has been said about potential abuses, given the ease with which these records may be obtained if the petition is sustained. Such fears are not determinative however. To argue that a criminal conviction obtained in a public proceeding in an open court system suddenly should be clothed with secrecy merely because an individual doesn't have to struggle to obtain it, makes a mockery of the right of public

> access. To suggest that public disclosure of conviction records is available only when it is through a difficult and time-consuming search of individual courthouse files or in local police stations, when the exact same information might be freely available if housed within a centralized computer bank, would be to create an irrational burden. Resolution of the question should not be resolved by how hard it is to discover the information sought" (emphasis added by the court).

The court did not determine that disclosure would constitute an unwarranted invasion of personal privacy, but in fact suggested that conviction records are generally available from the courts in which proceedings resulted in convictions were conducted "or in local police stations."

The Court of Appeals inferentially reached the same conclusion and recognized that not all elements of CHRI are accessible to the public. In New York and many other jurisdictions, 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 and perhaps other provisions of the Criminal Procedure Law. However, if it is determined that a person has engaged in a criminal offense, the record would be available from the courts in which the proceedings occurred. In this regard, 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 must be disclosed by an agency pursuant to the Freedom of Information Law, 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, while records pertaining to person whose charges were dismissed likely would not be accessible, those indicating convictions were found to be a matter of public record.

The notion of "practical obscurity" and the Supreme Court's conclusion might have been appropriate in 1989 when its decision was rendered, but due to advances in information technology and electronic information systems, it is questionable, in my opinion, whether that court or others would reach the same conclusion today. There are numerous instances in which items were difficult to find, but today, with sophisticated search mechanisms, they might be located and disseminated widely with relative ease.

Although the Division contends and through its regulations specifies that records of convictions are exempt from disclosure, another state agency makes those same records available upon payment of a fee. The Office of Court Administration (OCA) indicates on its website that it "provides a New York Statewide criminal history record search (CHRS) for a fee of $52.00....The search includes data from all 62 counties pertaining to convictions and open/pending cased originating from City and County courts. Town & Village criminal disposition data is limited." The basis for disclosure and the fees is Chapter 62 of the Laws of 2003, Part J, §14. Moreover, as stated earlier, records of convictions maintained by the courts in which individuals were convicted are accessible, not pursuant to the Freedom of Information Law, which exempts the courts from its coverage, but rather pursuant to other statutes that generally require that records maintained by courts be made available to the public (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a).

In sum, for the reasons described above, I believe that the longstanding practices of the Division should be revisited and that criminal history records must generally be made available to the public. Exceptions would involve those instances in which records have been sealed, as in cases in which charges are dismissed in favor of an accused, based on §§160.50 or 160.55 of the Criminal Procedure Law, when a court has adjudicated a person as a youthful offender and records are sealed under §720.15 or 720.35 of the Criminal Procedure Law, or when the records relate to the arrest of a juvenile and are exempt from disclosure under §784 of the Family Court Act.

In an effort to encourage review of its stance, copies of this opinion will be forwarded to the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gina L. Bianchi, Counsel
Valerie Friedlander, Records Access Officer
John Caher, Director of Communications

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16624

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June 18, 2007

E-MAIL

TO: Bridget Owens

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. Owens:

I have received your letter concerning "assigned council [sic] attorneys" and access to their records. Specifically, "if an inmate is having trouble getting his lawyer to forward records," you asked whether "that attorney [would] be subject to a FOIL request.

Based on the assumption that the attorney participates in the "assigned counsel" program, I offer the following comments.

The Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally applies to records maintained by state and local government; it would not apply to a private organization.

The assigned counsel program involves assignments under "Article 18-B", which encompasses §§722 to 722-f of the County Law. Under §722, the governing body of a county and the City Council in New York City are required to adopt plans for providing counsel to persons "who are financially unable to obtain counsel." Those plans may involve providing representation by a public defender, by a legal aid organization, through a bar association, or by means of a combination of the foregoing.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney or private organization performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

Similarly, a county bar association is not, in my opinion, an "agency" subject to the Freedom of Information Law. However, if a bar association, for example, maintains records for a county, I believe that they would constitute county records. The Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

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

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

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 19, 2007

E-MAIL

TO: Robert Kampf

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. Kampf:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You referred to a committee created by a town board to review and edit zoning regulations and asked whether the records that it prepares or acquires prior to reporting to the town board are subject to the Freedom of Information Law. Although you did not indicate that the meetings of the committee are open to the public, you wrote that it reports its recommendations to the town board during open town board meetings.

Based on the following rationale, I believe that the records at issue must be disclosed. In this regard, I offer the following comments.

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

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

The Court of Appeals, the state's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the

agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

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

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

More recently, the Court of Appeals found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, (1995)]. Therefore, if documents are produced for an agency, as in the case of a committee that prepares documents on behalf of a town, they constitute agency records, even if they are not in the physical possession of the agency.

Second, tangential to the matter but relevant to the analysis, I note that several judicial decisions indicate generally that advisory ad hoc entities, other than committees consisting solely of members of public bodies, having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, the committee does not constitute a public body subject to the Open Meetings Law because it does not perform a governmental function.

Relevant to the foregoing is §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the definition, an "agency" is a governmental entity performing a governmental function, such as a town. The committee that prepared records, however, would not be an agency; if it is not a public body for purposes of the Open Meetings Law because it does not perform a governmental function, for the same reason, it would not be an agency for purposes of the Freedom of Information Law. Again, however, the documents would constitute agency records, for they were produced for the town, which, unlike the committee, is an agency.

Third, if the committee is not an agency, I do not believe that any exception to rights of access would apply. By way of brief background, the Freedom of Information Law is based is based upon a presumption of access. Stated differently, all records of an agency are 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 §87(2)(g) pertains to inter-agency and intra-agency materials. Based on the definition of "agency", "inter-agency materials" would involve written communications between or among officials of two or more agencies; "intra-agency materials" would consist of communications between or among officials within an agency. If my contention is accurate, that the committee is not an agency, its records could not be characterized as inter-agency or intra-agency materials, and neither §87(2)(g) nor any other exception to rights of access could justifiably be asserted to withhold the records at issue.

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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June 20, 2007

Mr. Michael Richards
99-A-0728
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. Richards:

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

FOIL-AO - 16627

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, June 20, 2007 2:38 PM
To: [redacted]
Subject: FW: Freedom of Information Law - fees

Carol,

Thank you for sending the fax. Because the form referenced "statutory fees", I searched the Public Health Law and found the following provision:

Public Health Law section 4174(3): "For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of twenty dollars for each hour or fractional part of an hour of time of search, together with a fee of two dollars for each uncertified copy or abstract of such record requested by the applicant or for a certification that a search discloses no record."

Accordingly, I believe the Department of Health has the authority to charge for searches for the types of records you have requested. And, based on the statement on the fax you sent, that the Department of Health has authorized City Clerks to search for records, the City, would be permitted to collect the fee on the State's behalf. A quick search of our advisory opinions confirms my opinion:
http://www.dos.state.ny.us/coog/ftext/f15231.htm

Because the authority for additional fees is set forth in the statute, I have included a copy of the full text of the statute, set forth after my signature.

My apologies for the initial confusion. Please call me if you have further questions.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
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§ 4174. Records; transcripts and certifications by commissioner; fees

1. The commissioner or any person authorized by him shall:

(a) upon request, issue to any applicant either a certified copy or a certified transcript of the record of any death registered under the provisions of this chapter (1) when a documented medical need has been demonstrated, (2) when a documented need to establish a legal right or claim has been

demonstrated, (3) when needed for medical or scientific research approved by the commissioner, (4) when needed for statistical or epidemiological purposes approved by the commissioner, (5) upon specific request by municipal, state or federal agencies for statistical or official purposes, (6) upon specific request of the spouse, children, or parents of the deceased or the lawful representative of such persons, or (7) pursuant to the order of a court of competent jurisdiction on a showing of necessity; except no certified copy or certified transcript of a death record shall be subject to disclosure under article six of the public officers law;

(b) issue certified copies or certified transcripts of birth certificates only (1) upon order of a court of competent jurisdiction, or (2) upon specific request therefor by the person, if eighteen years of age or more, or by a parent or other lawful representative of the person, to whom the record of birth relates, or (3) upon specific request therefor by a department of a state or the federal government of the United States;

(c) upon request, issue a wallet-size certification of birth, in a form and bearing a design provided by the commissioner. Each applicant for a wallet-size certification of birth shall remit to the commissioner with such application, a fee determined by the department;

(d) upon request, issue certification of birth or death unless in his judgment it does not appear to be necessary or required for a proper purpose;

(e) furnish non-identifiable statistical information in tabular or machine readable format for research activities if satisfied that the same is required for a proper purpose, and the commissioner is authorized to fix and to require payment of a fee sufficient to compensate the state for the expense of providing the requested information;

(f) be deemed to have complied with the applicable provisions of paragraphs (a) and (b) of this subdivision by the issuance of a certified transcript of the desired certificate or record instead of a certified copy thereof except where the requester shall show, to the satisfaction of the commissioner or his authorized representative, a demonstrated need for such certified copy, or where a court order rendered pursuant to the provisions of paragraph (b) of this subdivision contains an express recital or direction therein that the issuance of a certified transcript of such certificate or record in place of a certified copy thereof shall not be considered to be in compliance therewith;

(g) upon request of a board of elections, issue certification of death.

2. Each applicant for a certification of birth or death, certificate of birth data or for a certified copy or certified transcript of a birth or death certificate or certificate of birth data shall remit to the commissioner with such application a fee of thirty dollars in payment for the search of the files and records and the furnishing of a certification, certified copy or certified transcript if such record is found or for a certification that a search discloses no record of a birth or of a death.

3. For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of twenty dollars for each hour or fractional part of an hour of time of search, together with a fee of two dollars for each uncertified copy or abstract of such record requested by the applicant or for a certification that a search discloses no record.

4. No fee shall be charged for a search, certification, certificate, certified copy or certified

transcript of a record to be used for school entrance, employment certificate or for purposes of public relief or when required by the veterans administration to be used in determining the eligibility of any person to participate in the benefits made available by the veterans administration or when required by a board of elections for the purposes of determining voter eligibility.

5. (a) The United States social security administration may obtain information from death certificates needed in the administration of old-age and survivors insurance benefits laws, subject to the provisions of any contract entered into pursuant to paragraph (b) of this subdivision.

(b) In addition, the commissioner or any person authorized by the commissioner is authorized and directed to enter into a contract to furnish the federal secretary of health and human services information concerning individuals with respect to whom death certificates have been officially filed with the commissioner. Such contract shall not include any restriction on the use of information obtained by such secretary pursuant to such contract, except that such contract may provide that such information is only to be used by the secretary (or any other federal agency) for purposes of ensuring that federal benefits or other payments are not erroneously paid to deceased individuals.

6. The federal agency in charge of vital statistics may obtain, at a fee acceptable to the commissioner, information from birth and death certificates for use solely as statistical data.

7. Except as herein otherwise provided, the commissioner is authorized to establish rules and regulations whereby searches may be made and certifications, certified copies and certified transcripts of birth and death certificates furnished without fees to federal, state and municipal departments for official purposes.

8. The commissioner, the commissioner of health of the city of New York, or any person authorized by the commissioner having jurisdiction shall immediately notify the division of criminal justice services in the event that a copy of a birth certificate or information concerning the birth records of any person whose record is flagged pursuant to > paragraph (i) of subdivision two of section four thousand one hundred of this article is requested. In the event that a copy of the birth certificate of a person whose record is so flagged is requested in person, the personnel accepting the request shall immediately notify his or her supervisor. The person making the request shall complete a form as prescribed by the commissioner or, in the city of New York, the commissioner of health of the city of New York, which shall include the name, address and telephone numbers and social security number of the person making the request. A motor vehicle operator's license, or if such license is not available, such other identification as the commissioner, or in the city of New York, the commissioner of the New York city department of health, determines to be satisfactory, of the person making the request shall be presented, shall be photocopied and returned to him or her. The person receiving the request shall note the physical description of the person making the request and his or her supervisor shall immediately notify the local law enforcement authority as to the request and the information obtained pursuant to this subsection. When a copy of the birth certificate of a person whose record has been flagged is requested in writing, the law enforcement authority having jurisdiction shall be notified as to the request and shall be provided with a copy of the written request. The registrar shall retain the original written response.

9. The commissioner may institute an additional fee of fifteen dollars for priority handling for each certification, certified copy or certified transcript of certificates of birth, death, or dissolution of marriage; or fifteen dollars for priority handling for each certification, certified copy or certified transcript of certificate of marriage.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16028

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June 21, 2007

Mr. Kenneth R. 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:

This is in response to your correspondence dated January 23 and 30, 2007, February 8, 2007 (2), and February 16, 2007. In an effort to provide you with our opinions in the most direct and understandable fashion, we have set forth your questions below, followed by our responses:

> 1. What if an agency states, in response to a request, that all records have already been provided, but the applicant has reason to believe that not all records were provided in response to the request?

If an applicant for records has reason to believe that an existing record has not been provided in response to a request, the applicant may request that the agency certify that it does not maintain or cannot locate the requested record. 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."

Further, as previously advised, once an applicant has exhausted the administrative remedies available pursuant to the Freedom of Information Law, the applicant may initiate a challenge to a denial of access under Article 78 of the Civil Practice Rules.

> 2. What is the time within which an applicant may file an appeal to a denial of a request made pursuant to the Freedom of Information Law, and when does the appeal time begin? When does the appeal time begin if the agency never responds to the request in writing?

If neither a response to a request 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."

In our opinion, when an agency does not respond to a request, the appeal time begins after a reasonable amount of time has elapsed to indicate that the agency has failed to comply with the mandatory response time. A determination of what is a reasonable amount of time to wait for a response would likely depend on whether the request was transmitted via email or the U.S. Postal Service, including any allowances for mailing time, resulting in a 30-day appeals period that could start as early as six business days after receipt of the request. There are a variety of factors that may influence a situation, and we cannot speculate regarding the period of time within which an applicant may continue to have a right to appeal.

> 3. Is an agency required to create a record indicating the date on which it failed to respond to a request, in order to determine the date on which the appeal time frame begins?

No. Section 89(3) of the Freedom of Information Law does not require an agency to create a record in response to a request.

> 4. Does an opinion pertaining to one state agency "apply" to another state agency?

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. Advisory opinions are often written about a particular set of facts and may apply only to those facts. In other instances, opinions express principles of law that would apply to any person or agency.

> 5. Will the Committee on Open Government "mediate" a resolution of these questions with the Department of Education?

The "mediation" services available from the Committee on Open Government exist to the extent that verbal and/or written advisory opinions are rendered in an effort to resolve disputes. As previously advised, this office has no authority to compel an entity's actions.

6. Will the Committee on Open Government force the Department of Education to comply with the Freedom of Information Law?

No. Please note responses to numbers 5 and 6.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Nellie Perez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16629

41 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, 2007

Mr. Robert E. Hunter
[redacted]

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

Dear Mr. Hunter:

As you are aware, I have received your correspondence concerning your efforts in obtaining detailed information concerning the use of a cell phone by the Mayor of the City of Auburn.

Based on a review of the correspondence, the City had paid the entirety of the bill for the Mayor's use of a cell phone until November of 2004, and total amounts billed up to that period were disclosed to you. Starting in November of that year, the City has been paying the Mayor for his use of a cell phone based on a flat monthly fee, and the City does not reimburse for any amount above the monthly rate. The bill is sent directly to the Mayor, who "pays the bill himself with the help of the now $45.00 City share", and "no other portion of the monthly billing is disclosed to the City." Because the City has no additional record involving use of a cell phone by the Mayor, no records, other than that indicating the "City share", are accessible. In conversation with Ms. Camille Jobin-Davis of this office, you were advised that, because there are no additional records maintained by the City, there is nothing more to be disclosed pursuant to the Freedom of Information Law. You suggested that "That interpretation would mean that Department billings would also not be available either because the detail was given to the Department head and he or she did not keep them."

If my understanding of the matter is accurate, the Mayor has a personal cell phone, which he uses for both personal and City business. Rather than attempting to identify and determine the cost of City related calls, the City has agreed to provide what appears to be akin to a small increase in salary, $45.00 per month, to the Mayor so that he can be billed directly at his residence and use his cell phone as he sees fit. If that is so, it appears that the City has met its obligations under the Freedom of Information Law.

As you may be aware, that statute pertains to records of an agency, such as a city, 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, insofar as documentation is maintained by or for the City, it would constitute an agency record that falls within the coverage of the Freedom of Information Law. As I understand the situation as it pertains to the Mayor, no record is maintained by or for the City; rather, the Mayor receives a bill at his home for use of his cell phone and is simply given a stipend that he may spend as he desires or apply to the use of the phone. If that is so, there would be no detailed record of his cell phone use that would be subject to the Freedom of Information Law.

I believe, however, that your conclusion concerning the use of cell phones by City personnel is inaccurate. In that situation, records concerning cell phone use would come into the possession of the City and, therefore, would be subject to rights granted by the Freedom of Information Law. It is also noted that records cannot be discarded or destroyed at will. Section 57.25 of the Arts and Cultural Affairs Law deals with the retention and disposal of local government records. In brief, schedules are developed indicating minimum retention periods for classes of records that are based largely on the significance or value of the records. Only when the minimum retention period has elapsed may records be discarded or destroyed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: John C. Rossi

FOIL-AO-16630

To: Brian McBride
Subject: RE: Failure to Comply with FOIL request
Date: June 21, 2007

Dear Mr. McBride:

I have received your letter in which you indicated that the University at Buffalo has failed to respond to your Freedom of Information Law request.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see '89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with '89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

For your information, the person designated to determine appeals is Ms. Stacey Hengsterman, State University of New York, State University Plaza, Albany, NY 12246.

I hope that I have been of assistance.

Janet M. Mercer
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - Fax
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16631

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

June 22, 2007

Mr. Jeffrey Williams
04-A-1222
Cape Vincent Correctional Facility
P.O. Box 739
Cape Vincent, NY 13618

Dear Mr. Williams:

I have received your letter and the materials relating to it. If I understand its content correctly, you have asked that this office obtain and send to you medical records that you requested but which have not been made available to you.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning public access to government records, primarily in relation to the Freedom of Information Law. The Committee is not empowered to obtain records on behalf of individuals such as yourself. Further, the entity from which you sought records does not appear to be a unit of government, but rather a not-for-profit corporation. If that is so, its records would not be subject to the Freedom of Information Law.

As you inferred, §18 of the Public Health Law generally grants patients rights of access to records medical records pertaining to themselves that are maintained by a physician or a public or private provider of medical services. To obtain additional information concerning patient access to medical records, it is suggested that you write to the:

Access to Patient Information Coordinator
New York State Department of Health
433 River Street, Suite 303
Troy, NY 12180-2299

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

OML-AO-4399
FOIL-AO-16632

41 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, 2007

E-Mail

TO: Mr. Steven Fornal

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. Fornal:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You expressed dissatisfaction with a statement that I made that was apparently published in the Kingston *Freeman* in which I indicated that: "There's nothing in the Open Meetings Law or any other law that forbids them (Town Board) from discussing it...." The subject involved consideration of potential appointees to serve on a town commission.

In this regard, I believe that there clearly would have been a basis for discussion of the matter during a closed or "executive" session. However, the point was that there was no requirement that it be discussed in private. 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, such as a town board, 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.

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

RJF:jm

cc: Rochester Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4396
FOIL-AO-1603A

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

June 18, 2007

Ms. Lynda B. LaMountain
[redacted]

Dear Ms. LaMountain:

I have received your letter and, based on your remarks, must reiterate the initial point offered in the opinion addressed to you on May 11. Very simply, there is nothing in the Freedom of Information Law or the Open Meetings Law that requires that government officers or employees respond to questions, supply information in response to questions or offer explanations for their governmental activities. Again, the Freedom of Information Law pertains to existing records and specifies that government agencies need not create new records to comply with that law. Also as noted in that opinion, the Open Meetings Law provides the public with the right to attend meetings of government bodies. It does not, however, give the public the right to speak or require that questions be answered during meetings held in accordance with that law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Peru Town Board
Hon. Kathleen Flynn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16633

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

June 25, 2007

E-Mail

TO: Mr. Joseph M. Rowlands

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. Rowlands:

I have received your letter in which you indicated that members and staff of the Planning Board in the Town of Steuben have met with resistance when seeking to obtain records from the Town, "such as records of codes violations and even such pubic information as the minutes of Town Council meetings." You indicated that those kinds of records could be sought pursuant to the Freedom of Information Law, "but it seems counterproductive for a Planning Board to have force the Town to share information that should be a matter of public record." You have sought advice in the matter, and in this regard, I offer the following remarks.

First, as you are likely 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 town 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 when 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 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, when charges are dismissed in favor of an accused and sealed pursuant to §160.50 of the Criminal Procedure Law, a town police department or justice court would be prohibited from disclosing.

When records requested by a government board and disclosure would enhance the board's functions, I believe sharing the records, without resort to using the Freedom of Information Law or other formality, is appropriate, efficient and should be encouraged. Moreover, the kinds of records to which you referred are and have long been accessible to the public. Minutes of meetings are frequently made available to requesters informally, and without citing the Freedom of Information Law. I 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)].

In short, it is suggested that you, the Planning Board and perhaps others might suggest to the Town Board that records, particularly those that are clearly accessible to any person, should be made readily available, without formality, when they are being sought in the performance of their Town related duties.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

FOIL-AO-16634

From: Freeman, Robert (DOS)
Sent: Monday, June 25, 2007 4:48 PM
To: Veronica Howley
Subject: RE: FOIL Question

Yes, it is true. The Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy, unless a different fee is prescribed by statute. A statute, based on judicial decisions, is an enactment of the State Legislature, not a local law, ordinance, regulation or policy. The State Police can charge $15.00 per accident report pursuant to a statute, §66-a of the Public Officers Law. There is no statute, however, upon which a unit of local government can rely to charge more than twenty-five cents per photocopy.

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
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www.dos.state.ny.us/coog/coogwww.html

From: Freeman, Robert (DOS)
Sent: Monday, June 25, 2007 5:10 PM
To: Sarah Ryley
Subject: RE: Brooklyn Bridge Park
Attachments: o3654.wpd

Hi Sarah - -

For reasons described in the attached advisory opinion, it does not appear that there was a valid basis for entry into executive session. In short, there is no exception for "legal matters", and the exception pertaining to litigation has been interpreted to enable a public body enter into executive session to discuss its litigation strategy in private so as not to divulge its strategy to its adversary, who might be present at the meeting. As I understand the matter, the discussion did not involve litigation strategy.

If the issue had been discussed in public, the information contained in the passage that you sent presumably would have been disclosed. Even if there was no meeting, the passage would constitute "intra-agency material" falling within §87(2)(g) of the Freedom of Information Law, and I believe that portions of the passage would be accessible. In brief, that provision authorizes and agency to withhold internal governmental communications consisting of advice, opinion, recommendation and the like. Therefore, the last sentence in the passage in my view could be withheld in that circumstance. However, the same provision also states that other portions of those communications consisting of statistical or factual information must be disclosed. The remainder of the passage in my opinion consists of factual information that would be accessible.

I hope 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
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www.dos.state.ny.us/coog/coogwww.html

FOIL-AO- 16636

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, June 26, 2007 8:32 AM
To:' [redacted]
Subject: RE: Freedom of Information Law - proposed contract

Jim,

Based on the attachments, it appears that the Town Clerk acknowledged your request and indicated that she is unable to determine whether it is required to be released to the public until June 28. The following is a link to an advisory opinion that should help clarify that marking a document "confidential" does not control access to the record pursuant to the Freedom of Information Law:

http://www.dos.state.ny.us/coog/ftext/f10050.htm

If you do not hear from the Clerk on or before the 28th, an appeal to the Supervisor and the Town Board would be appropriate. Please note the time frames described on the following page:

http://www.dos.state.ny.us/coog/explaination05.htm

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
41 State Street
Albany NY 12231
(518) 474-2518
(518) 474-1927 fax
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO- 16637

From: Freeman, Robert (DOS)
Sent: Tuesday, June 26, 2007 10:15 AM
To: [redacted]

Dear Ms. Bianchi:

To seek a record indicating a public employee's title and salary, a request should be made to the employing agency's records access officer. The records access officer has the duty of coordinating the agency's response to requests for records. If a record exists that indicates whether an employee is full time or otherwise, I believe that an agency would be required to disclose a record or portion of a records that so indicates.

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
(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

FOIL-AO- 16638

From: Freeman, Robert (DOS)
Sent: Tuesday, June 26, 2007 10:11 AM
To: cwillson@cityofglencoveny.org
Subject: scanning records, etc.

Dear Ms. Willson:

I have received your inquiry in which you referred to records that are bound and asked whether they must be copied or scanned. In this regard, it has been advised that when scanning in order to email records involves labor or tasks more substantial than the production of photocopies, an agency is not required to scan the records. However, I believe that an agency is required to photocopy records, even if they are bound. In that instance, as you are likely aware, the City may charge up to twenty-five cents per photocopy up to nine by fourteen inches. Although it may be suggested that an applicant inspect the records, if he or she is willing to pay for copies, I believe that the City is required to do so.

You also referred to a "foiler" who has "refused to pay for and pick up copies which were produced." It has been advised that an agency may inform the individual that it will not honor any additional or ensuing request until he/she pays the requisite fees for copies.

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-16639

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

June 26, 2007

Mr. Frankie Moore
03-A-0681
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

Dear Mr. Moore:

I have received your letter, which reached this office today, and in which you appealed a denial of access by the inmate records coordinator at your 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. The provision concerning the right to appeal a denial of access to records, §89(4)(a), states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

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

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16640

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

June 26, 2007

Mr. Larry Brown
C.N.Y.P.C. 246987
P.O. Box 300
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. Brown:

I have received your correspondence concerning your difficulty in obtaining "Procedures and Guidelines for filing a formal complaint upon professional misconduct by a licensed psychiatrist within the state of New York." You wrote that you have sent three inquiries to the New York State Department of Health and have not received a response.

As a service, we have enclosed the records of your interest. However, 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16641

41 State Street, Albany, New York 12231
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June 27, 2007

E-Mail

TO: Mr. Thomas E. Hogan

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Hogan:

I have received your communication in which you sought guidance concerning the status of private schools under the Freedom of Information Law.

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

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

Based on the foregoing, the Freedom of Information Law is generally applicable to governmental entities. That being so, from my perspective, it is clear that private schools are not subject to or obliged to comply with the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4405
FOIL-AO-16642

41 State Street, Albany, New York 12231
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June 27, 2007

Larry Amster, Commissioner
Medford Ambulance District
1890 Route 112
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 Mr. Amster:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to the Medford Volunteer Ambulance Company. Specifically, you inquired whether the Company is an "agency" subject to the Freedom of Information Law in light of Ryan v. Mastic Volunteer Ambulance Company, 212 AD2d 716, 622 NYS2d 795 (2d Dept, 1995). You noted that the Town's attorney indicated that the Company "is not an agency of the Town", yet has indicated that the records of the Company are subject to the Freedom of Information Law. We write to confirm our previously rendered verbal opinion that the Company is an "agency" within the meaning of the Freedom of Information Law.

First, the Committee on Open Government is the only entity with statutory authority to issue legal advice concerning application of the Freedom of Information and Open Meetings Laws. Pursuant to §89(1)(b) of the Freedom of Information Law, this office is authorized to issue legal advice to any agency or person, and, promulgate rules and regulations to implement the Freedom of Information Law. Similarly, §109 of the Open Meetings Law authorizes this office to provide advice and opinions regarding that statute. While the Committee 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 applicable to agency records, and §86(3) of the Law defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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

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

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

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

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law, despite their status as private, not-for-profit corporations.

With specific respect to your situation, the Appellate Division, Second Department, which includes Suffolk County within its jurisdiction, has held that a volunteer ambulance corporation is subject to the Freedom of Information Law. In so holding, the decision states that:

> "The Court of Appeals has rejected any distinction between a volunteer organization on which a local government relies for the performance of an essential public service and an organic arm of government (*see, Matter of Westchester Rockland Newspapers v. Kimball,* 50 N.Y.2d 575, 579, 430 N.Y.S.2d 574, 408 N.E.2d 904).
>
> "The appellant performs a governmental function, and it performs that function solely for the Mastic Ambulance District, a municipal entity and a municipal subdivision of the Town of Brookhaven (hereinafter the Town). The appellant submits a budget to and receives all of its funding from the Town, and the allocation of its funds is scrutinized by the Town. Thus, the appellant clearly falls within the definition of an agency and is subject to the requirements of FOIL" [Ryan v. Mastic Volunteer Ambulance Company, 212 AD 2d 716, 622 NYS 2d 795, 796 (1995)].

Based on your description of the Medford Volunteer Ambulance Company, and its similarity to the Mastic Volunteer Ambulance Company, we believe that it is an "agency" within the meaning of the Freedom of Information Law and subject to the law's requirements.

Although you did not question application of the Open Meetings Law, we note that in his February 27, 2007 correspondence, counsel for the Town indicated based on the Company's by-laws, that the Board of Directors' meetings "are indeed open to the public, but become closed meetings from which the public is excluded when the Board goes into executive session to discuss personnel or the budget."

In this regard, 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. Therefore, a public body may not conduct an executive session to discuss the subject of its choice, including, for example, "budget" matters.

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 our 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.

Assuming that the actions taken did not involve consideration of how well or poorly particular public employees were carrying out their duties, we do not believe that there would have been a basis for conducting an executive session.

Even when §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "personnel" or "personnel issues" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for

entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as a "personnel issue" is inadequate, for it fails to enable the public or even members of the Board to know whether the subject at hand may properly be considered during an executive session. Again, a public body may enter into executive session only for one or more of the purposes enumerated in §105(1).

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-16643

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June 27, 2007

Mr. Greg Fischer
[redacted]

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

Dear Mr. Fischer:

I have received your correspondence and a variety of materials relating to it. Following a denial of access by Suffolk County, you have requested an advisory opinion concerning your right to obtain records indicating the name, last known address, home telephone number, employment address, email address, and civil case numbers "of each child support obligor known to [the] county by way of each and every divorce proceeding, separation of marriage proceeding, child custody proceeding, paternity proceeding and all such similar causes having been processed through [the] county court system and/or other county agencies and/or county entities."

In this regard, I offer the following comments.

First, you based your request and referred at length to the federal Freedom of Information Act. That statute, however, is applicable only to records maintained by federal agencies; it does not apply to records maintained by entities of state or local government. The statute that generally deals with public access to records of those entities is the New York 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.

As suggested in the responses to your request, 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. The statute upon which the County relied in its denial, §136 of the Social Services Law, prohibits the disclosure of records identifiable to applicants for or recipients of public assistance. While I do not believe that §136 is necessarily applicable or pertinent, two other statutes in my view clearly indicate that the records of your interest are exempt from disclosure to the public.

Title 6-A of the Social Services Law is entitled "Establishment of Paternity and Enforcement of Support", and within Title 6-A is §111-v, entitled "Confidentiality, integrity and security of information." Subdivision (5) of that provision states that "The safeguards established pursuant to this section shall apply to staff of the department, local social services districts, and any contractor." Therefore, the requirements of §111-v apply to county departments of social services and other entities involved with child support enforcement. The confidentiality requirements appear in subdivisions (1) and (2), which state in relevant part that:

> "1. The department, in consultation with appropriate agencies including but not limited to the New York state office for the prevention of domestic violence, shall by regulation prescribe and implement safeguards on the confidentiality, integrity, accuracy, access, and the use of all confidential information and other data handled or maintained, including data obtained pursuant to section one hundred eleven-o of this article and including such information and data maintained in the automated child support enforcement system. Such information and data shall be maintained in a confidential manner designed to protect the privacy rights of the parties and shall no t be disclosed except for the purpose of, and to the extent necessary to, establish paternity, or establish, modify or enforce an order of support.
>
> 2. These safeguards shall include provisions for the following:
>
> (a) Policies restricting access to and sharing of information and data, including:
>
> (1) safeguards against unauthorized use or disclosure of information relating to procedures or actions to establish paternity or to establish or enforce support;
>
> (2) prohibitions against the release of information on the whereabouts of one party to another party against whom an order of protection with respect to the former party has been entered..."

Based on the foregoing, the information of your interest that is maintained by a county department of social services or other entity involved in child support is exempt from disclosure. Moreover, subdivision (4) indicates that a person who discloses that information maybe guilty of a misdemeanor and states that:

> "Any person who willfully releases or permits the release of any confidential information obtained pursuant to this title to persons or agencies not authorized by this title or regulations promulgated thereunder to receive it shall be guilty of a class A misdemeanor ."

The other statute of significance pertains to court records. Although the courts are excluded from the coverage of the Freedom of Information Law, most court records are accessible to the public under different provisions of law. However, the kind of records in which you are interested are exempt from disclosure pursuant to §235(1) of the Domestic Relations Law. That provision 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."

In sum, based on the statutes cited above, I believe that the records sought could properly have been 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: Rachael C. Anello

FOIL-AO-16644

To: gregg kaczmarczyk
Date: June 29, 2007
Subject: RE: FOIL request being ignored

Dear Mr. Kaczmarczyk:

I have received your letter concerning your difficulty in obtaining records under the Freedom of Information Law from the Eden Town Court.

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

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

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

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

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

.

Since you are seeking records from a justice court, it is suggested that a request for records be made to the clerk of the court, citing '2019-a of the Uniform Justice Court Act as the basis for the request.

I hope that I have been of assistance.

Janet M. Mercer
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - Fax
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16645

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

June 29, 2007

Mr. Briant George
94-A-3921
Auburn Correctional Facility
135 State Street
Albany, NY 13021

Dear Mr. George:

I have received your letter in which you appealed a denial of access by the inmate records coordinator at your 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. The provision concerning the right to appeal a denial of access to records, §89(4)(a), states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Lastly, it appears that the records of your interest are maintained by a court. Here I point out that the Freedom of Information Law does not apply to the courts. Nevertheless, records maintained by courts are generally available under other provisions of law (e.g., Judiciary Law, §255).

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-16646

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

July 9, 2007

E-MAIL

TO: Suzanne Schreter

FROM: Robert J. Freeman, Executive Director

Dear Ms. Schreter:

I have received your letter in which you raised issues concerning your farm market. Please be advised that the functions of the Committee on Open Government are limited to matters involving public access to government information, primarily in relation to the Freedom of Information Law.

Insofar as your comments relate to the Freedom of Information Law, it appears that the issue involves requests for records that allegedly do not exist. Here 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1606[illegible]7

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

July 9, 2007

Mr. Robert A. Caiazza
[redacted]

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

Dear Mr. Caiazza:

I have received your correspondence in which you state that you requested records from the Town of Colesville Fire District #1 on May 7, 2007 and on May 21st. You received a response on May 22nd acknowledging receipt of the request, but the correspondence did not have a "date signifying when the request would be fulfilled."

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

cc: Tonya Northrup

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16648

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

July 9, 2007

E-MAIL

TO: Jeffrey K. Branch

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. Branch:

I have received your correspondence in which you described a request made to the Saranac Lake Village Clerk for copies of all minutes of Village Board meetings for the past 14 months. You received a response on the same day stating the requested material would be sent within ten days. However, more than that time has passed and you still had not received the requested 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

cc: Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1661649

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

July 9, 2007

Mr. John Shepard
[redacted]

Dear Mr. Shepard:

I have received your letter in which you appealed a denial of access to the payment requisitions and a certified payroll that includes names and addresses of employees of a company with which the Mineola School District has contracted.

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

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

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

If my understanding of the matter is accurate, the payment requisitions that you requested must be disclosed, for none of the grounds for denial would be applicable.

Insofar as the payroll records at issue include a private company's employees' names, addresses and social security numbers, I believe that those portions of those records could properly

be withheld pursuant to §87(2)(b). That provision permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." Section 89(2)(a) authorizes an agency to delete identifying details to protect against an unwarranted invasion of personal privacy when it makes records available. In addition, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintained it...[§89(2)(b)(iv)].

In my opinion, what is relevant to an agency is whether the employees are being paid in accordance with prevailing wage standards; their names, addresses and social security numbers are largely irrelevant to that issue and may in my view be deleted to protect against an unwarranted invasion of personal privacy.

It is noted that the Appellate Division affirmed the findings of the Supreme Court in a case involving a situation in which a union sought home addresses of an agency's contractors' employees for the purpose of "monitoring and prosecution of prevailing wage law violations." The court found that the employees' home addresses could be withheld, stating that the applicant's "entitlement to access does not necessarily entitle it to the reports in their entirety. Indeed portions of the report made available to petitioner should be expunged to protect (the) privacy of the employees" [Joint Industry Board of the Electrical Industry v. Nolan, Supreme Court, New York County, May 1, 1989; affirmed 159 AD 2d 241 (1990)].

In sum, while I believe that portions of the records reflective of the titles, duties, wages, hours worked and similar data must be disclosed, disclosure of personally identifiable details pertaining to a contractor's employees may in my view be deleted or redacted from the records prior to disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donna Martillo, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16650

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

July 9, 2007

Mr. Willie C. Elliott
89-C-0148
Mohawk Correctional Facility
6100 School Road
Rome, NY 13442

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

Dear Mr. Elliott:

I have received your correspondence in which you referred to difficulty in gaining a response to a Freedom of Information Law request that you submitted to the Lackawanna 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Lackawanna Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16651

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

July 9, 2007

Mr. Rohan Brown
03-A-6919
Green Haven Correctional Facility
P.O. Box 400
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. Brown:

I have received your letter in which you complained that you had submitted a Freedom of Information Law request to the New York City Police Department five months ago and, as of the date of your letter to this office, 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

It is noted that the person designated to determine appeals by the New York City Police Department is Jonathan David.

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to New York City Police Department.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: FOIL Unit
Jonathan David

FOIL-AO-16652

From: Freeman, Robert (DOS)
Sent: Monday, July 09, 2007 2:50 PM
To: MULLEN, VICTORIA
Attachments: F10468.wpd

Having recently returned from a vacation, I today received your inquiry and apologize for the delay in response.

You have asked whether the following is a proper request: "All correspondence from the united group."

The issue in my view involves whether or the extent to which the request "reasonably describes" the records sought as required by §89(3) of the FOIL. In considering that standard, it has been held that the nature of an agency's filing or recordkeeping system often determines if that standard is met. If all the records pertaining to a particular subject are stored and can be retrieved from a single location, i.e., under the heading of or in a file folder marked "united group", the request would reasonably describe the records, even if it involves hundreds of records. On the other hand, if correspondence is filed chronologically, not by subject or the name of an organization, and if attempting to locate the records requested is equivalent to finding the needle in the haystack, the request would not meet the requirement imposed by FOIL.

Attached is an opinion that deals with the issue more expansively that may be useful to you.

Hope all is well.

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

FOIL-AO-16653

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, July 10, 2007 2:21 PM
To: 'mmlaw
Subject: Freedom of Information Law - court records and youthful offenders

Judge Matthews:

In follow up to our conversation, the following are links to advisory opinions of the Committee on Open Government pertaining to records of a Town Court, confirming my advice that FOIL does not apply to records maintained by a court:

http://www.dos.state.ny.us/coog/ftext/f15341.htm

http://www.dos.state.ny.us/coog/ftext/f14743.htm

And, if I haven't spoken with you yet, in response to your question about how much to charge someone for copies of records maintained by your court, I note that Judiciary Law section 255 sets forth:

"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."

Because I believe this provision applies to all courts, it is likely that provisions of the CPLR pertaining to fees charged by county clerks would apply to copies of records at your court (CPLR section 8019 et seq.).

Finally, this advisory opinion pertains to records maintained by an agency subject to FOIL regarding youthful offenders: http://www.dos.state.ny.us/coog/ftext/f11813.htm

I hope these are helpful to you. Please call with any further questions.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
41 State Street

Albany NY 12231
(518) 474-2518
(518) 474-1927 fax
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-16654

From: Freeman, Robert (DOS)
Sent: Tuesday, July 10, 2007 5:20 PM
To: Arthur Okada

Dear Mr. Okada:

I have received your letter concerning your ability to make a "blanket request" to the Department of State for records "concerning complaints, investigation, hearings or disciplinary actions against real estate brokers in NYC."

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. A request in this instance could be made to the Department's records access officer, Ms. Lauren Rivera, at the Department of State, 41 State St., Albany, NY 12231.

Second, and perhaps most importantly, §89(3) of the FOIL requires that an applicant must "reasonably describe" the records sought. In Konigsberg v. Coughlin (68 NY2d 245), the Court of Appeals determined that whether or the extent to which a request reasonably describes the records is often dependent on the nature of an agency's filing, recordkeeping or retrieval system. If records can be found and retrieved with reasonable effort, the request would "reasonably describe", even it involves a substantial volume of records. On the other hand, if locating records would involve a search through thousands of records individually to locate those containing the information sought, I do not believe that an agency would be required to do so.

I am unaware of the manner in which the records of your interest are kept or may be retrieved. If, for example, complaints, investigations, hearings or disciplinary actions can be found or retrieved only by use of a particular identifier, i.e., a licensee's name, the Department would not, in my opinion, be required to review all licensee files in order to locate the information sought in response to a blanket request for certain information relating to all real estate brokers in New York City.

It is suggested that you might review material available on our website, particularly regulations dealing with the procedural implementation of the Freedom of Information Law and advisory opinions under the key phrase "reasonably describing records" that are accessible via the FOIL index to opinions.

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
Department of State
41 State Street
Albany, NY 12231
(518) 474-2518

FOIL-AO-16655

From: Freeman, Robert (DOS)
Sent: Tuesday, July 10, 2007 5:23 PM
To: Carol Thompson, The Valley News
Subject: RE: Confidential letter

Since you did not obtain the record in question by illegal means, I know of no law that would preclude you from using it as you see fit.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4427
FOIL-AO-16656

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

July 10, 2007

E-MAIL

TO: Laura Wells

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Wells:

I have received your letter in which you asked whether a board of education may vote "by paper ballot" to elect its president.

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 [such as a board of education; 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."

In an Appellate Division decision that was affirmed by the Court of Appeals, the state's highest court, 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)]. Further, in a case dealing directly with election of officers, it was found that secret ballot voting violated both the Freedom of Information Law and the Open Meetings Law (Wallace v. City University of New York, Supreme Court, New York County, Julu7, 2000).

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.

Lastly, while the record of votes by members ordinarily is included in minutes, there is no requirement that it be included in minutes. Although such a record must be prepared and made available, the Court of Appeals 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

FOIL-AO-16657

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

July 10, 2007

E-MAIL

TO: Susan Otis

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Otis:

I have received your letter in which you asked whether "foil requests filed with the clerk of a municipality" are accessible to the public.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. From my perspective, with the exception of portions of certain kinds of requests, the records in question would be accessible to the public under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a municipal board, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests

are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, Nay 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

Lastly, the Freedom of Information Law is permissive; even in situations in which an agency *may* withhold records or portions of records, it is not obliged to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. Therefore, even when a municipal agency may withhold records on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see §87(2)(b)], it would not be required to do so.

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16058

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

July 10, 2007

Mr. Glen Mallean
06-B-2867
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

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

Dear Mr. Mallean:

I have received your correspondence in which you referred to difficulty in gaining a response to a Freedom of Information Law request submitted to the Monroe County Jail.

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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Lastly, enclosed is a copy of an advisory opinion previously rendered by this office dealing with access to records maintained by a public defender.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Enc. (FOIL-AO- 7421)

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16659

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July 11, 2007

Mr. Michael G. Iafrati
[redacted]

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

Dear Mr. Iafrati:

As you are aware, I have received a variety of material concerning a series of requests made pursuant to the Freedom of Information Law to the Division of State Police, all of which have been rejected in their entirety. You have sought an opinion concerning the propriety of the denials of access, and you also sought guidance concerning the ability of siblings or other relatives of a deceased to obtain an autopsy report.

By way of background, you are the brother-in-law of Andy Sperr, a state trooper who was murdered in Big Flats on March 1, 2006. Your first request to the State Police for reports relating to the incident was made on March 20, following the arrests of three suspects. On April 6, Captain Laurie M. Wagner, the Division's records access officer, wrote that the records sought "concern an on-going investigation and a case that is pending adjudication", and that they "were compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations and/or judicial proceedings." You appealed the denial, and on April 28, William J. Callahan, the Division's appeals officer, sustained the denial, using, word for word, the same basis for denial as that offered by Captain Wagner.

A second request was made for the same records on September 14, four days prior to the date scheduled for the trial of the suspects. You specified that you were "renewing [your] request...since the investigation has obviously now been completed." You also requested reports prepared by the Chemung County Sheriff's Office that had been forwarded to the State Police. Captain Wagner denied the request, indicating that the records "were compiled for law enforcement purposes and which, if disclosed, would interfere with judicial proceedings." The appeal was denied for the same reason.

Your third request was made on October 31 in which you referred to the previous denial based on interference with "a case pending adjudication" and pointed out that "this case was finally adjudicated on the 17th of this month when Judge Hayden sentenced the three suspects/defendants

in Chemung County relating to the murder/robbery to prison..." You added that one defendant was convicted following a trial, and that the two others pled guilty two days later. Nevertheless, in a response of November 10, Captain Wagner wrote that "the case is still pending adjudication" and again, that the records "were compiled for law enforcement purposes and which, if disclosed, would interfere with judicial proceedings." Mr. Callahan upheld the denial, using exactly the same words as Captain Wagner.

A fourth request was made on December 28 and rejected for the same reason by both Captain Wagner and Mr. Callahan.

From my perspective, which is based on the language of the Freedom of Information Law and its judicial interpretation, each denial of your requests reflected a failure to comply with law, and more records or portions of records should have been disclosed with each successive request. In this regard, I offer the following comments.

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, 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 certain reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from that referenced in response to your requests. 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 requests, the State Police have 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 State Police for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In sum, I believe that the blanket denials of your requests indicate a failure to comply with law. I note that New York City Department of Investigation was criticized in Lewis v. Giuliani (Supreme Court, New York County, NYLJ, May 1, 1997) for a denial of access also based merely on a reiteration of the statutory language of an exception, stating that "DOI may not engage in mantra-like invocation of the personal privacy exemption in an effort to 'have carte blanche to withhold any information it pleases'". In this and other responses by the State Police, the "law enforcement purposes" exception has been used in much the same manner.

In a related vein, §89(4)(a) of the Freedom of Information Law concerning appeals requires that a determination to uphold a denial of access must "*fully explain* in writing to the person requesting the record the reasons for further denial..." The determinations prepared by Mr. Callahan merely reiterate, verbatim, the reasons for denial offered by Captain Wagner; they clearly did not in any instance "fully explain" the reasons for further denial.

As suggested at the outset, I believe that more records or portions of records should have been disclosed with each successive request. In many instances, the ability of an agency to properly assert an exception to rights of access relates to the likelihood of harm that could arise by means of disclosure. Often an exception may be applicable, for a time, due to the effects of disclosure, but

with the passage of time or occurrence of certain events, the ability to assert that exception may diminish or even disappear. In my view, that would be so in the context of your requests.

The provision to which the State Police referred in each of the denials, §87(2)(e)(i), authorizes an agency to withhold records "compiled for law enforcement purposes" insofar as disclosure "would...interfere with law enforcement investigations or judicial proceedings..."

When the initial request was made, which was less than three weeks after the murder of Trooper Sperr, although three arrests had been made, it is possible that a law enforcement investigation was continuing and that, therefore, disclosure of some of the records sought could properly have been withheld in whole or in part. Similarly, because three persons had been arrested, it is likely some of the records could justifiably have been withheld in whole or in part because disclosure would, at that juncture, have interfered with judicial proceedings. However, it is also likely that disclosure of other records in whole or in part would have been required to comply with law. For instance, because there are no secret arrests of adults in New York, the basic booking records regarding the three persons arrested in my opinion would have been accessible.

When the second request was made, less than a week prior to the scheduled trial, it is likely, as you suggested, that the investigation had essentially ended. If that is so, no longer would disclosure have interfered with an investigation, and the aspect of §87(2)(e)(i) concerning interference with a law enforcement investigation likely would no longer have been applicable. If that was so, some of the records or portions thereof that were withheld in response to the first request should have been made available in response to the second. Because judicial proceedings were about to begin, it is possible, however, that some records or portions of records could remain deniable under the other aspect of that provision involving interference with judicial proceedings.

The ensuing requests were made after the three defendants were sentenced. Nevertheless, the State Police continued to deny access on the ground that disclosure would "interfere with judicial proceedings." If the criminal proceedings associated with the prosecution of the defendants ended, it is difficult to envision how disclosure could at that time interfere with judicial proceedings. Insofar as disclosure would not interfere with any such proceedings, the exception upon which the State Police relied would not, in my view, be applicable or justifiable.

It is important to note that statements made and records introduced as evidence during public judicial proceedings have to been found to be accessible, even if they could ordinarily be withheld under the Freedom of Information Law [see Moore v. Santucci, 151 AD2d 677 (1986)]. In addition, copies of records filed with and available from courts would also be available from agencies [see Newsday v. Empire State Development Corporation, 98 NY2d 746, 359 NYS2d 855 (2002)].

In short, it does not appear that §87(2)(e)(i), the only exception upon which the State Police relied in response to all of your requests, could properly have been asserted following the conviction and sentencing of the defendants.

In fairness and in an effort to offer a complete and balanced opinion, it is likely that other exceptions to rights of access might continue to be pertinent. For example, during the course of an investigation, many individuals not identified during judicial proceedings or in court records might

have been interviewed or questioned. In my view, portions of those records identifying those individuals might properly be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Similarly, there may be intimate personal information pertaining to family members or others relating to the defendants that might justifiably be withheld.

The other exception of potential significance, §87(2)(g), pertains communications between or among officers and employees of state and local agencies. Specifically, the cited provision permits an agency to 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.

One of the contentions offered by the New York City Police Department in Gould, supra was that certain reports could be withheld because they were not final. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." (id., 276 (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) id., 276-277).]

In addition, in a situation in which opinions and factual materials were "intertwined" within intra-agency materials, Ingram v. Axelrod, a decision cited by the Court in Gould rendered by the Appellate Division, Third Department, indicated that:

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

> Associates v. Yudelson, 68 AD2d 176, 48 NY 2d 706, motion of leave to appeal denied (1979); Xerox Corporation v. Town of Webster, 65 NY2d 131, 490 NYS2d 488 (1985)].

Based on the direction provided by the courts, even though statistical or factual information contained within a record may be "intertwined" with opinions, the statistical or factual portions would in any opinion be available under §87(2)(g)(i).

The court in Gould also referred to portions of records reflective of opinions of witnesses and others and found that they could not be withheld under §87(2)(g), because that provision pertains to an "internal government exchange" between or among government officers or employees, as opposed to opinions offered by persons not employed by government (id., 277).

Lastly, with respect to access to an autopsy report, again, if the report of your interest was submitted to the court, I believe that it would be accessible. Assuming that it was not, the report, would, in my opinion, be deniable. In denying access, the Chemung County Attorney wrote that "absent proof that either you or one of the siblings qualify as a personal representative or next of kin under the law, the Chemung County Medical Examiner cannot release the autopsy report." Although I do not have the expertise or jurisdiction to advise that you are next of kin, assuming that you and Trooper Sperr's siblings do not so qualify, I would agree that you do not enjoy rights of access to the autopsy report. However, based on a review of the applicable statute, I do not believe that disclosure of the report would constitute a violation of law or that there is any prohibition against disclosure.

The statute governing access is §677(3)(b) of the County Law, which pertains to autopsy reports and related records and 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 my view, a finding that records are confidential and *cannot* be disclosed must be consistent with the specific and unequivocal language of a statute. Section 677(3)(b) provides a right of access to certain persons, but nowhere specifies that disclosures to others is prohibited. Therefore, while the general public may have no right to 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.

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be sent to the Division of State Police and Chemung County.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: William Callahan
Captain Laurie Wagner
Weeden A. Wetmore

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1666

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July 11, 2007

Mr. Robert W. Rochler
[redacted]

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

Dear Mr. Rochler:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Taghkanic Fire Company for copies of financial accounting records and those pertaining to use and/or rental of the fire house. We believe the records, if they exist, must be made available to you. In this regard, we offer the following comments.

First, the Freedom of Information Law pertains to all agency records, and that §86(4) of the Law defines the term "record" to mean:

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

Based on the foregoing, when information is maintained by an agency in some physical form (i.e., drafts, worksheets, handwritten notes, etc.), we believe that it would constitute a "record" subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, if they exist, 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, one of the grounds for denial would be relevant to an analysis of rights of access to the records sought, however, under the circumstances, it would not in our view, have justified a denial of access.

Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld. Accordingly, it is our opinion that if the requested accounting records exist, there would be no basis in the law for denying access to them.

In response to your request for financial accounting records, the Taghkanic Fire Company asserted that it "does not maintain records of this nature." In support of its position, the Fire Chief relied on correspondence from Government Records Services at the New York State Archives, indicating that their office has no authority to impose records retention schedules on a volunteer fire company. Although we have little expertise in this area, it is unlikely in our view that members of the board of a volunteer fire company are relieved of the fiduciary responsibilities normally associated with entities of that nature.

With respect to any documents which you believe have been omitted from the Company's 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 with respect to copies of missing calendar months, for example.

With regard to the Fire Company's decision to redact individual names from calendars indicating use of the fire house, and names, home addresses and home phone numbers from contracts for rental of the fire house, we know of no provision of law that would authorize the Fire Company to redact such information. The only provision of significance in analyzing rights of access to these records, in our view might be §87(2)(b), which permits an agency to withhold records insofar as disclosure would constitute an "unwarranted invasion of personal privacy." Contracts, agreements, and similar records reflective of expenses incurred by an agency or payments made to an agency

must generally be disclosed, however, for those records do not involve intimate personal details and none of the grounds for denial could appropriately be asserted to withhold them. While it is likely that home telephone numbers could be withheld under this provision, contracts or written agreements are available to the public even though they identify particular individuals.

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: Town Board
Hon. Cheryl Rogers
Chief William Hilscher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16661

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July 12, 2007

E-MAIL

TO: Brenda Ross

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. Ross:

I have received your letter in which you indicated that the Village of Hudson Falls would charge 25 cents per photocopy when making records available under the Freedom of Information Law, as well as "75 cents more as a fee for responding..." You have questioned the legality of the additional fee.

From my perspective, the Village may not charge in excess of twenty-five cents per photocopy or impose any additional or separate fee when making records available. In this regard, I offer the following comments.

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

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

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

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

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

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

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

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

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be sent to the Board of Trustees.

I hope that I have been of assistance.

RJF:tt

cc: Board of Trustees

FOIL-AO-16662

From: Freeman, Robert (DOS)
Sent: Thursday, July 12, 2007 9:30 AM
To: Jay Cohen
Subject: RE: Record of votes

In short, because a political party committee is not a governmental entity, it would not constitute an "agency" and, therefore, would not be required to comply with the Freedom of Information Law.

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

July 12, 2007

Mr. Jamel Torres
02-A-6511
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

Dear Mr. Torres:

I have received your letter in which you requested various records, apparently from this office, concerning your conviction in Nassau County.

Please note that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have custody or control of records generally, and we do not maintain any of the records that you requested.

To seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that you believe would maintain the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

Although the courts are not subject to the Freedom of Information Law, I would conjecture that many of the records of your interest are maintained by the court in which your proceeding occurred. Therefore, those records would be available under provisions of law dealing with access to court records (see e.g., Judiciary Law, §255).

Lastly, when seeking records from an agency under the Freedom of Information Law, I point out that it has been held that records previously made available either to a defendant or his attorney need not be disclosed a second time, unless it can be demonstrated that neither the defendant nor his attorney any longer possesses the record [see Moore v. Santucci, 151 AD2d 677 (1989)].

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16664

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July 13, 2007

E-MAIL

TO: Joe Sciacca

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. Sciacca:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the East Islip School District. The dates of your requests and the responses to them suggest that responses were not given in a timely manner. 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, 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, the records you provided indicate the District's failure to respond to each of your requests by stating, for example, "special ed records not available yet." In this situation, the law authorizes you to appeal the constructive denial of any unanswered requests, as per the above.

With respect to any documents which you believe have been omitted from the District's responses to you, 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 should seek such a certification.

Finally, although you did not refer to it, we note that the written request form provided to you by the District requires that the applicant must agree "not to reproduce the record(s) without written authorization from the Records Access Officer." With one exception that is not applicable here, we know of no provision of law, nor any prohibition within the Freedom of Information Law, concerning the use of records once they are made available by an agency. Accordingly, we do not believe the District has the authority to require you to seek its permission to duplicate records that you or others may obtain.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

cc: Board of Education
Robert T. Tartaglia

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16665

41 State Street, Albany, New York 12231
(518) 474-2518
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July 17, 2007

Mr. Dominick Sutton
06-B-3550
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. Sutton:

I have received your letter in which you indicated that you have encountered difficulty in obtaining responses to your Freedom of Information Law requests directed the Erie County Sheriff's 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

In an effort to enhance compliance with law, a copy of this opinion will be sent to Robert Koch.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Robert Koch

FOIL-AO-16666

From: Jobin-Davis, Camille (DOS) [mailto:Camille.Jobin-Davis@dos.state.ny.us]
Sent: Tuesday, July 17, 2007 1:03 PM
To: Rettig, Andrew
Cc: Mercer, Janet (DOS)
Subject: Freedom of Information

Andrew:

Although I was not able to find anything in writing, I am still of the opinion that you are not required to offer, nor should you offer an applicant the ability to certify that the request for a list of names and address is not made for a commercial or fundraising purpose, if you already know that it is. I recommend you indicate the basis for your belief that the purpose is commercial in your letter of denial.

I trust this meets with your request.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
41 State Street
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(518) 474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16667

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July 17, 2007

Ms. Dania 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 facts presented in your correspondence.

Dear Ms. Hall:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests for records made to the North Bellmore Union Free School District. In an effort to address the issues raised in your correspondence and the responses from the District, 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 NY2d 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. This is the only enforcement mechanism available under the law. The "District policy" that allegedly permits you to appeal again to the Board of Education is neither required nor prohibited by law. Accordingly, we do not know whether it would extend the time frame within which you have the ability to bring an Article 78 proceeding.

Second, with respect to your request for minutes of an executive session for which the District indicated there are none, the Freedom of Information Law does not require the District to create a record that does not exist. 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."

Although §106(2) 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.

Third, with regard to your request to inspect original records rather than copies, we know of no provision of law or regulation that would require an agency to make original records available for inspection. In our opinion, therefore, the District is not required to produce original records for inspection.

With respect to the District's requirement that you to schedule an appointment to inspect records at the District's convenience, limiting your appointment to one hour, and then further, the requirement that you indicate in writing, "how much time you anticipate needing to complete your review of the documents and how many people you plan on bringing with you" we offer the following.

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, 210 AD2d 411, 620 NYS2d 101 (2nd Dept 1994)].

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 that a member of the public may dictate the date or dates on which 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 or dates suitable to both parties. Furthermore, on an ongoing basis until all the records have been inspected, we believe the District must make the records available for inspection during normal business hours.

Accordingly, based on the length of time that has elapsed since your initial request, the District's delays to date and the Superintendent's March 9, 2007 correspondence inviting you to schedule your review now that the records are available, we believe the District should make the requested records available for your inspection immediately and that your inspection may continue on subsequent dates scheduled within a reasonable period.

Further, the Freedom of Information Law requires that the District evaluate whether records are required to be released to the public. Inviting others to accompany you to the District office for inspection of the requested records, therefore, does not raise questions of rights of access. In short, it was held more than thirty years ago that records accessible under the Freedom of Information Law

must be made available to any person, without regard to one's status or interest [Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976) and M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)].

Whether the number of people who accompany you is reasonable, in our opinion, is based on the capacity of the District to accommodate people in available office space. In Murtha, *supra*, a small village with limited staff, space and facilities adopted rules prohibiting the use of a personal photocopier and limiting the number of persons who could assist in the review and inspection of documents. The court held that such a rule constituted "a valid and rational exercise of the Village's authority under Public Officers Law §87(1)(b)" [id., 102]. In our opinion, the decision was based upon the reasonableness of the rule in view of attendant facts and circumstances. In situations in which an agency has sufficient space to permit a number of people to review records in a non-disruptive manner, it would likely be found that a prohibition limiting inspection to one person would be invalid. In this instance, there is no indication in the correspondence that the District has adopted rules pertaining to the number of persons permitted to inspect records at one time. In our view, assuming that the District has the physical space to enable you and others to review records, and that use of the space would not be disruptive to the District's routine and necessary business, especially in light of the time-saving effects of a multiple-person inspection, and based on the direction provided in Murtha, we believe that the District would be obliged to permit multiple people to inspect records simultaneously. As a courtesy, the District could indicate dates on which the larger conference table would be available, however, in our opinion, that availability cannot be used to further delay access.

With respect to the District's denial of access to records of "IEP Consultations"of two students in the fourth grade, as a general matter and 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.

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. Conversely, because disclosing records pertaining to a named student would by its very nature, disclose educational information pertaining to that student, the District must not disclose such records.

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 simply a task that government officials are required to carry out; doing so is part of our governmental duty.

The District made reference in response to your request for observation reports and annual professional performance review forms generated by those supervisors who authored reports pertaining to you, that "this request is overly burdensome and would put an administrative strain on the day-to-day operations of the District." While we are under the impression that there were only two supervisors who reviewed your work, we have advised that when records cannot be found with reasonable effort, 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 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, we 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 local telephone directory is an agency 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 identifying all of those persons in the directory 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 our 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. Depending on the nature of the District's filing system, it may be that reports authored by your two supervisors could be maintained in many separate employee personnel files and a search for such records would involve reviewing every page in every file pertaining to every District employee, an effort, in our opinion, not required by the Freedom of Information Law. Conversely, if all of the reports authored by a particular supervisor are maintained in one location, the request would reasonably describe such records. Because we are not familiar with the manner in which the District's records are maintained, however, more information would be necessary for us to accurately advise you.

With respect to the District's offer to permit you to inspect the "document entitled 'Records Retention and Disposition, ED-1'" in response to your request for the District's subject matter list, please note§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)].

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. Records Retention and Disposition ED-1 is a minimum records retention schedule applicable to all public school districts in New York State, promulgated by the State Archives. As such, it contains an index identifying most records maintained by public school districts, and in our opinion is sufficient to meet the requirements of §87(3)(c).

Finally, we emphasize that the courts have consistently applied reasonable standards to effectuate the purposes and intent of the Freedom of Information Law. We encourage you, and by copy of this letter to the District, the District, to move forward in a reasonable and responsible manner.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Mr. Dominic Mucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16668

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

July 17, 2007

E-Mail

TO: Concerned Person

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Concerned Person 9:

I have received your letter in which you asked whether agencies are required to make records available to "otherwise acceptable requesters who do not divulge their identity."

In this 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 (j) 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 my opinion, the name of an applicant or his/her use of the records are irrelevant.

The only instance in my view in which a person seeking records must indicate his/her identity would involve a request for records pertaining to him/herself that would be accessible only to the subject of the record, and which could be withheld from others on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §§87(2)(b) and 89(2)(b) and (c)].

Lastly, I note that a new provision, §89(3)(b), pertains to requests for and the transmission of records by means of email. That being so, records are frequently made available through use of an email address, and the actual name of the applicant is often not known.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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July 17, 2007

E-Mail

TO: Ms. Micki Leader

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Leader:

I have received your letter, and this is to advise that I do not believe that a PTA or the unit of the PTA to which you referred is 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."

Based on the foregoing, the Freedom of Information Law generally applies to entities of state and local government. A PTA is a private organization, not a governmental entity. Therefore, its records, in my opinion, fall beyond the coverage of the Freedom of Information Law.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16670

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

July 18, 2007

Ms. Amy H. Witryol
[redacted]

The staff of the Committee on 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. Witryol:

I have received your letter in which you asked whether "phone records of State legislators and their staffs are accessible" under the Freedom of Information Law. You added that such records "would include telephone number, length of call, date and time of call, and expense of call" made through use of land line or cell phones.

In this regard, I offer the following comments.

Section 88 of the Freedom of Information Law deals with rights of access to records of the State Legislature. It is noted that the structure of that provision differs from that of §87 of the Freedom of Information Law, which pertains to agencies of state and local government generally. In brief, as the Freedom of Information Law applies to agencies, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. As the Law applies to the State Legislature, §88(2) and (3) include reference to certain categories of records that must be disclosed. Therefore, unless records of the Legislature fall within one or more of those categories of accessible records, there is no obligation to disclose. From my perspective, the kinds of records that you requested would not fall within the categories of records that must be disclosed by the State Legislature. Consequently, as a matter of law, it appears that the records of your interest need not be disclosed.

I point out that Rule VIII adopted by the Assembly deals with public access to Assembly records and that §1 states that:

> "It is the intent of the Assembly that central administrative records maintained by the Assembly be governed by the same presumption of

> disclosure which governs access to executive agency records, with similar enumerated exceptions."

As such, the Assembly, by rule, has chosen to disclose or withhold its records based on standards similar to those applicable to state and local government agencies.

Section 2(2) of the rules pertains to the ability to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". An example of an unwarranted invasion of personal privacy appearing in the ensuing provisions involves the disclosure of "names, addresses, numbers or other personal identifying details of telephone communications or mail correspondence made by or to Members of the Assembly or employees thereof."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16671

41 State Street, Albany, New York 12231
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July 18, 2007

Hon. David C. McFadden
Mayor
Village of Tuxedo Park
P.O. Box 31
Tuxedo Park, NY 10987

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

Dear Mayor McFadden:

I have received your letter concerning the status of a certain report under the Freedom of Information Law, as well as the report itself.

By way of background, you wrote that the Board of Trustees of the Village of Tuxedo Park was informed more than a year ago by representatives of the Office of the Orange County District Attorney that it was investigating the then Chief of Police and two part-time police officers who might have claimed compensation for work they did not perform. The Chief has since retired, and the two others are no longer employed by the Village. The Board retained a forensic accountant to review Village records to "establish the scope and extent of the possible fraudulent activities of these individuals." You wrote that firm was retained and that a report "was obtained through the attorney for the Village in order that the Village might invoke the 'attorney-client privilege', at least during the preparation of various drafts which led up to the final report." You indicated that the attorney for the Village expressed the view that there is no valid reason for invoking the attorney-client privilege, and you introduced a resolution to authorize release of the report upon receipt of a request made pursuant to the Freedom of Information Law. The resolution was defeated by a vote of 3 to 2, and the Village has received several requests for the report.

In this regard, it is emphasized at the outset that this office is authorized to offer advisory opinions concerning the Freedom of Information Law. Although I have reviewed the report, I am not a judge, and the Committee on Open Government does not possess judicial or quasi-judicial authority. However, having read the report, I offer the following comments, which are advisory in nature.

First, at the top of the first page of the report are the phrases: "Attorney Client Privileged" and "Attorney Work Product." It appears that they are printed on the firm's letterhead and were not added as an admonition or description of the content of this particular report. Notwithstanding those phrases, I do not believe that report falls within the attorney-client privilege or that it constitutes attorney work product. Rather, it is more akin in my opinion to an audit pertaining to the operation and functioning of a particular entity within the Village and its fiscal practices and accountability. Moreover, 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, the printed statements involving attorney-client privilege and attorney work product appearing on the first page of the report, without more, would not in my view serve to enable the Village to withhold 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 (j) of the Law. As suggested above, 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 §4503 of the Civil Practice Law and Rules (CPLR), which codifies the attorney-client privilege. Another is §3101(c) of the CPLR concerning attorney work product. 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..." It is intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. It does not appear that the report at issue relates to litigation or that the intent of §3101(c) is pertinent in the context of your inquiry.

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 short, based on the foregoing and in consideration of the nature of the content of the report, I do not believe that it could be characterized as attorney work product. Further, since it serves as a barrier to disclosure, it is emphasized that the courts have narrowly construed the exemption concerning attorney work product. It has been held that only the work product that involves the learning and professional skills possessed only by an attorney is exempt from disclosure [see Soper v. Wilkinson Match, 176 Ad2d 1025 (1991); Hoffman v. Ro-San Manor, 73 AD2d 207 (1980)]. Because the contents of the report do not reflect the specialized skill that can be offered only by an attorney, I do not believe that the report can be withheld based on a contention that it consists of attorney work product. Similarly, based on its content, I do not believe that the report constitutes an attorney-client communication that falls within the scope of the privilege. That being so, rights of access to the report should be determined on the basis of the Freedom of Information Law.

In my view, one of the exceptions to rights of access is most pertinent to an analysis of rights of access. However, due to its structure, that provision often requires substantial disclosure, and I believe that to be so in this instance.

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, 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)].

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)."

As I view the report, most of it consists of factual information, final determinations or Village policy that must be disclosed. The portions that might justifiably be redacted prior to disclosure of the remainder involve those passages indicating that "it appears" or that "it does not appear", for those phrases reflect opinions. In addition, section IV. of the report entitled "Recommendations" may in my view be withheld.

Lastly, I point out that the Freedom of Information Law is permissive. While an agency may choose to withhold records or portions of records falling within the exceptions to rights of access, the Court of Appeals has held that it is not required to do so [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James Roemer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4429
FOIL-AO-16672

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July 18, 2007

E-Mail

TO: Hon. Kathleen Smith, Assessor, Town of Deerpark

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Smith:

I have received your letter in which you referred to a board of assessment review and asked whether minutes are required to be prepared in relation to its deliberations, which are quasi-judicial and, therefore, exempt from the requirements of the Open Meetings Law.

In this regard, a board of assessment review is in my view clearly a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)]. While meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

Moreover, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

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

The minutes are not required to indicate how a board member reached its conclusion; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes.

Lastly, since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

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

In sum, because an assessment board of review is a "public body" and an "agency", I believe that it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of the votes of each member in conjunction with §87(3)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16673

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July 18, 2007

Mr. Alfonso G. Flores, Jr.
Cattaraugus County Jail
301 Court Street
Little Valley, NY 14755

Dear Mr. Flores:

Your letter addressed to the Division of Corporations at the NYS Department of State has been forwarded to the Committee on Open Government for response. It appears that you are requesting various court records pertaining to yourself.

Please be advised that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. Neither the Committee nor the Department has custody or control of records generally, and we do not maintain any of the records of your interest.

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

I hope that the foregoing serves to clarify your understanding.

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-16674

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July 20, 2007

Mr. Mark Polite
99-A-6193
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

Dear Mr. Polite:

I have received your letter in which you sought assistance in obtaining information from the Federal Bureau of Prisons, specifically "documentary verification" that a particular individual was arrested in Kings County on a certain date.

Please be advised that the functions of this office involve providing advice and opinions relating to the New York Freedom of Information Law. This office does not maintain records generally, and we have no records involving the matter of your interest.

If you believe that a federal agency maintains information of your interest, a request should be made to that agency pursuant to the federal Freedom of Information act. If you believe that an agency of state or local government in New York maintains records of your interest, a request should be made pursuant to the New York Freedom of Information Law to the records access officer at that agency. The records access officer has the duty of coordinating an agency's response to requests.

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-16675

From: Freeman, Robert (DOS)
Sent: Monday, July 23, 2007 10:39 AM
To: [redacted]

Dear Mr. Weinkrantz:

I have received your letter in which you referred to a failure on the part of the New York County District Attorney to include on his agency's website the information described in §87(4)(c) of the Freedom of Information Law.

In this regard, first, the provision in question does not become effective until October 31. Second, it applies only to state agencies. That being so, I do not believe that offices of district attorneys or local government agencies are subject to the provision.

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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 23, 2007

Mr. Robert M. Homko
[redacted]

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

Dear Mr. Homko:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests for records made to the Hyde Park Central School District. Correspondence between yourself and the District indicates, in sum, that the numerical data you requested, although public, is not available in the format you require. In this regard, we offer the following.

By way of background, 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. However, §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)].

When denying your request for the data to be arranged in a "detailed numerical listing in columnar fashion assigning dollar values to the actual cost where completed in whole or in part by school by line item", the District indicated "the data you requested is not available in the specified format." However, the District further indicated "You are welcome to have it in its existing format." Accordingly, we advise that you accept the District's offer to provide you the data in the format in which it is currently maintained.

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, we believe that it is required to do so.

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 we interpret the foregoing, insofar as the District 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.

With respect to the records access officer's obligation to assist you in determining the format in which the data currently exists and whether this would be helpful to you, §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...
>
> (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."

The records access officer cannot be the same person who determines appeals. If a request is denied, 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."

Corresponding regulations promulgated by the Committee indicate as follows:

> "(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 designated to determine 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."

In our opinion, this means that the person who denies access to the requested records must be different from the person who determines the appeal.

Finally, as you may already know, it is our view that if an agency has the ability to scan records in order to transmit them via email and doing so will not involve any effort additional to an alternative method of responding, it is required to do so. 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 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. In that instance, transferring a paper record into electronic format would eliminate any need to collect and account for money owed or paid for preparing paper copies, as well as tasks that would otherwise be carried out. In addition, when a paper record is converted into a digital image, it remains available in electronic format for future use.

In sum, when an 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 in our opinion, the agency must do so to comply with the Freedom of Information 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: Wayne L. Kurlander

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1660

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July 23, 2007

Mr. Archie Jackson
[redacted]

Dear Mr. Jackson:

I have received your letter in which you requested from this office an "interagency transfer form", as well any rules and regulations pertaining to that form.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have custody or control of records generally, and we do not possess the form or records relating to it.

When seeking records under the Freedom of Information Law, a request should be made to the agency that you believe would maintain the records. Further, the regulations promulgated by the Committee require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should be directed to that person.

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 23, 2007

E-MAIL

TO: Bruce Golding

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. Golding:

As you are aware, I have received your letter and a variety of related materials concerning your request for records of the Town of Bedford Police Department. The request involves three unsolved murders of Guatemalan immigrants who "disappeared from the streets of Mount Kisco."

By way of background, you wrote that Mount Kisco police are investigating the first two killings, and that Bedford police are investigating the third, "in which three Mount Kisco police officers are subjects of the investigation." You added, significantly, in my opinion, that:

> "Both departments have acknowledged multiple contacts with the most recent victim, with Mount Kisco reporting 59 arrests and about 300 incidents since about 2000, and with Bedford reporting about 60 incidents. Both departments also acknowledged contact with the victim on the night he was found mortally wounded."

In a letter dated May 10, your request was denied, and it was stated that: "The information you are requesting has been compiled for law enforcement purposes and which if disclosed would: interfere with a law enforcement investigation or judicial proceeding..." You appealed the denial to the Town Board, which, based on minutes of a meeting of May 15, resolved that the request was "properly denied in accordance with Section 87(2)(e)(i) of the Freedom of Information Law as the present matter is an exception to the law because there is an open Bedford Police Department criminal investigation involved" and that "the information sought was compiled for law enforcement purposes, and the disclosure of this information would interfere with a pending law enforcement investigation."

From my perspective, because the investigation is ongoing, it is likely that portions of the records sought might properly have been withheld. However, it is equally likely some elements of

the records, particularly those relating 60 previous incidents, must be disclosed and that the blanket denial of access by the Town 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, 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 certain reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from that referenced in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink 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 Town 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 for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In sum, I believe that the blanket denial of your request indicates a failure to comply with law. I note that New York City Department of Investigation was criticized in Lewis v. Giuliani (Supreme Court, New York County, NYLJ, May 1, 1997) for a denial of access also based merely on a reiteration of the statutory language of an exception, stating that "DOI may not engage in mantra-like invocation of the personal privacy exemption in an effort to 'have carte blanche to withhold any information it pleases'". In this response by the Town, the "law enforcement purposes" exception has been used in much the same manner.

In a related vein, §89(4)(a) of the Freedom of Information Law concerning appeals requires that a determination to uphold a denial of access must "*fully explain* in writing to the person requesting the record the reasons for further denial..." The Board's determination is essentially a reiteration of the initial denial of access. In my opinion, it does not "fully explain" the reasons for further denial as required by law.

Even though the investigation regarding the three murders may be ongoing, it is likely that various records relating to those incidents must be disclosed. For instance, police blotter entries or equivalent records should be disclosed in whole or in part [Sheehan v. City of Binghamton, 59 AD2d 808 (1977)]. Records reflective of police radio communications or their equivalent are should likely be available in whole or in part [Buffalo Broadcasting Co., Inc. v. City of Buffalo, 126 AD2d 983 (1987)]. While those and others might have been compiled for law enforcement purposes, in most instances, portions of them would not if disclosed interfere with an investigation or judicial proceeding.

Further, often records prepared in the ordinary course of business, some 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. Case law illustrates why §87(2)(e)(i)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."

Another example pertinent to your request might involve attendance records or time sheets pertaining to certain public employees. It has been held, for instance, that records indicating the days and dates of sick leave claimed by police officers must be disclosed [Capital Newspapers v. Burns, 67 NY2d 562(1986)]. Those and similar records, although perhaps related to or used in an investigation, are prepared in the ordinary course of business and, in my opinion, could not be characterized as having been compiled for law enforcement purposes.

With respect to the other 60 incidents in which the victim was involved, at the very least, some of the records or portions of records should be disclosed. Police blotter entries, booking records, and records indicating convictions should be in my opinion be disclosed. If copies records available from a court are maintained by the Town, they would constitute Town records subject to rights conferred by the Freedom of Information Law, even if they were prepared by a court or court officer [see Newsday v. Empire State Development Corporation, 98 NY2d 746 (2002)]. I note, too, that although courts are not subject to the Freedom of Information Law, records maintained by the courts are generally accessible to the public under other provisions of law (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a), unless they have been sealed or are exempted from disclosure by statute. As you may be aware, when charges are dismissed in favor of an accused, the records relating to the arrest that are maintained by a court or an agency are typically sealed pursuant to §160.50 of the Criminal Procedure Law.

In sum and to reiterate, while some of the records or portions of records that you have requested might properly have been withheld pursuant to §87(2)(e)(i) of the Freedom of Information Law, I believe that the blanket denial of your request is inconsistent with the requirements imposed by that statute.

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Lt. Robert W. Mazurak
Nancy A. Tagliafierro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16629

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July 23, 2007

E-MAIL

TO: Rosalie Green

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. Green:

I have received your letter in which you asked whether a police department is subject to the Freedom of Information Law and required to disclose the identities of people who make complaints if there is no arrest or charge.

In this regard, first, a police department is a unit with an agency of local government. Any such agency falls within the coverage of the Freedom of Information Law. Therefore, police department records fall within the scope of that law.

Second, by way of background, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I note that the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that there may be instances in which a single record includes both accessible and deniable information, and that an agency is required to review a record that has been requested to determine which portions, if any, may properly be withheld.

The exception to rights of access of primary significance, in my view, pertains to the protection of privacy, and §87(2)(b) permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." It has consistently been advised that those portions of a complaint or other record which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

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

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

Also relevant is §87(2)(e)(iii), which authorizes an agency to withhold records "compiled for law enforcement purposes" to the extent that disclosure would "identify a confidential source or disclose confidential information relating to a criminal investigation." In my view, the identity of the complainant may be deleted based on this provision when he or she is a "confidential source." As indicated previously, I believe that a complainant's identity may alternatively be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

In sum, I believe that those portions of a complaint may be withheld to the extent that disclosure would identify the person who made the complaint. However, it is possible that other portions of the record should be disclosed.

I hope that I have been of assistance.

RJF:tt

FOIL-AO-16680

From: Mercer, Janet (DOS)
Sent: Tuesday, July 24, 2007 10:18 AM
To: 'Marc Winkler'
Subject: RE: 87(2)g

"Inter-agency materials" would involve written communications between or among officials of two or more agencies. "Intra-agency materials" would consist of communications between or among officials within an agency.

Janet M. Mercer
NYS Committee on Open Government
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FOIL-AO-16681

From: Freeman, Robert (DOS)
Sent: Tuesday, July 24, 2007 1:00 PM
To: William Rashbaum
Subject: RE: NYC Economic Development Corporation
Attachments: F9439.wpd

Hi again - -

There is case law dealing with the records that I believe to be of your interest.

You likely recall that there is an exception in FOIL regarding internal governmental communications, so-called inter-agency and intra-agency materials. In brief, those portions of the materials that consist of opinions, recommendations and the like may be withheld. Other portions consisting of statistical or factual information, agency policy or determinations must be disclosed.

The case law focuses on a process similar to that described to you. Narrative expressions of opinion or recommendation were found to be deniable, but "rating sheets" prepared to evaluate the strengths or weaknesses of various elements of a proposal submitted pursuant to an RFP (i.e., 10 being great; 1 being terrible) were found to be "statistical tabulations" required to be disclosed. In short, when opinions are given in the form of numbers, they have been determined to be accessible under FOIL.

Attached is an opinion dealing with the matter more expansively. The passage dealing with tier 1 and tier 2 scores near the end of the opinions refers to the judicial precedent.

If I have misinterpreted, please let me know.

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-16682

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July 24, 2007

Mr. Kevin P. Gorman
[redacted]

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

Dear Mr. Gorman:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests for records made to the City of Yonkers. In this regard, and in an effort to respond to your questions, please be advised of the following.

First, as indicated by Mr. Arena, 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.

Second, an appeal may be made when an agency denies access by informing an applicant that it has a record, but the applicant does not have the right to inspect or copy that record based on one or more of the grounds for withholding the record appearing in §87(2) of the Freedom of Information Law. When an agency indicates that it does not have records that are responsive to a request, we do not believe that response constitutes a denial of access; a denial of access occurs when an agency withholds an existing record.

In your correspondence, you allege that the City should maintain certain records, and if it does, you should have the ability to review them. 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 possible that your difficulty in obtaining records gives rise to other issues. One involves the obligation of an agency to search for its records. By way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it

with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. 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)]. While we are unfamiliar with the record keeping systems of the City, to the extent that the records sought can be located with reasonable effort, we believe that the request would have met the requirement of reasonably describing the records.

Third, although as a general rule an agency is not required to create a record in response to a request, an exception to that rule relates to your request for a subject matter list. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in 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 index to 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. The schedule for cities, towns, villages and fire districts (MU-1) is available on-line through the State Archives' website, on the publications page for managing government records, as follows:

http://iarchives.nysed.gov/Publications/pubOrderServlet?category=ServicesGovRecs)

Finally, 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.

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-16683

From: Freeman, Robert (DOS)
Sent: Tuesday, July 24, 2007 4:33 PM
To: Schneider, Doug
Subject: RE: FOIL request

Hi - -

First, you asked whether it is "reasonable for an agency to require 20 business days to provide a decision on a FOIL request to see the records of a police chief who retired almost three years ago." In this regard, if an agency cannot grant or deny access to records within five business days of the receipt of a request, it is required to acknowledge receipt in writing and provide an approximate date not to exceed twenty additional business days when it will grant the request in whole in part. The approximate date, according to §89(3) of the FOIL, "shall be reasonable under the circumstances of the request." In my opinion, when records sought are not voluminous and are easy to locate, a delay of up to twenty business days to determine rights of access would be unreasonable.

Second, you questioned your right to obtain records "records related to a jail deputy who, [you]'ve been told, has repeatedly left her gun unattended in public places including a courthouse washroom." Section 50-a of the Civil Rights Law states that personnel records pertaining to police officers that are "used to evaluate performance toward continued employment or promotion" are confidential, and cannot be disclosed absent consent by the officer or a court order. That being so, it appears that the records of your interest would be exempt from disclosure.

If you have further questions, please feel free to get in touch.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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July 25, 2007

E-MAIL

TO: Becky L. Dieterle

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Dieterle:

As you are aware, we have received your letter which in your subject line describes the matter as "Does this apply to...." and asked whether "this" applies a variety of matters. It is assumed that "this" refers to the Freedom of Information Law. Based on that assumption, I offer the following comments.

First, the Freedom of Information Law applies to all records of state and local government agencies in New York, including school districts, and §86(4) defines the term "record" to mean:

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

Based on the foregoing, records pertaining to investigations of any sort fall within the coverage of that law.

Second, however, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3)(a) states in part that an agency is not required to create a record in response to a request. Similarly, while agency officers or employees may choose to provide information in response to questions, they are not required to do so. Therefore, if, for example, there is no record indicating steps taken to protect a victim from harassment, there would be no requirement that a record be prepared that contains the information at issue.

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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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 (j) of the Law.

Since you referred to youth court and other matters that may involve students, §87(2)(a), the initial ground for denial, is relevant. That provision pertains to records that are "specifically exempted from disclosure by state or federal statute." 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. Conversely, a parent of a minor student generally has rights of access to records pertaining to his or her child.

Insofar as youth court decisions or other records, such as those involving investigations, threats or harassment, identify students other than your child, I believe that they must be withheld to comply with federal law.

There may be other exceptions to rights of access relating to investigations or allegations of wrongdoing that may be pertinent in determining rights of access. For instance, if there is an unsubstantiated charge or complaint about an individual, the records pertaining to that person may, in my view and based on judicial decisions, be withheld. On the other hand, if a person (other than a student) has been found to have engaged in or admitted to misconduct, a determination indicating such a finding would ordinarily be available.

If you can provide additional guidance concerning the nature of the records of your interest, perhaps I could offer more precise advice.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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FOIL-AO-16685

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July 25, 2007

E-MAIL

TO: Thomas Brennan

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. Brennan:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Rochester School Board, of which you are a member. Specifically, you are concerned with the propriety of entering into executive session to discuss "proposed changes in the structure of the school district central office" and whether written evidence of the proposal under consideration is "confidential" and must be returned, upon demand, to the superintendent. It is our opinion that a discussion concerning the structure of an office, or how a particular department is organized should be held during the public portion of a meeting to comply with law. In this regard, we offer the following.

First, 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 so-called 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), we 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 discussion involves structural changes to the central office, and "not the specific hiring and firing for the hypothetical consolidated positions", we do not believe that §105(1)(f) may be asserted to justify holding an executive session. Further, based on your description of the flow chart that "dealt only with these structural changes," and the interim superintendent's effort to seek "only board approval of the structure", we believe the discussion concerning the proposed chart must occur in public to comply with law.

We 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 essentially 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 AD2d 840, 841 (1983)].

In sum, only to the extent that the matters considered by the Board 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 NY2d 573, 575; 207 AD2d 55 (1994)].

Next, with respect to access to the proposed flow chart, and whether, upon request, it must be maintained "confidentially," we note that in general, the Freedom of Information Law is based upon a presumption of access. All records of an agency are 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." 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). 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 NY2d 341 (1979); Washington Post v. Insurance Department, 61 NY2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS2d 780 (1979)]. As such, an assertion or promise of confidentiality, without more, would not in our view serve to enable an agency, such as a school district to withhold a record.

In this instance, we know of no statute that would require or prohibit release of this record.

This does not necessarily mean that the proposed flow chart must be disclosed upon request. More specifically, §87(2)(g) states that an agency such as a school district 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. Accordingly, as long as the proposed flow chart remains an inter-agency recommendation, in our opinion, it would not be required to be disclosed to the public.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

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July 25, 2007

E-MAIL

TO: Elizabeth Passer

FROM: Robert J. Freeman, Executive Director RJF

Dear Ms. Passer:

As you are aware, I have received your letter concerning a request for notes used as the basis for a statement read at a meeting of the Mexico Central School District Board of Education. It appears that they were made available to another person, but you were informed by a District official that they are "not part of any information in [her] possession" and that the District "does not recognize notes used to speak from a record as a record therefore we do not retain these as documents."

In this regard, I point out that there are two definitions of the term "record", both of which may be pertinent in the context of the situation to which you referred.

For purposes of the Freedom of Information Law, §86(4) defines "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, if documentation in some physical form is maintained by or for an agency, such as a school district, it constitutes a "record" that is subject to rights of access conferred by the Freedom of Information Law. Even if, for example, material read or used by a member of the Board of Education in that person's capacity as a Board member is kept at his or home, I believe that it would be an agency record falling within the coverage of that statute. If documentary material is not maintained by or for the District, or if it no longer exists, the Freedom of Information Law would not apply.

Insofar as an existing District record is read aloud during an open meeting or that notes reflect what was said during such a meeting, I believe that the record or notes would be accessible, for none of the grounds for denial would apply.

The other definition appears in Article 57-A of the Arts and Cultural Affairs Law, the "Local Government Records Law," which deals with the management and preservation of records by local governments, including school districts. In brief, §57.25 provides that records cannot be destroyed or discarded, except in accordance with schedules indicating minimum retention periods for various categories of records. However, the term "record" is defined in the Local Government Records Law more narrowly than the definition of the same term in the Freedom of Information Law. Specifically, §57.17(4) 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."

I am unaware of whether the notes at issue would constitute a "record" falling within the provision quoted immediately above. If the notes do not constitute a record, they fall outside of the retention schedule; if they do, they must be retained in accordance with the schedule. The schedule itself should be available if it is maintained by the District; alternatively, I believe that it is accessible on the State Education Department's website and its reference to the State Archives.

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

cc: Marcia A. Bessel

STATE OF NEW YORK
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July 26, 2007

Mr. Sidney G. Sloves
[redacted]

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

Dear Mr. Sloves:

As you are aware, I have received a variety of correspondence concerning your efforts in obtaining information from the City of Yonkers. Based on a review of the materials, I offer the following comments.

First, I note that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires that agency staff provide information in response to questions. Similarly, §89(3) states in relevant part that an agency is not required to create a new record in response to a request for information. In short, the Freedom of Information Law pertains to existing records.

Several of your requests appear to involve an effort to elicit information in response to questions. While an agency may choose to respond to questions, it is not required to do so pursuant to the Freedom of Information Law. By means of example, you indicated that you "want to know how much the assessment rolls were reduced for 2006 by the Yonkers Board of Assessment Review." If the City of Yonkers maintains a record indicating a total, I believe that it must be disclosed. However, if no such record exists, City officials would not be required to prepare a new record containing the information sought on your behalf. Again, the Freedom of Information Law pertains to existing records and does not require an agency to create new records to accommodate an applicant.

Next, you asked whether "a department head [is] obliged to adhere to FOI laws?" The Freedom of Information Law does not generally refer to obligations imposed upon individuals; rather, compliance with the Law rests with an agency. In the context of your correspondence, the agency is the City of Yonkers.

With respect to the implementation of the Law, the Committee on Open Government is required to and has promulgated general rules and regulations involving the procedural implementation of the Freedom of Information Law (21 NYCRR Part 1401). In turn, §87(1) requires that the governing body of a public corporation, e.g., the City Council of the City of Yonkers, adopt its own rules and procedures consistent with those promulgated by the Committee and the Freedom of Information Law.

One element of the Committee's regulations requires that the governing body designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records (21 NYCRR §1401.2), and requests should generally be made to him or her.

When a request is made to a department head or any agency officer or employee, I believe that the recipient of the request is required, if he or she has the authority to do so, to respond in a manner consistent with the Freedom of Information Law. Alternatively, if he or she is not authorized or is unable to do so, the request should be forwarded immediately to the records access officer. The records access officer then has the responsibility to determine rights of access and ensure that staff give proper effect to the 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: City Council
Eric Arena

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July 26, 2007

David J. Rynkowski, Esq.
[redacted]

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

Dear Mr. Rynkowski:

We have received your letter and apologize for the delay in response. You have sought an opinion concerning "the availability for public inspection of appellate decisions regarding the Unemployment Insurance Appeals Board and the DMV appeals board for chemical test refusal hearings."

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.

Pertinent is §89(6), which provides that nothing in the Freedom of Information Law "shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records." Therefore, if records are accessible under a different provision of law or by means of judicial precedent, an exception to rights of access appearing in the Freedom of Information Law could not be asserted to deny access.

With respect to the determinations rendered by the Department of Motor Vehicles, it appears that §307(3)(a) of the State Administrative Procedure Act requires disclosure, for it provides that:

> "Each agency shall maintain an index by name and subject of all written final decisions, determinations and orders rendered by the agency in adjudicatory proceedings. For purposes of this subdivision, such index shall also include by name and subject all written final

> decisions, determinations and orders rendered by the agency pursuant to a statute providing any party an opportunity to be heard, other than a rule making. Such index and the text of any such written final decision, determination or order shall be available for public inspection and copying. Each decision, determination and order shall be indexed within sixty days after having been rendered.

Second, §102(1) of the State Administrative Procedure Act specifies that the Unemployment Insurance Appeals Board is not an "agency" for the purpose of the Act. Nevertheless, I believe that its determinations must be made available in whole or in part in most instances.

In a decision rendered by the Court of Appeals dealing specifically with the Unemployment Insurance Appeals Board, the Court considered the issue of "whether there is any basis for setting aside the strong public policy in this State of public access to judicial and administrative proceedings" [Herald Co. v. Weisenberg, 59 NY2d 378, 381 (1983)] and held that "[a]n unemployment insurance hearing is presumed to be open, and may not be closed to the public unless there is demonstrated a compelling reason for closure and only after the affected members of the news media are given an opportunity to be heard" (id., 380). One of the questions before the Court involved the impact of §537 of the Labor Law, which requires that certain records be kept confidential and states in relevant part that:

> "[i]nformation acquired from employers and employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court, in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provisions of law."

The court found that "[s]ection 537 does not require closure of hearings at which claimants present their cases for unemployment benefits", and that "section 537 concerns only disclosure of information acquired through the reporting requirements of article 18, and not closure of hearings..." (id., 382). Since the hearing was erroneously closed, the court found that the petitioner "is entitled to a transcript of the hearing", specifying that "[i]nasmuch as no examination was conducted at the time into the reasons for barring public to specific portions of the testimony, however, the affected parties should be given an opportunity to make such a showing, if they so desire" (id., 384). In conjunction with the foregoing, the Court found that portions of a hearing may be closed when there are "compelling reasons" to do so, as in cases of revelation of alcoholism or mental illness, and held that:

> "To the extent that such compelling reasons may exist for making certain information confidential, however, less drastic remedies than closing a hearing in its entirety exist. Although an unemployment compensation hearing is not a criminal judicial proceeding, the procedures outlined with respect to such proceedings are apt (see *Matter of Westchester Rockland Newspapers v. Leggett*, 48 NY2d

> 430, 442, *supra*). When a claimant or employer requests closure of an unemployment compensation hearing during the presentation of certain evidence, he or she must demonstrate that a compelling reason exists for such closure. The court does not have occasion here to catalogue the possible reasons justifying closure, other than to note that a presumption of open hearings does not provide a license to publicize the intimate details of claimants' private lives. If the administrative law judge does find a compelling reason for closure, such reason shall be stated on the public record in as much detail as would be consistent with the reason for closure. And, equally important, no hearing should be closed before affected members of the news media are given an opportunity to be heard 'in a preliminary proceeding adequate to determine the magnitude of any genuine public interest' in the matter" (id., 383).

Unless an unemployment insurance appellate hearing is closed due to "compelling reasons", I believe that a record of the hearing would be accessible to the public. In other contexts, it has been held that records ordinarily deniable under the Freedom of Information Law when they are submitted into evidence or otherwise made part of a court record prepared in relation to a public judicial proceeding [see e.g., Moore v. Santucci, 151 AD2d 151 (1989)]. If the record of the hearing is accessible, I believe that a determination would be equally available, again, unless there were compelling reasons for closure and, therefore, for withholding a determination in whole or in part.

Lastly, you referred to binders maintained by the Unemployment Insurance Appeals Board that include three hundred cases which are apparently filed chronologically, and that you reviewed those cases to determine whether which among them involved a matter of interest. Following that case by case review, you suggested that "there has to be a way to search each case for a certain keyword" and that the public should have the ability to locate determinations in that manner.

In my opinion, if indeed the Board has the ability through the use of its computers to locate or identify determinations involving a particular issue or subject, the public should be able to request and obtain those records using the same search or retrieval mechanism.

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)].

In my view, whether a request reasonably describes the records sought, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. When an agency can locate records with reasonable effort, I believe that a request meets the requirement of reasonably describing the records.

Further, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, require that agency staff provide the public with guidance that will enable those seeking records to submit a proper request. The regulations in 21 NYCRR §1401.2(a) require that an agency's records access officer has "the duty of coordinating agency response to public requests for access to records," and §1401.2(b)(2) states 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 records are filed, retrieved or generated to assist persons in reasonably describing records."

Based on the foregoing, if your assumption that Board staff has the ability to locate cases based on use of a key word or similar mechanism, I believe that it must inform you of its manner in which cases can be located in order to enable you do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Unemployment Insurance Appeals Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16689

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

July 26, 2007

Mr. Louis Spies
06-A-1997 B-1-44B
Orleans Correctional Facility
3531 Gains Basin Road
Albion, NY 14411-9199

Dear Mr. Spies:

I have received your letter in which you appealed to this office following a denial of your request to Suffolk County to redact a statement sent to the office of the County Attorney.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. Under the circumstances, since you have already appealed to the County Attorney, I believe that the remaining recourse would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules.

Second, the Freedom of Information Law does not include provisions concerning the amendment or correction of a record. While agencies may choose to amend records whose contents may be erroneous, there is nothing in the Freedom of Information Law requiring that they do so.

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: Christine Malafi
Rachael C. Anello

FOIL-AO-16690

From: Freeman, Robert (DOS)
Sent: Friday, July 27, 2007 8:46 AM
To: [redacted]
Subject: Financial Grant

Dear Mr. McGregor:

I have received your letter and assume that you are referring to the method of seeking a grant application from a unit of state or local government in New York.

Based on that assumption, a written request should be made to the "records access officer" at the government agency that you believe would maintain the record of your interest. The records access officer has the duty of coordinating an agency's response to requests made under the Freedom of Information Law. That law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should contain detail sufficient to enable agency staff to locate and identify the record. If you would like a copy of the record, you should offer to pay the appropriate fee, which cannot exceed twenty-five cents per photocopy or the actual cost of reproducing other records.

One of the publications accessible on our website is "Your Right to Know," which summarizes the Freedom of Information Law and includes a sample letter of request that may be useful to you.

I hope that I have been of assistance.

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

FOIL-AO-16691

To: Patricia Sweeney
Subject: RE: FOIL request
Date: July 27, 2007

Dear Ms. Sweeney:

Please be advised that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office does not possess records generally, nor does it maintain any records of your interest.

For your information, a request should be directed to the "records access officer" at the agency that you believe maintains the records. The records access officer has the duty of coordinating an agency's response to requests.

Since the information you are interested in relates to property in the City of Albany, it is suggested that you submit your request to the City Clerk of the City of Albany.

I hope that I have been of assistance.

Janet M. Mercer
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - Fax
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16692

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

July 27, 2007

Mr. David Selwyn
[redacted]

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

Dear Mr. Selwyn:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. Based on a review of the materials, the facts are not entirely clear. However, it appears that you submitted a complaint concerning the certain actions of the principal at the school that employs you as a teacher. Your request for a report pertaining to the complaint was denied by the office of the Special Commissioner of Investigation for the New York School District on the basis of §87(2)(b) of the Freedom of Information Law. That provision authorizes an agency to deny access to records when disclosure would constitute "an unwarranted invasion of personal privacy."

In this regard, I offer the following comments.

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

Second, although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50

(1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, 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)].

If the report in question refers to unproven allegations and did not result in a finding or determination indicating misconduct, it appears that it could properly have been withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. On the other hand, to the extent that includes an admission of or final determination reflective of a finding of misconduct, for the reasons described above, I believe that it would be accessible.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Eileen C. Daly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16693

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

July 27, 2007

Mr. Kenneth Bartholomew
[redacted]

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

Dear Mr. Bartholomew:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You have objected to deletions made by the Department of Environmental Conservation in response to your request for a complaint relating to permit violations.

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. 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." 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.

While I am unfamiliar with the facts associated with the complaint form that you forwarded, it is questionable in my opinion whether all of the deletions are appropriate. As you suggested, it is unlikely that disclosure of the town, state and zip code of the complainant would in most instances lead to identification of that person. Under the heading of "Possible Responsible Parties Information", assuming that a responsible party is a business entity, I do not believe that the exception involving the protection of privacy would apply, for it pertains to items involving natural persons. There are deletions within the narrative that appear to pertain to persons other than the complainant. If, for example, they relate to government employees in relation to their duties, I do not believe that the deletions would be justifiable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Sheryl L. Quinn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16694

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

July 27, 2007

Mr. David Senehi
Green Power Energy
3633 Cody Road
Cazenovia, NY 13035

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

Dear Mr. Senehi:

I have received your letter and hope that you will accept my apologies for the delay in response.

You have sought an advisory opinion concerning the propriety of a denial of a request made to the New York State Energy Research and Development Authority (NYSERDA) for "wind data collected for the Fenner Wind Farm", the recipient of a NYSERDA grant. You wrote that the data in question "was collected with common industry instruments using nothing invented just for this project" and that "[i]f there were any proprietary methodologies, financial assumptions, or analytical techniques used to create this report they are separate and distinct from the results and the data itself." You added that "[t]he data is specific to this site and each project faces different development issues and problems", and that disclosure would "not give anyone the 'secret formula' to developing a wind farm..."

If your assertions are correct, it appears that the denial of access by NYSERDA may have been 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 (j) 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.

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.

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).

I 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).

As suggested earlier, if your contentions are accurate, that the data was collected by means of techniques that are widely known, that the records themselves do not include unique methodologies, but rather consist of data collected through commonly used techniques or methods, and particularly if the data is site specific and would not, if disclosed, provide an advantage to a competitor, it does not appear that §87(2)(d) would justify a denial of access.

In short, in my opinion, only to the extent that disclosure would "cause substantial injury to the competitive position" of the Fenner Wind Farm could NYSERDA properly deny access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sara LaCain

FOIL-AO-16695

From: Freeman, Robert (DOS)
Sent: Friday, July 27, 2007 3:48 PM
To: asstmayor@cityofglensfalls.com
Subject: unsuccessful applicants for government positions

Dear Mr. Mender:

I have received your inquiry concerning the obligation of the City of Glens Falls to release to a reporter "the names of the unsuccessful applicants, those who applied but were not hired" to serve in the position of recreation director.

In this regard, §89(7) of the Freedom of Information Law states that nothing in that statute "shall require the disclosure of the name or home address...of an applicant for appointment to public employment..." Based on that provision, it is clear in my opinion that the City is not required to disclose the names of applicants who applied but who were not hired. The only name that must be disclosed is that of the person hired to fill the position.

I hope that I have been of assistance.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16696

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

July 30, 2007

Mr. Morris B. Yuson
#260736
Monroe County Jail
130 South Plymouth Ave.
Rochester, NY 14614

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

Dear Mr. Yuson:

I have received your letter in which you sought guidance concerning a request for records made to the Monroe County Jail that had not been answered.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I believe that the person designated to determine appeals in this instance is the Monroe County Attorney.

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-16697

41 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 30, 2007

Mr. Ansel Gouveia
05-A-4861
Five Points Correctional Facility
State Route 96, P.O. Box 119
Romulus, NY 14541

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

Dear Mr. Gouveia:

I have received your letter concerning the authenticity of copies of records made available in response to a request made under the Freedom of Information Law.

In this regard, when a request for a record is approved, §89(3) of the Freedom of Information Law states in part that:

> "Upon payment or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Based upon the foregoing, an agency is required to certify that a copy of a record made or to be made available is a true copy upon request to do so.

I point out that §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

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

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."

Further, §1401.2(b) of the regulations describes the duties of a records access officer and states in relevant part that:

> "The records access Officer is responsible for assuring that agency personnel...
>
> (5) Upon request, certify that a record is a true copy..."

Pursuant to §1401.2(b)(5) and to implement §89(3) concerning an agency's duty to provide certification, the records access officer has the duty of ensuring that agency personnel certify that copies of records are true copies.

It is also noted that a certification made under the Freedom of Information Law does not pertain to the accuracy of the contents of a record, but rather would involve an assertion that a copy is a true copy. In other words, a certification prepared pursuant to §89(3) would not indicate that the contents of a record are complete, accurate or "legal"; it would merely indicate that the copy of the record is a true copy.

Additionally, it has been consistently advised, particularly when certification is requested with respect to a voluminous number of records, that a single certification, given by means of a written assertion, statement or affidavit, for example, describing or identifying the records that were copied, would be sufficient. I do not believe that each copy of records made available under the Freedom of Information Law must be stamped or "certified" separately.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4439
FOIL-AO-16698

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

July 30, 2007

E-MAIL

TO: Joseph Eisner

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. Eisner:

As you are aware, I have received your letter, and I hope that you will accept my apologies for the delay in response.

You referred to an advisory opinion citing Westchester-Rockland Newspapers v. Kimball [50 NY2d 575 (1980)], in which the Court of Appeals determined that volunteer fire companies are "agencies" subject to the Freedom of Information Law, despite being not-for-profit corporations. The Court found that those entities perform what historically has been considered an essential governmental function, and that such function is carried out pursuant a contract with one or more municipalities. You asked whether the reasoning in that decision might be applicable in determining the status of association libraries and cooperative library systems under the Freedom of Information Law.

While I believe that all public libraries are essential to the communities that they serve, due to judicial precedent, I cannot advise that they fall within the coverage of the Freedom of Information Law, absent the issuance of a new judicial decision specifying that they are subject to that statute.

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

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

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

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

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

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, in French v. Board of Education, which includes the area in which you reside. The Court stated that:

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

In view of the precedent in French, albeit involving a different context, it cannot be advised that an association library constitutes an "agency" subject to the Freedom of Information Law.

With regard to library systems, I believe that there are distinctions among them. Some, like association libraries, are not-for-profit entities that would likely be found by a court to be outside the

coverage of the Freedom of Information Law. Others are creations and under the control of governmental entities, such as counties, and in those instances, they would be subject to that statute.

Lastly, you referred to a newspaper article indicating that I advised that a task force was subject to the Open Meetings Law because its membership consisted of members of two boards of trustees. I know of no case law that deals with that particular factual situation. However, the Open Meetings Law pertains to meetings of public bodies, and based on the definition of the phrase "public body" [§102(2)], it is clear in my opinion that a "committee or subcommittee or similar body" consisting solely of the members of a governing body would itself constitute a public body falling within the scope of the Open Meetings Law. From my perspective, when a "similar body", such as the task force described in the article, consists solely of members of two governing bodies, I believe that a court would determine that, due to its membership, it is a public body subject to the requirements of the Open Meetings Law. Analogous are conference committees consisting of members of the Senate and Assembly, which in my view, clearly constitute public bodies falling within the coverage of that law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16699

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July 30, 2007

E-MAIL

TO: Doug Schneider

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. Schneider:

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 Broome County Legislature for a copy of its Comprehensive Emergency Response Plan.

You wrote that your efforts to obtain a copy of the Plan have been unsuccessful, indicating briefly, as follows: in January of 2007, representatives of the League of Women Voters of Broome and Tioga Counties were ostensibly permitted to inspect a paper copy of the plan, but were directed to file a written request when they asked for an electronic version. Officials in Tioga, Delaware and Ulster Counties released their Plans in January and made them available on their websites. After the League representatives were denied access to a copy of the Broome County Plan for "homeland security reasons", you emailed a request to the Broome County Records Access Officer, Eric Denk. Having received no response, you appealed, at which point you were informed by the Assistant County Attorney that part of your request "may be denied" pursuant to §87(2)(f). No date was given by which the review would be complete. On March 14, you received further correspondence stating that the Plan would be made available for review, "in part" on March 29, 2007. It is our understanding that you have not yet received a copy of the plan.

In this regard, we believe a copy of the plan should be made available to you and 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 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 federal statute clearly requires that emergency response plans must be disclosed.

As you correctly point out, §11044 of Chapter 116, Title 42 of the United States Code requires that:

> "(a) Each emergency response plan, material safety data sheet, list described in section 11021 (1)(2) of this title, inventory form, toxic chemical release form, and followup emergency notice shall be made available to the general public, consistent with section 11042 of this title, during normal working hours at the location or locations designated by the Administrator, Governor, State emergency response commission, or local emergency planning committee, as appropriate. Upon request by an owner or operator of a facility subject to the requirements of section 11022 of this title, the State emergency response commission and the appropriate local emergency planning committee shall withhold from disclosure under this section the location of any specific chemical required by section 11022 (d)(2) of this title to be contained in an inventory form as tier II information.
>
> (b) Each local emergency planning committee shall annually publish a notice in local newspapers that the emergency response plan, material safety data sheets, and inventory forms have been submitted under this section. The notice shall state that followup emergency notices may subsequently be issued. Such notice shall announce that members of the public who wish to review any such plan, sheet, form, or followup notice may do so at the location designated under subsection (a) of this section."

Based on the foregoing, federal law requires that emergency response plans must be made available to the public. An entity required to submit a plan or one of the designated records that include information pertaining to a hazardous chemical, an extremely hazardous substance, or a toxic chemical, may substitute the generic class or category of the hazardous substance for the specific chemical identity at the time of submission, based on a claim of trade secret, pursuant to §11042 of Title 42 of the United States Code. Section 11042 further requires that the submitting entity show that the specific chemical identity has not been previously disclosed, that it is not required to be disclosed by law, that disclosure is likely to cause substantial harm to the entity's competitive position and that the chemical identity is not readily discoverable through reverse engineering. A claim under the trade secret exemption is reviewable upon petition to the Administrator of the Environmental Protection Agency.

Accordingly, it is our opinion that a county, at the time of submission of an emergency response plan to the state emergency planning commission or local emergency planning committee, could substitute generic information for specific chemical identification information. The plan itself,

including any generic or specific chemical identification information contained therein, however, would be required to be made available in its entirety.

To the extent that an advisory opinion previously rendered by this office indicates otherwise, (Advisory Opinion No. 16090, July 31, 2006), we have rescinded our opinion and removed it from our website.

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-16200

41 State Street, Albany, New York 12231
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July 31, 2007

Ms. Angela de Souza
[redacted]

The staff of the Committee on 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 Souza:

As you aware, I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You have sought an advisory opinion pertaining to a request for information sought from a public school in New York City. The request involves several components, and I offer the following comments.

First, 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. For instance, if there is no "log of observation reports" that would indicate "the date when each teacher signed acknowledging receipt of the Administration's observation report", there would be no obligation to create such a log or record on your behalf.

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

Insofar as your request involves existing records that do not identify students, i.e., "the budget line from which the test was paid", the dates when training was given to certain teacher and the names of instructors, it appears that they would likely be accessible. Pertinent is §87(2)(g). Although that provision potentially serves as a ground for denying access, due to its structure, it often requires 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.

Lastly, educational agencies generally are prohibited from disclosing information that is personally identifiable to a student without consent of a parent. Relevant in the context of your request is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." 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.

I note that 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.

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: Miriam Nightengale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4441
FOIL-AO-16701

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July 31, 2007

Hon. Judy Koehler
Councilperson
Town of Albion
3510 Gaines Basin Road
Albion, NY 14411

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

Dear Councilperson Koehler:

I have received your letter and hope that you will accept my apologies for the delay in response. You referred to a passage from a summary of a Town Board meeting that you "suspect" represents "an attempt to keep [you] from putting items on our agenda for discussion in open session." You also referred to "the necessity of FOILs by board members, copies of items foiled" and the like.

In this regard, there is nothing in the Open Meetings Law that refers or pertains to agendas. A public body, such as a town board, may choose to prepare or abide by an agenda, but there is no obligation to do so. Most important in my view is §63 of the Town Law, which states in part that "The board may determine the rules of its procedure" and 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." In consideration of those provisions, the means by which items may be placed on an agency should in my view be adopted by a majority of the board and included as part of its rules of procedure.

With respect to access to records, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41; also Town Law, §63). In my view, in most instances, a board, member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-16702

From: Freeman, Robert (DOS)
Sent: Tuesday, July 31, 2007 10:19 AM
To: Judy Gallagher - NYS Thruway Authority
Subject: RE: FOIL Request

Dear Ms. Gallagher:

As you are likely aware, the Freedom of Information Law pertains to existing records. For that reason, it has consistently been advised that an agency is not required to give effect to a request that is prospective in nature. Very simply, in a technical sense, an agency can neither grant nor deny access to records that do not yet exist.

Certainly the Thruway Authority may choose to honor the request and make records available on an ongoing basis as they are prepared. However, I believe that there are pitfalls associated with agreeing to do so, and if you do so for one applicant, in fairness, you might have to do the same for many.

In short, I do not believe that the Authority must accede to a request for records that do not yet exist or create what in effect is a subscription service, and it is suggested that the applicant be informed that he/she may submit periodic requests for existing records.

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

Bob Freeman

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State
41 State Street
Albany, NY 12231
(518) 474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16703

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

August 2, 2007

Mr. Anthony Rolls
05-A-3690
Livingston Correctional Facility
P.O. Box 1991
Sonyea, NY 14556

Dear Mr. Rolls:

I have received your letter in which you indicated that your requests for records of the New York City Police Department have not been answered.

In this regard, first, I note that each agency is required to designate one or more persons as "records access officer" (21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records, and requests should be made to that person. Although I believe that the recipient of your requests should have responded directly in a manner consistent with the Freedom of Information Law or transmitted the requests to the records access officer, if you have not done so, it is suggested that you resubmit your request to the records access officer, Room 110C, 1 Police Plaza, New York, NY 10038

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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain

> within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

For your information, the person designated to determine appeals at the Department is Jonathan David, whose office is in the Department's Legal Bureau, also at 1 Police Plaza.

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-1607

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

August 2, 2007

Ms. Marianne L. Stewart
[redacted]

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

Dear Ms. Stewart:

I have received your letter and apologize for the delay in response. You referred to a request for records to the City of Ithaca Police Department that appears to have been denied in part. Although the facts associated with the records are not entirely clear, 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, it appears that one of the exceptions to rights of access may be pertinent. Section 87(2)(g) concerns communications between and among government officers and employees. A report prepared by a City employee concerning an incident or event would fall within that provision, which authorizes an agency, such as a City, to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 clarifies 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-16705

41 State Street, Albany, New York 12231
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August 2, 2007

E-MAIL

TO: Caroline Hendrick

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Hendrick:

I have received your letter and apologize for the delay in response. You asked whether "daily attendance sheets that are freely and openly distributed, often by students in public schools is a FOILable document." It is assumed that the records at issue pertain to students, not employees of a school district. Based on that assumption, I offer the following comments.

As a general matter, 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 (j) of the Law.

Relevant in the context of your inquiry is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." 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.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-170-16706

41 State Street, Albany, New York 12231
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August 2, 2007

E-MAIL

TO: Kathleen M. Boice

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. Boice:

I have received your letter and hope that you will accept my apologies for the delay in response. You asked whether "the report document presented to the Audit Committee of the Board of Education by the District's Internal Auditor [is] available to the general public."

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

The only basis for denial of apparent relevance is §87(2)(g). That provision permits an agency to withhold records that:

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

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

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

Because the provision cited above refers to "external audits", it has been contended that internal audits may be withheld in their entirety. Nevertheless, there is nothing in the language of the Freedom of Information Law that pertains specifically to internal audits or that exempts them form disclosure. The fact that external audits must be disclosed does not suggest other records, such as internal audits, are exempt, in their entirety, from disclosure. On the contrary, as stated earlier, all records are presumed to be available, and silence in the law concerning a certain kind of record does not confer confidentiality, but rather a presumption of access. In this instance, an internal audit constitutes "intra-agency" material that is accessible or deniable, in whole or in part, based on its contents.

The paragraph quoted above, other than the first sentence, was quoted in full in Gannett Co. v. Rochester City School District [684 NYS 2d 757, 759 (1998)], and the court agreed with my opinion that portions of internal audits consisting of "statistical or factual tabulations or data" must be disclosed pursuant to subparagraph (I) of §87(2)(g).

I note, too, that the Court of Appeals, the state's highest court, dealt with a similar contention relating to a different aspect of §87(2)(g). In Gould et al. v. New York City Police Department [89 NY2d 267 (1996)], the agency denied access on the basis of §87(2)(g)(iii), which grants access to "final agency policy or determinations", on the ground that the records sought were not final and did not relate to any event whose outcome had been finally determined. As in Ganett, in which the agency contended that because external audits are accessible, internal audits can be withheld in their entirety, the New York City Police Department argued that because final determinations are public, records other than final may be withheld in their entirety. The Court of Appeals rejected that argument and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute *nonfinal* intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 89 NY2d 267, 276 (1996); emphasis added by Court].

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

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

In sum, insofar as the record at issue consists of statistical or factual information, I believe that the District is obliged to disclose.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16707

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August 2, 2007

E-Mail

TO: Ms. Kathy Ridgway

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Ridgway:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You wrote that the principal of an elementary school in the Clarkstown School District "was investigated for tampering with state ELA tests", but that "[n]o evidence of any wrong doing was given to the public and they have never released the formal investigation report." The Superintendent has chosen not to answer parents' questions, "saying only that it was a personnel matter", and you added that "[t]his is the second principal to leave this elementary school just before tenure in the same shady manner."

You have asked whether the school board is "allowed to keep the truth from the public like this." In this regard, I offer the following comments.

First, I know of no law that requires that government officers or employees answer residents' questions. They may choose to do so, but they are not required to do so.

Second, and in a related vein, the Freedom of Information Law pertains to existing records and states in part in §89(3) that an agency, such as a school district, is not required to create records in response to a request. Therefore, if, for example, no record exists that describes the events leading to the departure of the principal, there would be no obligation to create such a record in response to a request.

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 (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.

Next, 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.

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 NYS2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD2d 309 (1977), aff'd 45 NY2d 954 (1978); Sinicropi v. County of Nassau, 76 AD2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS2d 309, 138 AD2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY2d 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 AD2d 298 (1994), concerning disclosure of social security numbers].

There are numerous instances in which portions of personnel records are available, while others are not. By means of example, items within a record indicating a public employee's gross pay would be accessible, but items involving charitable contributions, alimony, deductions and the like would be exempt; those latter items are unrelated to the performance of one's official duties.

Attendance records indicating time in and out, days and dates of leave claimed have been found to be accessible (see Capital Newspapers, supra), but portions of those records indicating an employee's medical condition could be withheld.

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 NYS2d 460 (1980)].

If there was no determination to the effect that the principal engaged in misconduct, I believe that the District could withhold records reflective of unproven or unsubstantiated allegations. Nevertheless, there are several decisions indicating that the terms of settlement or similar agreements must generally be disclosed [see Geneva Printing, supra; Western Suffolk BOCES v. Bay Shore Union Free School District, 250 AD2d 773 (1998); Anonymous v. Board of Education for Mexico Central School District, 616 NYS2d 867 (1994); and Paul Smith's College of Arts and Science v. Cuomo, 589 NYS2d 106, 186 AD2d 888 (1992)]. Therefore, if, for instance, an agreement was reached between the District and the principal indicating the terms and conditions under which the principal left the employ of the District, the agreement, in my opinion, would be accessible to the public.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 3, 2007

E-Mail

TO: Ms. Maria Hlushko

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Hlushko:

As you are aware, I received your correspondence concerning your efforts in obtaining certain information from the Town of North Salem.

You asked whether you are "incorrect to expect that if documents which have personal information (Social Security number and Driver's License Number) can be copied and the personnel information that [you are] not allowed to see be blacked out." You also referred to a request for a copy of "personnel calendars" indicating "the various sick, personal and vacation time taken..."

From my perspective, your understanding that records must be disclosed after portions have been deleted is correct, and records indicating leave time taken or accumulated must, based on a decision rendered by the state's highest court, be disclosed. 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. The phrase "records or portions thereof" appearing in that provision indicates that situations arise in which some aspects of a record must be disclosed, while others may justifiably be withheld. It also indicates that an agency, such as a town, is required to review records sought, in their entirety, to determine which portions, if any, may properly be withheld, and conversely, which portions must be made available.

Second, with respect to records relating to leave time, by way of background, §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", and the courts have provided

substantial direction regarding the privacy of public employees. According to those decisions, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. As a general rule, it has been held 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 NYS2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD2d 309 (1977), aff'd 45 NY2d 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 NYS2d 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 NY2d 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 NY2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

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

I hope that I have been of assistance.

RJF:jm

cc: Town Board
Hon. Veronica Howley, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16709

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August 3, 2007

Mrs. Denise Burritt
[redacted]

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

Dear Mrs. Burritt:

I have received your letter in which you complained that a representative of the Assessing Unit and a member of the Town Board of the Town of Broadalbin have failed to respond properly to your requests made under the Freedom of Information Law.

In this regard, the regulations promulgated by the Committee on Open Government require that each agency, such as a Town, 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, and requests should ordinarily be made to that person. I note that in most towns, the town clerk is the records access officer.

Notwithstanding the foregoing, I believe that the recipients of your requests should have responded in a manner consistent with law or forwarded your requests to the records access officer.

Irrespective of which agency officer or employee receives a request, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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, there is no necessity of retaining an attorney to seek records under the Freedom of Information Law. Any person may do so. Enclosed is a 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.

cc: Leamon Steele
Tina Winney
Town Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1670

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August 3, 2007

E-MAIL

TO: Michael Maher

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Maher:

I have received your letter and apologize for the delay in response. You have sought guidance concerning the status of the Town of Newburgh Volunteer Ambulance Corps ("the Corps") in relation to the Freedom of Information Law.

You wrote that the Corps is a not-for-profit corporation that receives funding from the Town, through donations and "third party billing of patients' insurance companies." You indicated that you reviewed an opinion rendered in 1998 and suggested that "in receiving public funds from the Town," the Corps "should be subject to full disclosure of all records..."

From my perspective, funding by the Town is not necessarily the critical factor in determining whether the Corps is subject to and required to comply with the Freedom of Information Law. As you are aware due to your review of the 1998 opinion, the Court of Appeals, the state's highest court, has found that volunteer fire companies constitute "agencies" that fall within the coverage of that statute, despite their status as not-for-profit corporations Westchester-Rockland Newspapers v. Kimball [50 NY2d 575 (1980)]. You may also be aware that various kinds of entities perform ambulance services, some of which are governmental, while others may be not-for-profit or for profit.

In the only case of which I am aware on the subject, the Appellate Division held that a volunteer ambulance corporation performing its duties for an ambulance district is subject to the Freedom of Information Law. In so holding, the decision stated that:

> "The Court of Appeals has rejected any distinction between a volunteer organization on which a local government relies for the performance of an essential public service and an organic arm of

> government (*see, Matter of Westchester Rockland Newspapers v. Kimball,* 50 N.Y.2d 575, 579, 430 N.Y.S.2d 574, 408 N.E.2d 904).
>
> "The appellant performs a governmental function, and it performs that function solely for the Mastic Ambulance District, a municipal entity and a municipal subdivision of the Town of Brookhaven (hereinafter the Town). The appellant submits a budget to and receives all of its funding from the Town, and the allocation of its funds is scrutinized by the Town. Thus, the appellant clearly falls within the definition of an agency and is subject to the requirements of FOIL" [Ryan v. Mastic Ambulance Company, 212 AD 2d 716, 622 NYS 2d 795, 796 (1995)].

It is emphasized that the decision cited above pertained to an ambulance company performing its duties for an ambulance district, which is itself a public corporation. Further, the ambulance company in Ryan obtained "all of its funding by the Town." That appears not to be so with respect to the Corps.

Another consideration may be the relationship between the Corps and a volunteer fire company. In some instances, ambulance companies are formed by a volunteer fire company. Because a volunteer fire company is an agency subject to the Freedom of Information Law, by creating an ambulance company, it would be creating an agency that is also subject to that statute.

In short, I do not have sufficient information to offer an unequivocal response. However, it appears that application of the Freedom of Information Law to the Corps would be dependent on its relationship with a municipality, an ambulance district, or a volunteer fire company.

I regret that I cannot be of greater assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4418
FOIL-AO-16211

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August 3, 2007

Ms. Susan Robertson
[redacted]

Dear Ms. Robertson:

Thank you for your July 3, 2007 correspondence addressed to Governor Eliot Spitzer in support of legislation to require homeowners' associations to operate in an open and democratic manner. Your correspondence was forwarded to this office for a response, and we offer the following comments.

As you may be aware, the Open Meetings Law applies to public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

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

Based on the foregoing, the Open Meetings Law is applicable to governmental entities; it does not apply to private or non-governmental organizations such as homeowners' associations.

Similarly, the Freedom of Information Law applies to agency records, and "agency" is defined in §86(3) to include:

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

In short, the Freedom of Information Law pertains to the obligation of state and local government to disclose records. That statute does not apply to private entities, i.e., homeowners' or condominium associations.

Because there is no state law pertaining to those entities that requires openness, transparency or disclosure analogous to that required of government, it is suggested that you express your views to those who have the ability to introduce legislation, specifically, members of the state senate and assembly. You might also seek the support of others that may be influential, such as the AARP.

We appreciate your thoughts on this matter and hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: ECO

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 3, 2007

Mr. Arthur Singer
Planning Board Chairman
Town of Kent
25 Sybil's Crossing
Kent Lakes, NY 10512

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

Dear Mr. Singer:

I have received your letter in which you referred to "documents...being withheld" by the New York City Department of Environmental Protection, "even though they had already been supplied to [you] for review."

In this regard, as a general matter, when records are available for inspection under the Freedom of Information Law, I believe that they are available for copying and that an agency must provide copies upon payment of the requisite fee [see Freedom of Information Law, §89(3)]. Therefore, assuming that the disclosure was not inadvertent and was made "intelligently and voluntarily" [see McGraw-Edison v. Williams, 509 NYS 2d 285, 287 (1986)], it would appear that the Department would have waived its right to prohibit a person who inspected a record from copying a record that was previously disclosed for the purpose of inspection.

In the case cited in the preceding paragraph, among the records inspected was a document that the agency believed was exempted from disclosure and which should have been withheld. It was held that an inadvertent disclosure of an exempt records did not create a right to copy the record (McGraw-Edison Co. v. Williams, supra). If indeed records may justifiably be withheld, but they were inadvertently made available for inspection, it would appear that the Department could properly deny a request that the records be copied.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Melissa S. Siegel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 3, 2007

E-MAIL

TO: David Mack

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Mack:

I have received your letter and hope that you will accept my apologies for the delay in response. You wrote that in some criminal cases, "witnesses have referred to other witnesses or people involved in an investigation by their nicknames or street names...like 'Snoop', 'G-money', 'Whistler' and so on." You asked whether a database maintained by a police agency that includes those names and individuals' actual names must be disclosed. You also questioned rights of access to mugshots.

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 my perspective, the nicknames, street names or aliases of witnesses and others might justifiably be withheld. It has been advised in a variety of circumstances that the identities of witnesses whose names were not disclosed during public judicial proceedings or in records disclosed to the public pursuant to law may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [§87(2)(b)]. The ability to deny access under that provision would apply, in my view, with respect to actual names, as well as aliases. The other provision of significance, §87(2)(f), authorizes an agency to withhold records to the extent that disclosure "could endanger the life or safety of any person." In some circumstances, disclosure of an alias relating to a witness could place that person in jeopardy, and I believe that §87(2)(f) could be cited as a basis for denying access.

With respect to access to mugshots, it is assumed that individuals arrested could have been seen during judicial or other proceedings (i.e., arraignments) that were open to the public. If the

public can be present at or view a proceeding during which an arrestee can be identified, it is difficult to envision how a photograph of that individual would constitute an unwarranted invasion of personal privacy.

While disclosure of mugshots might embarrass or humiliate the individuals in those photos, there are many instances in which records have been determined to be available even though they represent events or occurrences that may be embarrassing. When individuals are arrested and/or convicted, their names and other details about them are generally made available and may be published; when a public employee is the subject of disciplinary action, that person's name and other details about him or her are accessible to the public, irrespective of whether the individuals to whom the records pertain may be embarrassed by their actions [see e.g., Daily Gazette v. City of Schenectady, 673 2d 783, (A.D. 3 Dept. 1998); Anonymous v. Board of Education for Mexico Central School District, 616 NYS 2d 867 (1994); Scaccia v. NYS Division of State Police, 520 NYS 2d 309, 138 AD 2d 50 (1988); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981]. In short, in many cases, even though individuals may be embarrassed by particular aspects of their lives, that factor may have little or no bearing upon public rights of access to records concerning what might be considered as public events in which the public interest in disclosure outweighs an individual's interest in privacy.

In the only decision of which this office is aware that dealt with facts pertinent to the instant situation, a similar argument was offered, but the court determined that the mugshots regarding all persons arrested must be disclosed, unless charges were dismissed in favor of the accused. In general, when charges against an accused are dismissed or terminated in favor of the accused, the records pertaining to the event become sealed under the Criminal Procedure Law, either §160.50 or §160.55. When the records are sealed, they are exempted from disclosure under the Freedom of Information Law [§87(2)(a)]. With respect to disclosure of the mugshots of those persons against whom the charges were pending in which the records had not been sealed, the court held that the agency could not meet its burden of proving that the privacy exception could validly be asserted [Planned Parenthood of Westchester, Inc. v. Town Board of the Town of Greenburgh, 587 NYS2d 461, 463 (1992)].

In sum, unless cases against individuals charged are considered to have been terminated in their favor, in which instances the mugshots would be sealed, I believe that mugshots must be disclosed under the Freedom of Information Law.

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 6, 2007

Mr. John E. Greer
[redacted]

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

Dear Mr. Greer:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to a request for billing records submitted to the Skaneateles School District by the law firm retained by the District and indicated that the records access officer sent the request to the District's attorneys for review. You have asked whether the records at issue are "specifically exempted from disclosure by statute or that [your] request would need to be reviewed by the School District's attorney before it could be answered."

In consideration of the nature of the records sought, there may be portions of them that are exempted from disclosure by statute. Further, it is not unusual for an agency to ask that its attorneys review records for the purpose of seeking their advice prior to granting or denying access to records in whole or in part. In this regard, I offer the following comments concerning access to billing and similar records submitted to agencies by attorneys.

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)].

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

In the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.)...

> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters being communicated and, consequently, was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)"

In short, in Knapp, even though portions of the records containing the time billed and the amount paid for the time, it was determined that other aspects of billing statements indicating "the general nature of legal services performed", as well as certain others, did not fall within the attorney client privilege and were available.

In the other decision dealing with the issue under the Freedom of Information Law, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], the matter involved a request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). While monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.).

Although the County argued that the "description material" is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the CPLR, the court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determines the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications...

> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

In my view, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, I agree that references identifiable to students may properly be deleted. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

In the context of your inquiry, I believe that names of students, private citizens and witnesses, for example, could be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Similarly, insofar as the records include information in the nature of a description of legal advice, legal strategy or similar information reflective of communications falling within the scope of the attorney-client privilege, I believe that deletions would be proper.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 6, 2007

Ms. Michelle Pirraglia
Suffolk Life
P.O. Box 9167
Riverhead, L.I., NY 11901-9167

The staff of the Committee on 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. Pirraglia:

I have received your letter and the correspondence attached to it. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning the propriety of a request made pursuant to the Freedom of Information Law to the Suffolk County Police Department concerning "the total cost that was expended by the SCPD during Suffolk County Executive Steve Levy's State of the County address on February 7, 2007...." Specifically, you requested:

> "...all documents related to the monetary expenses of that event, including overtime expenditures, costs incurred by having bomb squad technicians and bomb-sniffing dogs on the scene, and the cost of replacing officers who would otherwise be stationed at headquarters or out on the street if they were not at the event. We would also like to know the total number of law enforcement officers that were present at the county executive's address, as well as their specific functions, including those who were directing traffic."

In response to the request, the County provided the aggregate cost of overtime and indicated that it "does not maintain reflecting a breakdown of non-overtime costs for officers on assignments." All other records falling within the scope of your request were withheld pursuant to §87(2)(f), which authorizes an agency to withhold records insofar as disclosure "could endanger the life or safety of any person."

You appealed the denial and were informed that a variety of the information sought is not maintained by the County, such as the cost of having bomb squad technicians and bomb-sniffing

dogs at the scene, the cost of replacing officers who otherwise would have been stationed elsewhere, or a breakdown of non-overtime costs for officers on assignment.

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, insofar as the information sought does not exist in the form of a record or records, the County would not be obliged to prepare new records 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.

Second, to the extent that records falling within the scope of your request do 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.

As indicated in both the initial response and the determination of your appeal, one of the exceptions to rights of access, §87(2)(f), authorizes an agency to withhold records to the extent that disclosure "could endanger the life or safety of any person." In your appeal, you emphasized that you were seeking "records regarding the number of police officers who were present for the State of the County Address, as well as their specific functions, and expressed the understanding that disclosure of information "about future staffing may be considered a danger." The determination of your appeal referred to that contention, stating that similar events "are held by the County at least once a year", and that, even though the State of County Address had already occurred, "the details regarding security for this particular event, if disclosed, could impair the effectiveness of the security plan and compromise the safe and successful operation of similar events."

In numerous situations in which the application of §87(2)(f) is at issue, a primary consideration involves the degree of detail contained in the records. For instance, there is unquestionably an interest in ensuring a safe supply of water for the public, and proposals have been made, primarily in other jurisdictions, to require that maps indicating the location of water supplies be kept confidential. That kind of proposal is, in my view, overly broad and largely unenforceable. I can see the Hudson River from my office, and Reservoir Road is likely close to a reservoir. Maps that can purchased at any number of locations contain information of that nature. On the other hand, if a map is so detailed that it indicates the location of certain valves, places where terrorists or others could deposit poisons or chemical or biological agents, perhaps it could be contended that there is a reasonable likelihood that disclosure, due to the degree of detail, could endanger life or safety.

In the context of your request, if you sought details concerning the placement of police officers or others involved in security, or the number of those persons stationed in specific locations, it might be appropriately contended that disclosure could endanger life or safety if indeed similar events will occur in the future. Nevertheless, your request in my view involves records containing minimal detail, i.e., the number of police officers who participated and their functions. It would be unlikely in my opinion that disclosure, for example, of the number of officers involved in directing

traffic, particularly without details concerning the location of their placement, could endanger life or safety in relation to similar events that have yet to occur.

In short, I believe that the denial by the County is overbroad and that it could not be demonstrated that there is a reasonable likelihood that the minimal details that you are seeking could endanger life or safety.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Rachael C. Anello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-16716

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August 6, 2007

Mr. Wayne Jackson
[redacted]

The staff of the Committee on Open 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 sought advice concerning whether you are "able to inspect records held by an entity that was an entity that was originally mandated under Public Officers Law Article 6 and Article 6 (a) to allow inspection of records, after said entity forms an alliance with an other company to become an LLC, that is spending 'Public Monies' and not allowing inspection of their records."

Although your question is not entirely clear, I point out that the statutes that you cited are applicable to governmental entities, defined as "agencies" in both. Specifically, the Freedom of Information Law defines the term "agency" in §86(3) to mean:

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

Based on the foregoing, the Freedom of Information Law pertains to records maintained by entities of state or local government. Section 92(1) of the Personal Privacy Protection Law defines "agency" for purposes of that statute to mean:

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

In consideration of the language quoted above, the Personal Privacy Protection Law is applicable to state agencies and excludes local governments from its coverage.

A limited liability company, also known as an LLC, is a form of a business company that offers limited liability to its owners. Having performed research concerning LLC's, it appears that they are always private business entities that are not governmental in nature. If that is so, I do not believe that an LLC would constitute an "agency" that is subject to either the Freedom of Information Law or the Personal Privacy Protection Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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August 6, 2007

E-MAIL

TO: George Almeter *et al*

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. Almeter *et al.*

As you are aware, I have received your letter and hope that you will accept my apologies for the delay in response. You have raised three questions relating to access to records and/or the implementation of the Freedom of Information Law, particularly by the Town of Warsaw.

First, you asked whether the Town is required to "maintain all of its files and records in the Town Offices readily accessible and made available on request." In short, while I believe that every unit of government should maintain its records in a manner that permits easy retrieval and efficiency, I know of no law that requires that an agency maintain "all" of its records in a manner in which they are "readily accessible." Further, although the statement of legislative intent appearing in §84 of the Freedom of Information Law indicates that agencies should make records available "wherever and whenever feasible", I note that agencies may require that requests for records be made in writing and that they must respond to the requests in some manner within five business days of their receipt [see §89(3)].

You referred to a provision in the regulations promulgated by the Department of Environmental Conservation concerning the SEQR process that requires that all records relating to that process "must be maintained in files that are readily accessible to the public and made available on request" [§617.02(b)]. That requirement, which has the force of law, pertains to particular records, those relating to SEQR. Again, however, there is no law of which I am aware that imposes the same requirement with respect to all records of an agency.

Your second and third questions are related. You asked whether a town official, such as a zoning officer, may "select which documents the public can see", and whether the town attorney may "take over the duties of the Town's records access officer." In this regard, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate rules and

regulations involving the procedural implementation of that statute. Those regulations appear in 21 NYCRR Part 1401 and have the force and effect of law. In turn, §87 (1) requires the governing body of a public corporation, such as a town board, to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access 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.

Therefore, with respect to your questions, I do not believe that the zoning officer determines which records are accessible to the public. The records access officer, in his or her capacity as the coordinator of public access to records, performs that function. Similarly, a town attorney cannot in my view "take over" the functions of records access officer unless he or she is so designated by the Town Board. This is not to suggest that the records access officer cannot seek assistance or guidance from other Town officials in carrying out his/her duties as records access officer. However, so long as a person remains as the designated records access officer, I believe that he or she has the

authority to determine rights of access to records sought pursuant to the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 6, 2007

Mr. Kyle York
[redacted]

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

Dear Mr. York:

We are in receipt of your correspondence and accompanying DVD concerning the Department of Environmental Conservation's responsibility to address public concerns concerning dredging of the Hudson River at Queensbury, near Moreau Lake State Park. Specifically, you allege in your letter that a citizens advisory council "met behind closed doors, with no public records at all" and that "[a] CAC is an *option* for the Commissioner of DEC ... but the meetings must be made public. This CAC was special" (emphasis yours). You further indicate that, by law, citizen advisory councils "MUST have public participation with 'Open House' presentations of any clean-up plan. And by law, they MUST allow public participation through Public Hearings." While we did not take the time to watch the 80 minute presentation you submitted, and we cannot confirm that an advisory council was formed by law with respect to the issue that you describe, we offer the following general comments with respect to the requirements imposed by the Open Meetings and Freedom of Information Laws.

First, the Committee on Open Government is authorized to issue advisory opinions concerning application of the Open Meetings and Freedom of Information Laws, however, 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.

Second, although we are not experts with respect to the Environmental Conservation Law, we believe that an advisory council formed by law is likely a public body subject to the Open Meetings Law.

Section 102(2) of that statute defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members,

> performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Judicial decisions indicate generally that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS2d 373, 374, 151 AD2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD2d 65, 67 (1989); see also New York Public Interest Research Group 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)].

In the decisions cited above, none of the entities were designated by law to carry out a particular duty and all had purely advisory functions. More analogous to your questions may be the decision rendered in MFY Legal Services v. Toia [402 NYS2d 510 (1977)]. That case involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511-512).

Accordingly, if an advisory council performs a necessary and integral function in the implementation of the Environmental Conservation Law, and/or if the Department could not act without first having consulted with such council, we believe that the council would be performing a governmental function and, therefore, would be a public body subject to the Open Meetings Law.

Third, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, 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.

Further, while the Department may be required by law or regulation to hold public hearings at particular junctures in the deliberative process, from our perspective, hearings may be different than meetings. A meeting is generally a gathering of quorum of a public body for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A public hearing is generally held to provide members of the public with an opportunity to express their views concerning a particular subject, such as a proposed budget, a local law or a matter

involving land use. Hearings are often required to be preceded by the publication of a legal notice. In contrast, §104(3) of the Open Meetings Law specifies that notice of a meeting must merely be "given" to the news media and posted. Further, there is no requirement that a newspaper, for example, publish a notice given regarding a meeting to be held under the Open Meetings Law. We note, too, that a meeting of a public body held in accordance with the Open Meetings Law can only occur with the presence of a quorum. A hearing, on the other hand, can be conducted without a quorum present.

While we know of no judicial decisions concerning the ability of those to speak at either meetings or hearings, we believe that the principles pertinent to that issue would be the same. In short, we believe that an entity has the authority to adopt rules or procedures to govern its own proceedings. Those rules or procedures, however, must in our opinion be reasonable. We believe that it would be unreasonable, for example, to authorize those with one point of view to speak for ten minutes or perhaps without limitation, while permitting those with a different view to speak for three minutes or not at all.

If it is contended that a hearing was not conducted reasonably, the potential remedies, if they can be characterized as such, would involve offering complaints to those who conducted the hearing or the initiation of a judicial proceeding under Article 78 of the Civil Practice Law and Rules. In an Article 78 proceeding, a petitioner (a member of the public) must demonstrate that a public officer or governmental entity acted unreasonably, or that such person or entity failed to give effect to a legal requirement. If, for instance, a provision of law requires that a public hearing be held and that members of the public be given an opportunity to be heard, and if that opportunity is not reasonably granted, a court could find that a public officer or governmental entity failed to comply with law. In that event, we believe that court could issue an order designed to guarantee compliance with law and/or reasonableness.

Turning to your allegations that records were removed from the Department's website and that they may no longer exist, there is nothing in the Freedom of Information Law that requires a state agency to make certain records available on a website.

Relevant is §86(3) of the Freedom of Information Law, that 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 definition, an "agency" is a governmental entity performing a governmental function, such as the Department of Environmental Conservation. If the council described above is a public body for purposes of the Open Meetings Law because it performs a governmental function, for the same reason, it would be an agency for purposes of the Freedom of Information Law.

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 (j) of the Law. While we are not aware of the specific records that you have requested, the following discussion pertains to the authority of an agency to withhold a particular type of records.

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.

Accordingly, if the council is an agency, §87(2)(g) would apply to records exchanged with the Department, and portions of those records would be required to be released upon request unless a different ground for denial could appropriately be asserted. Records exchanged between the Department and a private entity, such as Niagara-Mohawk, on the other hand, would not be considered inter-agency or intra-agency records, and this provision would not apply. Similarly, if there is an advisory council that is not a public body, not performing a governmental function as an "agency", but only rendering advice to the Department, §87(2)(g), in our opinion, would not apply to records exchanged between the Department and the council and would be required to be made available upon request.

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

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16719

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August 7, 2007

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 facts presented in your correspondence.

Dear Mr. Marino:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to difficulties in obtaining records from the Schoharie County Department of Health. Having reviewed the correspondence that you attached, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, require that each agency, such as the County, designate one or more persons as "records access officer" (21 NYCRR §1401.2) The records access officer has the duty of coordinating an agency's response to requests for records, and requests ordinarily should be made to that person. While I believe that the recipient of your request should have responded directly in a manner consistent with law or forwarded the request to the records access officer, it is suggested that any future requests be made to the records access officer. To learn the identity of that person, I recommend that you contact the clerk of the County Board of Supervisors.

Second, in your request, you referred to 5 USC §552. That is the federal Freedom of Information Act, which applies only to federal agencies. The applicable statute is the New York Freedom of Information Law, which pertains to access to records of state and local government.

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:tt

cc: Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16720

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August 7, 2007

Mr. Damon Holmes
95-A-1809
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. Holmes:

I have received your letter and enclosed the advisory opinion to which you referred. With respect to what may be a reasonable delay in disclosing records would be dependent on factual circumstances.

In order to offer additional guidance because the law has been amended since the preparation of the attached opinion, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions,

> submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 7, 2007

Mr. Michael Gabor
[redacted]

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

Dear Mr. Gabor:

As you know, I have received your letter concerning a settlement agreement between the City of Newburgh and a former employee. Please accept my apologies for the delay in response.

You attached a copy of a response to a request by the City's Corporation Counsel, who offered a series of reasons for denying access to the settlement agreement. As I understand his comments, none of those reasons is valid, and if that is so, the agreement must be disclosed.

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

The Corporation Counsel referred initially to §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." However, no reference to any statute was given. He did indicate that a "[f]ederally-approved pre-trial mediation program in the shadow of litigation, can include a provision holding all parties to a condition of confidentiality." Nevertheless, again, there is no reference to a statute that either confers or requires or confidentiality. I note that if a federal court issued an order requiring confidentiality, it could not be advised by this office that any person should violate an order issued by a federal judge. There is no evidence, however, in his comments that any such order exists. More importantly, there are several decisions rendered under the New York Freedom of Information Law indicating that settlement agreements are accessible to the public, and that promises or agreements regarding confidentiality are irrelevant when determining public rights of access.

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, 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 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)].

Several controversies 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)]. 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 context involving a settlement agreement between a municipality and a public employee, 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."

The Corporation Counsel next referred to the ability to withhold the agreement on the basis of §87(2)(b), which authorizes an agency, such as the City, to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In this regard, it is clear that those who serve or who have served as public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of a public employee's duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

In two relatively recent decisions rendered by the Appellate Division, the facts may 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)].

In short, government agencies and employees are required to more accountable than other sectors of society, and I believe that disclosure in this instance would result in a permissible, not an unwarranted invasion of personal privacy.

The remaining contention involves what the Corporation Counsel characterized as a "public interest doctrine" as a justification for denying access. From my perspective, although the public interest privilege or its equivalent might be properly asserted in other contexts, it does not exist with respect to the ability to withhold records under the Freedom of Information Law. As stated by the Court of Appeals in 1979: "[T]he common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed" [see Doolan v. BOCES, 48 NY 2d 341, 347]. In short, either records or portions thereof fall within the grounds for denial appearing in §87(2) of the Freedom of Information Law or they do not; if they do not, there would be no basis for denial, notwithstanding a claim of privilege.

In an effort to encourage a review of the denial of your request, copies of this opinion will be sent to the City Council and Corporation Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: City Council
Geoffrey E. Chanin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16722

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August 8, 2007

E-MAIL

TO: Laurie Smyla

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Smyla:

I have received your letter in which you indicated that a request made pursuant to the Freedom of Information Law to the Town of Tuxedo in May 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Hon. Elaine Laurent, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16723

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August 8, 2007

Mr. Robert J. Zafonte
[redacted]

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

Dear Mr. Zafonte:

As you are aware, I have received your letter in which you asked the following question concerning employees of state and local government: "What portions of employee's personnel records is [sic] releasable and available under the provisions of the Freedom of Information Laws?" You then referred to specific categories of records and asked whether they are available. In the following paragraphs, general guidance will be offered initially, followed by brief remarks regarding the specific categories of records to which you referred.

First, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another and from one employee to another. Neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

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

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Also significant is §87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear based upon judicial decisions that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, with regard to records pertaining to public employees, the courts have found in a variety of contexts that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Judicial decisions, several of which are cited above (see e.g., Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida), dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. If there is no determination to the effect that an employee engaged in misconduct, I believe that a denial of access to the records based upon considerations of privacy would be consistent with law. A similar rationale would apply in instances in which an employee is the subject of a "confidential investigation." Arbitration records would likely involve final agency determination available under §87(2)(g)(iii). Medical records could in my view be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Attendance records indicating days and

dates of leave time used or accrued have been found to be accessible (see Capital Newspapers, supra). It has been held that reference to one's prior private employment may be withheld, but that references to public employment must be disclosed [Kwasnik v.City of New York, 262 AD2d 171 (1999)]. Portions of background investigative reports might if disclosed constitute an unwarranted invasion of the privacy of the subjects of those reports, as well as others identified in the reports. Letters of commendation would, in my opinion, likely be accessible. Payroll records reflective of salary or wages must be disclosed. However, items such as social security numbers, deductions and similar items unrelated to the performance of one's duties may be withheld.

Lastly, while the contents of performance evaluations may differ, I believe that a typical evaluation contains three components.

One involves a description of the duties to be performed by a person holding a particular position, or perhaps a series of criteria reflective of the duties or goals to be achieved by a person holding that position. Insofar as evaluations contain information analogous to that described, I believe that those portions would be available. In terms of privacy, a duties description or statement of goals would clearly be relevant to the performance of the official duties of the incumbent of the position. Further, that kind of information generally relates to the position and would pertain to any person who holds that position. As such, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In terms of §87(2)(g), a duties description or statement of goals would be reflective of the policy of an agency regarding the performance standards inherent in a position and, therefore, in my view, would be available under §87(2)(g)(iii). It might also be considered factual information available under §87(2)(g)(i).

The second component involves the reviewer's subjective analysis or opinion of how well or poorly the standards or duties have been carried out or the goals have been achieved. In my opinion, that aspect of an evaluation could be withheld, both as an unwarranted invasion of personal privacy and under §87(2)(g), on the ground that it constitutes an opinion concerning performance.

A third possible component, is often a final rating, i.e., "good", "excellent", "average", etc. Any such final rating would in my opinion be available, assuming that any appeals have been exhausted, for it would constitute a final agency determination available under §87(2)(g)(iii), particularly if a monetary award is based upon a rating. Moreover, a final rating concerning a public employee's performance is relevant to that person's official duties and therefore would not in my view result in an unwarranted invasion of personal privacy if disclosed.

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 8, 2007

Mr. Gary L. Rhodes
[redacted]

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

Dear Mr. Rhodes:

I have received your letter, which is dated April 15, but which did not reach this office until April 27. Please accept my apologies for the delay in response. In consideration of your remarks, I offer the following comments, primarily for the purpose of clarification.

First, the title of the Freedom of Information Law may be somewhat misleading. It is not a vehicle that requires that government officers or employees provide information in response to questions. They may choose to do so, and many do, but they are not required by that law to do so. Rather, that statute 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.

Second, it has been held that an agency need not honor a request for records that have previously heen made available to the person seeking them, unless that person can demonstrate that neither he/she nor his/her representative (i.e., that person's attorney) any longer has possession of the records [see e.g., Moore v. Santucci, 151 AD2d 677 (1989)].

Third, you wrote that the Town Board "routinely goes into executive session even to discuss vacancies on boards, which [you] do not understand that is done or allowed. As you may recall, the Open Meetings Law requires that meetings of public bodies be conducted open to the public, except to the extent that an executive session may properly be held. Paragraphs (a) through (h) of §105(1) specify and limit the topics that may properly be discussed during an executive session.

The subject of executive sessions to discuss vacancies on boards was considered in an advisory opinion sent to you earlier this month. In short, it is clear in my opinion that a public body may conduct an executive session pursuant to §105(1)(f) to weigh the strengths and/or weaknesses of those under consideration for appointment, unless the matter involves a vacancy in an elective office [Gordon v. Village of Monticello, Supreme Court, Ulster County, August 5, 1995, modified, 207 AD2d 55, reversed on other grounds, 87 NY2d 124 (1995)].

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: Henderson Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 8, 2007

Hon. Richard Salisbury
Vice Chairman
Rensselaer County Legislature
1600 Seventh Avenue
Troy, NY 12180

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

Dear Legislator Salisbury:

I have received your letter and the correspondence attached to it. You referred to "difficulty accessing what [you] believe to be public information from the Minority office of the Rensselaer County Legislature" and sought an advisory opinion concerning the matter.

According to your letter, a minority office staff member "was seen taking a photograph of a majority office staff member", and the photograph was later used in a "political flyer" sent by a member of the minority caucus. You expressed concern that the photograph was taken while the staff person was "on county time", and you requested access to "flash cards, disks or any other devices on the camera used to record the photograph in question" pursuant to the Freedom of Information Law in order to help "confirm the time and date in which the photograph was taken." In response to the request, you were informed that the staff person who took the photograph "used a personal camera", that "[t]here are no flash cards or disks associated with this picture", and that "[n]o county funds or equipment were used in connection with the picture."

Based on that response, for two reasons, I do not believe that the Freedom of Information Law is applicable.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in relevant part that an agency is not required to create in record in response to a request. If there are no flash cards, disks associated with the photograph, there are no records to be made available or withheld.

Second, the Freedom of Information Law applies to agency records, and §86(4) defines the term "record" to mean:

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

Because the photograph was apparently taken for political purposes, rather than in connection with County business, because the response indicates that the photograph was taken with a personal camera, and because no county funds or equipment were used, I do not believe that flash cards or disks, even if they existed, would constitute County records subject to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas V. Kenney, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 8, 2007

E-MAIL

TO: Joseph Dick

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. Dick:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to Cornell University Police Department for copies of complaints filed against particular officers, performance reviews concerning those officers, and statistical reports regarding complaints against the Department during the last 25 years. Cornell University denied your request on the ground that the requested documents requested cannot be characterized as financial documents relating to Cornell's public accounting functions in the contract colleges, and thus are not subject to FOIL. Further, the University conveyed that it does not maintain most categories of documents listed in your request, and that the one category of records which the University does maintain, personnel records of police officers, would be exempt from disclosure pursuant to Civil Rights Law §50-a. In this regard, we offer the following.

The Court of Appeals, the state's highest court, has twice considered the status of Cornell under the Freedom of Information Law.

In the first decision, Stoll v. NYS College of Veterinary Medicine [94 NY2d 162 (1999)], the request involved records of complaints brought under the University's Campus Code of Conduct relating to any administrator, professor or student of any statutory college. Because "the Legislature has chosen to vest Cornell – with discretion over the 'maintenance of discipline' at the four statutory colleges....there is no statutory provision for oversight by the SUNY Trustees, or for any appeal to the SUNY Board...[and] the disciplinary records of the statutory colleges and the private colleges are all held by the same private office of the University" (id., 167-168), and, because the records were not unique to the statutory colleges or under the direct control of SUNY, the Court concluded that the records fell beyond the scope of the Freedom of Information Law.

The second decision, Alderson v. NYS College of Agriculture and Life Sciences [4 NY3d 225 (2005)], involved a request for records relating to research and other activities conducted by a unit of one of the statutory colleges, and the Court asserted that "the proper inquiry is whether the documents requested under FOIL relate to an activity over which Cornell, as manager of the statutory colleges, exercises autonomy and control" (id., 232). In finding that it does, it was determined that:

> "Neither the SUNY trustees nor any other state agency participate in decisions relating to prospective or ongoing research pursuits. Because Cornell is vested by statute with broad authority over 'all matters pertaining to....educational policies, activities and operations, including research work' at CALS and the Agricultural Experiment Station, documents relating to those activities involve a private function and are therefore not subject to FOIL" (id.,232-233).

The Court in Alderson further determined that Cornell is "subject to certain financial reporting requirements to allow state officials to track the expenditure of state funds" and that [t]o the extent that Cornell is accountable for the expenditure of public funds, it is performing a public function"(id., 233). When that is so, it was found that records "relating to this activity are subject to FOIL" (id.).

The issue, in our opinion, then, is whether Cornell University is acting, in essence, as a governmental entity in carrying out statutory powers through its Police Department, and, therefore, performing a governmental function.

Cornell University employs and has supervision and control over "special deputy sheriffs", defined as "police officers" pursuant to Criminal Procedure Law §1.20, with additional powers as peace officers (Education Law §5709[1]). Further, Cornell University has complete authority to adopt provisions of the Vehicle and Traffic Law and rules of the State Department of Transportation to control and regulate vehicular and pedestrian traffic, and parking (Education Law §5708), for the purpose of providing for the safety of its students, faculty, employees and visitors. We know of no other entity, other than a government, that possesses similar authority.

In consideration of such authority, we believe that many records of Cornell University fall beyond the coverage of the Freedom of Information Law. Others, in accordance with the preceding analysis, are subject to rights conferred by that statute. Records maintained by Cornell University with respect to that portion of its authority that constitutes a governmental function, based on the Alderson rationale, in our opinion would be subject to the Freedom of Information Law. To that limited extent, it is our opinion that Cornell University Police Department is a governmental entity that performs a governmental function and therefore, constitutes an "agency" required to comply with the Freedom of Information Law.

This does not mean that the records you have requested are necessarily required to be made available to you. As you may know, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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." One such statute as mentioned is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used "to evaluate performance toward continued employment or promotion" are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered in 1999 reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156-157 (1999)].

To acquire the records that fall within the coverage of §50-a, there must be a court order issued in accordance with other provisions in that statute that state that:

> "2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.
>
> 3. If, after such hearing, the judge concludes there is a sufficient basis he shall sign an order requiring that the personnel records in question be sealed and sent directly to him. He shall then review the file and

> make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting."

Based on the language of §50-a of the Civil Rights Law, various aspects of a personnel file pertaining to a police officer are exempt from disclosure, such as evaluations of performance, complaints and related records pertaining to allegations of misconduct. Statistical information, on the other hand, that does not identify individual police officers, created for purposes other than "to evaluate performance toward continued employment or promotion" would not be subject to that statute. In our opinion, therefore, access to statistical information in the aggregate, if it exists, would not be used for a purpose envisioned by §50-a, and, therefore, rights of access would be governed by the Freedom of Information Law.

Because the University has indicated that "most of the categories of documents listed in your request are not records that Cornell keeps in the ordinary course of business", 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.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

cc: Valerie Cross

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 8, 2007

Mr. Kenneth F. Dillon
[redacted]

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

Dear Mr. Dillon:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Schuyler County Sheriff's Department, the New York State Police and the Town of Montour. In an effort to address all issues raised in your requests and your correspondence, we offer the following.

From our perspective, unless the records maintained by the Sheriff's Department were sealed pursuant to law, the response that you received was inconsistent with law. Specifically, although you were provided access to incident reports, you were denied access to complaints, informations, depositions, records of arrest, appearance tickets, duty roster records and a list of evidence on the ground that "we do not release" such records. Further, you requested reimbursement of the $10 fee for copies of incident reports, based on Executive Law §646, which states that "[a] victim of crime shall be entitled, regardless of physical injury, without charge to a copy of a police report of the crime."

First and most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 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 state's highest court, the Court of Appeals, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

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

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

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

Second, with respect to your request for copies of complaints filed by persons other than yourself, we note that 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. 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. Copies of records memorializing a complaint that you made, in our opinion, should be made available to you, as disclosure would not involve an unwarranted invasion of personal privacy.

Third, in our view, unless arrest records, appearance tickets or citations have been sealed pursuant to §§160.50 or 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 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)].

Unless sealed, these records would in our opinion be available in great measure, if not in their entirety. 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.

With respect to your request for "duty roster reports/records detailing what deputies were on duty on November 7, 2006" we note that §89(3) states in part that an agency, such as a town, is not required to create or prepare a record in response to a request.

In a related vein, however, we note that the Freedom of Information Law pertains to all agency records, and that §86(4) defines the term "record" expansively to include:

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

Therefore, insofar as the Town maintains records, irrespective of their physical form, that contain the information requested, we believe that they would be subject to rights of access conferred by the Freedom of Information Law. Again, assuming that records exist identifying those on duty on a particular date, we believe that they would be required to be made available.

With respect to your request for a list of evidence collected and your request to the New York State Police for incident reports that were denied on the grounds that "they are records which were compiled for law enforcement purposes and which, if disclosed, would interfere with judicial proceedings and/or would constitute an unwarranted invasion of personal privacy of those concerned", we note that 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 requested records, as discussed above.

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

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

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

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

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 or portions thereof 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).

When a trooper or police officer is called to a certain location, the presence of that person with his or her vehicle is not secret. It is an event that can be known by any person present or any passerby. That being so, we 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 our view, be accessible, for it would reflect the content of the traditional police blotter entry described by the Appellate Division in Sheehan v. City of Binghamton, [59 AD2d 808 (1977)].

In sum, arrest 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 our opinion contrary to both the language of the Freedom of Information Law and its judicial construction by the state's highest court.

With respect to your questions concerning the appropriate fee for obtaining 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. 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)."

One of the rare instances in which an agency may charge a fee different from that generally permitted by the Freedom of Information Law relates to the situation that you described. Specifically, §66-a of the Public Officers Law, a statute that deals with accident reports and certain other records maintained by the Division of State Police, provides in subdivision (2) that:

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

Based on the foregoing, it is clear that a statute separate from the Freedom of Information Law authorizes the Division of State Police to charge fifteen dollars for the search and copy of accident reports. It is not clear, however, what authority the State Police relies on to change your $10.00 for copies of incident reports, unless those reports may be characterized as "investigative reports." We are familiar with the provisions of Executive Law §646, however, we are not aware of the legislative intent behind its construction, or any judicial interpretation.

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)].

We turn now to your repeated requests to the Town of Montour, for "certified, return receipts and/or any other items of evidentiary proof that each and every member of the Town of Montour Town Board was notified in writing at least two (2) days prior to the town meeting held on November 12, 2006, as required by Town Law §62 and Public Officers Law §104" and "certified copies of the proof of publication of notice for the public hearing of November 13, 2006, as required by Town Law §108 and Public Officers Law §104." In response to your requests, the Records Access Officer indicated that "the Town of Montour is not the custodian of such record(s)."

It is not clear what "is not the custodian of records" means in this instance, or what the records access officer intended it to mean in response to your request. We note that the provision of Town Law to which you refer, §62, requires "two days notice in writing to members of the board" be given prior to special meetings, but that it does not require that written notice be delivered in a particular fashion, i.e., by certified letter. In contrast, the other provision of Town Law that you reference, §108, requires that notice of a public hearing on a preliminary budget "...shall be published at least once in the official newspaper...". Accordingly, while the Town would not be required by law to maintain copies of records indicating that notice of a special meeting was sent via certified or return receipt mail, because the Town is required to provide written notice of a special meeting and to publish notice of a public hearing on a preliminary budget, if records confirming that requirement exist, the Town would be required to produce them in response to your request.

Because the Town's response to your request is not clear, 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.

Further, we note that §104 of the Open Meetings Law pertains to notice and states that:

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

> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice.
>
> 4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

This section imposes a dual requirement, for notice must be posted in one or more conspicuous, public locations, and in addition, notice must be given to the news media. The term "designated" in our opinion involves a requirement that a public body, by resolution or through the adoption of policy or a directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a town hall has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of the board will be held.

With respect to notice to the news media, subdivision (3) of §104 specifies that the notice given pursuant to the Open Meetings Law need not be legal notice. That being so, a public body is not required to pay to place a legal notice prior to a meeting; it must merely "give" notice of the time and place of a meeting to the news media. Moreover, when in receipt of notice of a meeting, there is no obligation imposed on the news media to publish the notice.

To clarify, please note the distinction between a "meeting" and a "hearing". The former involves a gathering of a majority of a public body for the purpose of conducting public business collectively, as a body. As such, meetings are ordinarily held for the purpose of discussion, deliberation, taking action and the like. A "hearing" typically is held to enable members of the public to express their views on a particular subject, i.e., a budget, a change in zoning, etc., The notice requirements relating to meetings are prescribed in §104 of the Open Meetings Law, and as you know, that statute requires that every meeting be preceded by the posting of notice of the time and place of a meeting.

The town's response to your request for copies of minutes reflecting town board's decision to conduct a public hearing on November 13, 2006, again, is confusing. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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 this instance, it is our opinion that the response from the Town, indicating that the Town "is not the custodian of such record(s)" constitutes a constructive denial of access, and can be appealed.

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
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August 9, 2007

Mr. Raymond Hobdy
[redacted]

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

Dear Mr. Hobdy:

I have received your letter in which it appears that you appealed a denial of access to records by the Bronx Supreme Court.

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

Second, 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, the courts are not subject to the Freedom of Information Law.

This is not intended to suggest that court records are not public. In most instances, other statutes require that the clerk of a court disclose records in his/her custody (see e.g., Judiciary Law, §255). It is suggested, therefore, that you transmit a request to the clerk of the court, citing an applicable provision of law as the basis for the request.

I hope that the preceding remarks serve 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 9, 2007

Mr. Frank S. Shamenek
[redacted]

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

Dear Mr. Shamenek:

I have received your letter concerning a request made pursuant to the Freedom of Information Law to the East Meadow School District.

Because the District "ignored [your] hand-delivered FOIL request" made on July 26, you considered its failure to do so a denial of your request and you appealed the denial on August 13. You wrote that it is your belief that the Committee on Open Government "has the power of subpoena" and urged this office to assert its authority, "including the power of subpoena", to obtain the records that you have requested pursuant to the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. It is not empowered to compel an agency, such as a school district, to grant or deny access to records. Further, the Committee does not have subpoena power.

As you indicated in the correspondence, §89(3)(a) of the Freedom of Information Law requires that an agency respond to a request with five business days of the receipt of a request. If an agency has failed to do so, an applicant may consider the request to have been denied and may appeal. When an agency receives an appeal, §89(4)(a) requires that the 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. If an agency fails to do so, the appeal may also be deemed denied, and the person denied access may seek judicial review by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

I note that some of the records sought likely identify students. If that is so, it is noted that a separate provision of law, the federal Family Educational Rights and Privacy Act ("FERPA", 20

USC §1232g), pertains to records identifiable to students maintained by educational agencies or institutions. In brief, FERPA prohibits the disclosure of personally identifiable information pertaining to a student unless a parent of a student consents to disclosure. While you may be representing the interests of the students and their family, I believe that a parent would be required to provide consent to disclosure to you in accordance with FERPA prior to the disclosure of personally identifiable information pertaining to a student.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Leon J. Campo

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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August 9, 2007

E-Mail

TO: Dr. Bobrowsky

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Dr. Bobrowsky:

I have received your most recent correspondence involving a situation in which it has been contended that the records that you requested pertaining to yourself have been lost.

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 suggested that you might seek such a certification.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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August 10, 2007

Ms. Mary Tichenor
Frank H. Brunstetter, M.D.
47 North Main Street
Honeoye Falls, NY 14472

Dear Ms. Tichenor and Dr. Brunstetter:

We have received your letter addressed to Camille Jobin-Davis of this office relating to your efforts in gaining access to information from the Town of Mendon. Having considered your remarks and questions, it appears that the issues raised, as they relate to the authority of this office to provide advice and opinions concerning the Freedom of Information Law, were addressed in an advisory opinion sent to you on May 17, 2006. For purposes of clarification, however, I offer the following brief remarks.

First and most importantly, the Freedom of Information Law pertains to existing records. In several instances, as I understand your comments, you contend that certain documents made available to you should have included additional information. In short, the Freedom of Information Law does not require that an agency add details or notations that you believe should be included in records. The public has the right to obtain what an agency maintains, and the law does not require that records be altered or amended if records are incomplete or inaccurate. Similarly, the Freedom of Information Law does not require that agency officers or employees provide answers to questions. They may choose do so, and often do, but there is no requirement that they must in order to comply with that law.

Second, whatever contact you might have with the news media is beyond the control government agencies. In like manner, neither government agencies nor members of the public have the right to control what is reported by the news media.

Lastly, you asked whether you can "expect the same results" if you seek records from the Town in the future. Very simply, I have no way of answering that question.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Morris Bickweat
Hon. James P. Merzke

STATE OF NEW YORK
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August 13, 2007

Mr. Colin Wayne 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 facts presented in your correspondence.

Dear Mr. Hall:

I have received your letter and the materials attached to it. You have sought assistance in your efforts in gaining access to records of the New York City Department of Education.

In brief, you wrote that you are employed by the Department as a teacher and the subject of an inquiry involving alleged corporal abuse of a student. You indicated, however, that the student assaulted you. Although the principal of your school did not interview you regarding the incident and you have not been charged, you have been reassigned, and the matter is the subject of an investigation by the Department's Office of Special Investigations. Having requested records relating to the matter, the Department denied access on the ground that the records sought constitute intra-agency materials that may be withheld pursuant to §87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

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. From my perspective, two or perhaps three of the grounds for denial may be pertinent in determining rights of access.

Section §87(2)(a) pertains to records that are "specifically exempted from disclosure by state or federal statute." 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 ordinarily be withheld in order to comply with federal law.

I note, however, the definition of "education record" 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) of the federal regulations 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 the records in question could be characterized as those of a law enforcement unit, the FERPA likely would not serve as a basis for withholding the records. In that case, the records would be subject to whatever rights exist under the Freedom of Information Law.

Insofar as FERPA does not apply and the Freedom of Information Law is the governing statute, relevant would be §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." I would conjecture that portions of the records identifiable to the student or others could be withheld under that provision.

Finally, as indicated by the Department, §87(2)(g) likely serves as a basis for denying access to some aspects of the records. That provision permits an agency to withhold records that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Michael Best
Susan Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 13, 2007

E-MAIL

TO: Catherine M. Kunz

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. Kunz:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. You have asked whether you "may request a particular student's residence as it is listed in school district records."

In this regard, first, although the Freedom of Information Law generally governs rights of access to records maintained by entities of state and local government in New York, a federal statute deals with records identifiable to students. Specifically, the Family Educational Rights and Privacy Act (FERPA; 20 USC §1232g) 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. An "eligible student" is defined in the Code of Federal Regulations to mean "student who has reached 18 years of age or is attending an institution of post-secondary education" (34 CFR §99.3).

An exception to the rule of confidentiality in FERPA involves "directory information", which is defined in the regulations of the Department of Education (§99.3) 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 to eligible students in order that they may essentially prohibit any or all of the items from being disclosed. Specifically, §99.37 of the regulations promulgated pursuant to FERPA state in relevant part that:

> "(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of --
>
> (1) The types of personally identifiable information that the agency or institution has designated as directory information;
>
> (2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and
>
> (3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information."

The regulations also indicate that a consent to disclose can only be given by the parent of a student under the age of eighteen; students have no rights under FERPA until they reach the age of eighteen.

Lastly, when FERPA does not apply, I believe that an agency could withhold the residence address of a student on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [Freedom of Information Law, §87(2)(b)].

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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August 14, 2007

E-Mail

TO: Joe

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Joe:

As you are aware, I have received your inquiry. Please accept my apologies for the delay in response.

You asked whether it is "proper for the name, address and phone numbers to be redacted from freedom of information request forms." 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 my perspective, with the exception of portions of certain kinds of requests, those records would be accessible to the public under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy. Similarly, in the context of your inquiry, a home telephone number could, in my opinion, be deleted.

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).

You also raised issues relating to the retention of records. Please note that the Freedom of Information Law does not include any provision concerning the retention or disposal of records. It is suggested that you might confer with the town clerk in the municipality of your interest, for the clerk by law is the town's records management officer.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4460
FOIL-AO-16735

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 14, 2007

E-Mail

TO: Ms. Virginia Buechele

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. Buechele:

As you are aware, I have received your inquiry. Please accept my apologies for the delay in response.

If I understand the matter correctly, the Town of Poughkeepsie does not disclose records relating to items referenced on agendas of Town Board meetings. You asked whether that is appropriate, and in this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all records of an agency, such as a town, for §86(4) defines the term "record" expansively to mean:

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

Based on the foregoing, whether written material is draft or final, or approved or unapproved, I believe that it would constitute a "record" that falls within the scope of the Freedom of Information Law.

Second, some aspects of the records at issue may be deniable, but others might be accessible to the public. As a general matter, the Freedom of Information Law is based upon a presumption of

access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 Town staff or Board members and forwarded to other 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.

I note that the Court of Appeals, the State's highest court, 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 suggested earlier, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Items within an agenda packet might in some instances fall within that exception.

I point out that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals, the state's highest court, 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 a Board member transmits a memorandum 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 seemingly diminishing the need or rationale for withholding.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

There is no

101-A0-16736

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16737

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August 14, 2007

E-MAIL

TO: Robert W. Engle

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Engle:

As you are aware, I have received your letter concerning the "rule or law regarding the reclamation of road asphalt."

Please note that the primary function of the Committee on Open Government involves providing advice and guidance concerning the Freedom of Information Law. As you suggested, the agency that would appear to have primary responsibility relating to the matter you described is the DEC. Certainly the records of that agency that detail the rules, policies and procedures concerning the subject of your interest would be accessible to the public under the Freedom of Information Law.

If you have not done so already, to seek records from an agency, a request should be made to the "records access officer." The records access officer has the duty of coordinating an agency's response to requests. In the case of the DEC, there is a records access officer at each regional office, and I would conjecture that the regional office nearest to Madison is in Syracuse. That office can be reached at (315)426-7400. In consideration of the water resources that you described, it might also be worthwhile to contact your state senator and/or member of the Assembly.

I regret that I cannot be of greater assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16738

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

August 14, 2007

E-MAIL

TO: Conchita Cassin

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Cassin:

I have received your letter concerning your request for a copy of a report of an investigation initiated by Child Protective Services.

For purposes of clarification, I point out that the functions of the Committee on Open Government involve providing advice and opinions concerning public access to government records, primarily in relation to the state's Freedom of Information Law. This office does not maintain 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 you believe would possess the records of your interest. The records access officer has the duty of coordinating an agency's response to requests to requests.

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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the

> event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Next, 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 (j) of the Law.

Since you referred to Child Protective Services, of possible relevance is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §372 of the Social Services Law, which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4) of §372 states in relevant part that such records:

> "shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination or by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court or by a justice of the supreme court, or by a judge of the family court when such records are required for the trial of a proceeding in such court, after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information

> thus obtained without authorization so to do by the department, or by such judge or justice."

Based on the foregoing, I do not believe that records maintained by entities having duties involving child protective services can be disclosed, unless authorization to disclose is conferred by a court, by the County Department of Social Services or by the NYS Office of Children and Family Services.

Also potentially relevant is §422 of the Social Services Law, which pertains to the statewide central register utilized by an agency having responsibility regarding such matters. Subdivision (4)(A) of section 422 states that reports as well as information concerning those reports are confidential, and may be disclosed only under specified circumstances listed in that statute. One of those circumstances involves disclosures to " any person who is the subject of the report or other persons named in the report" [§422 (A)(d)]. In addition, subdivision (7) of section 422 states:

> "At any time, a subject of a report and other persons named in the report may receive, upon request, a copy of all information contained in the central register; provided, however, that the commissioner is authorized to prohibit the release of date that would identify the person who made the report or who cooperated in a subsequent investigation or the agency, institution, organization, program or other entity where such person is employed or with which he is associated, which he reasonably finds will be detrimental to the safety or interests of such person."

Based on the foregoing, although a report may generally be available to a parent, those portions that would, if disclosed, identify the source of the report may be withheld to protect that person's privacy and safety.

Lastly, I note that subdivision (5) of §422 of the Social Services Law generally prohibits the disclosure of reports that have been determined to be unfounded.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4462
FOIL-AO-16739

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August 15, 2007

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 your letter and a variety of correspondence relating to it. Please accept my apologies for the delay in response. You have sought an advisory opinion concerning "various practices by the Incorporated Village of Patchogue (the 'Village') to block" your requests for records. In this regard, I offer the following comments.

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

Second, with respect to contentions that requests may be "overbroad", I point out that the Freedom of Information Law as initially enacted required that an applicant must seek "identifiable" records. However, since 1978 it has merely required that an applicant "reasonably describe" the records sought. Moreover, it has heen 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.

I note, too, that the request in Konigsberg involved thousands of pages of material; the volume of a request is not necessarily significant. Further, I do not believe that the Village may require that "separate" requests must be submitted.

While I am unfamiliar with the record keeping systems of the Village, to the extent that records sought can be located with reasonable effort, I believe that your 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 Village 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 Village maintains its records in a manner that renders its staff unable to locate and identify the records would a request fail to meet the standard of reasonably describing the records.

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]).

Third, while the Village court may be part of the Village government, courts are not subject to the Freedom of Information Law. That statute 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, their records are generally available under other provisions of law (see e.g., Uniform Justice Court Act §2019-a). Therefore, although records maintained by a court are not accessible based on rights conferred by the Freedom of Information Law, rights of access often exist under a different provision of law.

Fourth, the Freedom of Information Law does not address issues involving the retention and disposal of records. Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

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

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

Based on the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials must "have custody" and "adequately protect" records until the minimum period for the retention of the records has been reached.

Since questions regarding the retention of tape recordings of open meetings have been the subject of numerous questions over the course of time, I would add that the minimum retention period for such records is four months.

Next, with respect minutes of meetings of public bodies, such as village boards of trustees, §106 of the Open Meetings Law deals directly with minutes of meetings and states that:

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said. At a minimum, however, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member.

Lastly, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. If, for example, the Village does not maintain "[a]n index of all submissions of village officers and employees, from 1991 till the present, pursuant to Incorporated Village of Patchogue Code §5A-12...", it would not be required to prepare an index, a new record, containing the information sought.

In a related vein, some aspects of your requests may not involve requests for records, but rather interpretations of law. For instance, you sought records pertaining to "taxation of boat slips, authorization and proposed or actual....Code sections governing the taxation of boat slips, rules, regulations, procedures", etc. If I correctly understand that request, a response might involve making a series of judgments based on opinions, some of which would be subjective, mental impressions, the strength of one's memory, and perhaps legal research. By means of analogy, 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."

From my perspective, insofar as a request involves the making of a judgment regarding the applicability of laws, it likely does not constitute a request for records properly made pursuant to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Patricia M. Seal, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16740

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August 15, 2007

Mr. Glenn Ford
90-A-4045
Eastern Correctional Facility
P.O. Box 338
Napanoch, NY 12458

Dear Mr. Ford:

I have received your letter in which you asked for "a complete copy of the F.O.I.L. request forms..."

In this regard, there is nothing in the Freedom of Information Law that requires that a particular form be used when seeking records. In short, any request that is made in writing that reasonably describes the records sought in accordance with §89(3) of that statute should be sufficient and acceptable.

Enclosed as requested is a copy of the Freedom of Information Law, as well as "Your Right to Know", which includes a sample letter of request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 15, 2007

E-Mail

TO: Ms. Shirley J. Motyl

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Motyl:

I have received your correspondence concerning your efforts in gaining access to records under the Freedom of Information Law and hope that you will accept my apologies for the delay in response.

The first issue involved a request for " a copy of the entire report for a fire that Galway Volunteer responded to" at a certain address that had not be answered. In my opinion, whether or the extent to which the report must be disclosed would be dependent on its content. 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. I point out that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report may contain both accessible and deniable information. Moreover, that phrase in my opinion imposes an obligation upon agencies to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Of relevance may be §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 my perspective, a record of a medical emergency call consists in great measure of what might be characterized as a medical record or history relating to the person needing care or service (see Hanig v. NYS Department of Motor Vehicles, 79 NY 2d 106 (1992)].

In my opinion, portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, for disclosure of a name coupled with those details in my view represents a personal and somewhat intimate event in the individual's life. However, I believe that other aspects of the records, such as the names of volunteer firemen present at the scene, the locations of calls or addresses, should be disclosed. In my view, an emergency call, particularly when sirens or flashing lights are used, is an event of a public nature. When a fire truck or ambulance travels to its destination, that destination is or can be known to those in the vicinity of the event. In essence, I believe that event is of a public nature and that disclosure of an address or a brief description of an event would not likely constitute an unwarranted invasion of personal privacy. Nevertheless, the personally identifiable details described earlier could in my view be withheld.

In short, whether you have the right to gain access to "the entire report" is dependent on its content.

The other issue appears to involve the failure to respond 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in

> writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

RJF:jm

cc: Douglas DeRitter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4463
FOIL-AO-16742

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

August 16, 2007

E-MAIL

TO: Marcia Novek

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Novek:

I have received your letter and the materials attached to it. You asked to be informed of "your rights" in relation to an alleged failure of the Supervisor of the Town of Manlius to disclose certain records pursuant to the Freedom of Information Law. The records pertain to a "mudslide disaster" that occurred in 2002 and which continues to affect you and your residence.

Based on a review of your correspondence, 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, as a general matter, the Freedom of Information Law applies to entities of state and local government in New York, such as the Town of Manlius.

As I understand your remarks, an effort was made without success to obtain an engineering report from the attorney representing a neighbor without success. If that was so, the neighbor's attorney would not have had an obligation to disclose the report to you or others, for neither your neighbors nor their attorney would be an "agency", and the Freedom of Information Law would not have applied. You indicated, however, that you obtained the study following a request made to FEMA under the federal Freedom of Information Act, which applies to federal agencies.

That study and other records, such as a letter sent to your Congressman by the Supervisor, were not disclosed in response to your request to the Town. Here I point out that the Freedom of Information Law is expansive in its coverage, for it includes all agency records, irrespective of their authorship, origin or function. 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."

Due to the breadth of the definition quoted above, if the Supervisor maintained the report or the letter to which you referred, or any other written material falling within the scope of your request, those documents would constitute "records" subject to rights of access conferred by the Freedom of Information Law. Further, in any instance in which records sought are withheld, the law requires the person seeking the records be informed of the denial of access and the right to appeal the denial pursuant to §89(4)(a) [see regulations of the Committee on Open Government, 21 NYCRR §1401.7(b)]. If my understanding of the matter is accurate, you were not informed that any aspect of your request was denied.

Next, 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. From my perspective, neither the engineering report nor the letter to the Congressman could properly have been withheld by the Supervisor, for none of the exceptions to rights of access would have been applicable. I note, too, that in most instances, communications between a municipality and a federal agency must be disclosed. In short, it is unlikely that those documents would fall within any of the grounds for denial.

Lastly, you referred to a meeting in Town Hall involving the Supervisor and business people for the purpose of discussing repair of the damage caused by the mudslide and complained that you were informed that there were no minutes. In my view, there may have been no requirement that minutes be prepared. Provisions concerning the obligation to prepare minutes appear in §106 of the Open Meetings Law. That statute pertains to meetings of public bodies, such as town boards, and it applies when a quorum, a majority of a public body, gathers to conduct public business. If there was no quorum of the Town Board present at the gathering that you described, the Open Meetings Law would not have applied, and there would have been no obligation to prepare minutes.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16743

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

August 16, 2007

Mr. Alex Rodriguez
02-A-5894
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. Rodriguez:

I have received your letter in which you referred to your inability to pay for copies of records sought pursuant to the Freedom of Information Law.

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 NYS2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16744

41 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 17, 2007

Ms. Gale M. Hatch
[redacted]

The staff of the Committee 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. Hatch:

I have received your letter concerning a request made by email to the Clerk of the Village of Ilion in which you were "not requesting a report, but simply a one-line response" transmitted by email. The matter involves a change in the Village's designation of an official newspaper.

In this regard, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires government agencies to provide information *per se*; rather it deals with existing records. Section 89(3)(a) states in part that an agency, such as a village, is not required to create a record in response to a request. Similarly, while agency officers and employees *may* provide information in response to questions, they are not required to do so to comply with the Freedom of Information Law.

It is my understanding that, by seeking a "one-line response", you were not requesting a record or records. If that is so, the Village would not have been obliged to create a new record in order respond.

Having discussed the matter with the Village Clerk, it is also my understanding that you were informed that certain records that you requested are available to reviewed or obtained, but that you have not done so. I believe that those records are bills submitted to the Village by the former and current official newspapers, and I was told that one of the bills indicates the charge, by line, for publication of legal notices, but that the other does not. Again, if the bill does not contain a breakdown or indication of the cost of publication per line, the Village would not be obliged to prepare a new record to reflect the cost per line.

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: Linda Coffin, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16745

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

August 20, 2007

E-MAIL

TO: Janet M. Watson

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee 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. Watson:

As you are aware, I have received your inquiry. Please accept my apologies for the delay in response.

You referred to a policy in the town in which you reside "wherein anyone who makes a request for information under the Freedom of Information Law has their name, address, and in some instances, phone number, posted on the town's website, along with the information they are requesting." You wrote that the practice is "discouraging many residents from making requests" and asked whether the town "can...do that."

Based on similar inquiries, I would conjecture that you are referring to the Town of Irondequoit. Although the policy in my opinion is not contrary to law, I believe that it is unnecessary and apparently intended to dissuade members of the public from asserting their rights of access to government records.

In this regard, there is no law that requires that government agencies to post items on websites, and I know of no municipality that posts requests made under the Freedom of Information Law, including the names and addresses of those seeking records, as a matter of practice or policy. I note, however, that it has been advised that, depending on the facts associated with a request, identifying details concerning the applicant may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)(b)]. While home addresses may often be acquired easily from a variety of sources, it has consistently been advised that home telephone numbers may be withheld to protect privacy.

Notwithstanding the foregoing, I point out that the Freedom of Information Law is permissive; even in situations in which an agency *may* withhold records or portions of records, it is not obliged to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. Therefore, even if the Town could withhold records or portions of records on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see §87(2)(b)], it would not be required to do so.

In short, irrespective of the motivation of the Town regarding the policy in question, I do not believe that there is any provision of law that prohibits the Town from posting requests for records made under the Freedom of Information Law on its website, including the names, home addresses and home phone numbers of those seeking records.

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

RJF:tt

cc: Town Board

FOIL-AO- 16746

From: Freeman, Robert (DOS)
Sent: Monday, August 20, 2007 10:57 AM
To: Robert Reninger

Dear Mr. Reninger:

I have received your letter concerning your efforts in obtaining invoices involving labor charges for installation of an exhaust system. You were informed that "Such a differentiated record for labor charges does not exist" and that "Various existing part time and full time employees have done labor as warranted." You have sought an opinion relating to the concept of "differentiated records."

In this regard, that is not a term with which I am familiar. In the context the matter that you described, I would conjecture that it means that there is no record that may reflect a breakdown of work performed or the cost of carrying out a particular function associated with a project. If there is no such record, an agency, according to §89(3) of the Freedom of Information Law, would not be required to create a new record to satisfy your request.

I note that the issue has arisen on many occasions. For instance, when municipal employees are paid a salary but perform a variety of tasks, there often is no record that indicates the amount of time spent in performing a particular task or, therefore, any record that would indicate the cost of carrying out that task. Similarly, because I am paid a salary to carry out a variety of functions, there will be no record that specifies the amount of time that I might have taken to read your communication, review the law and draft this response, and there would be no obligation to prepare such a record in response to a request made under the Freedom of Information Law.

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

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16747

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

August 20, 2007

Mr. Paul J. Nassetta
[redacted]

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

Dear Mr. Nassetta:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

You referred to a request to scan records maintained by the City of Poughkeepsie into your laptop computer. You did so for three days but had equipment problems on the fourth day. On the fifth, you were told that you could no longer scan the records, and that the records would be made available upon payment of a fee covering duplication and postage. You have sought assistance in the matter.

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 are 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 scanner would be valid.

In the context of your inquiry, 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 City staff and similar factors, the use of one's own scanner may be disruptive. There may be other instances, however, in which the attendant facts suggest that the use of a scanner might not be disruptive. In those cases, it may be unreasonable to prohibit the use of a personal photocopier.

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

Section 1401.4 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 Murtha, the decision cited earlier 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..."

Based on the foregoing, the City, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Stella Isaza

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16748

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

August 20, 2007

Hon. Lee A. Hollenbeck
Town Supervisor
Town of Broadalbin
201 Union Mills Road
Broadalbin, NY 12025

The staff of the Committee on 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 Hollenbeck:

I have received your letter concerning certain requests made under the Freedom of Information Law and hope that you will accept my apologies for the delay in response.

You referred to a person who has made numerous requests for records and tried, in your words, "to get us out of office." That being so, you asked: "When is a FOIL a true FOIL instead of a FOIL request used as a personal attack against the Supervisor and the Town Clerk.?"

In short, there is no method that enables agencies to distinguish among FOIL requests. I point out that it was held soon after its enactment that when records are accessible under the Freedom of Information Law, they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

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

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

Notwithstanding the foregoing, if you believe that this office can offer guidance in relation to any request for records, please feel free to contact us.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-16719

From: Freeman, Robert (DOS)
Sent: Tuesday, August 21, 2007 9:54 AM
To: Alan Isselhard
Cc: townofro@rochester.rr.com
Subject: RE: FOIL

If two weeks have passed without disclosure of the records or written acknowledgment of the receipt of your request offering an approximate date of an expected response, you may consider the request to have been denied. In any instance in which there is a denial of access, the applicant has the right to appeal. The appeal is made to the governing body, the Town Board, or a person or body designated by the Board to determine appeals. When an appeal is received, the appeals person or body has ten business days to grant access to the records, or fully explain in writing the reasons for further denial.

A detailed explanation of the provisions involving the time for responding to requests and appeals is available on our website by clicking on to "What's New."

In an effort to offer guidance and to encourage compliance with law, a copy of this response will be sent to the Town Clerk.

I hope that I have been of assistance.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC AO - 4466
FOIL-AO - 16750

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

August 21, 2007

E-MAIL

TO: Cheri Evershed

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Evershed:

As you are aware, I have received a variety of material from you involving issues that have arisen in the Town of Irondequoit relating to the Open Meetings and Freedom of Information Laws.

The initial issue involves your functioning as a member of the Planning Board and a request that you recuse yourself from consideration of a certain application that was about to come before the Board "because [you] made public comments during public input at a town board meeting." In my view, there is no valid reason to recuse yourself or to be bound by rules that offer you, as a planning board member, a lesser right to speak and express yourself than the public at large. From my perspective, it is the duty of elected and appointed officials to express themselves in order that the public can know how those officials feel about issues important to their communities. In the case of elected officials, the public cannot know whether candidates for public office, whether they are incumbents or challengers, merit support in an election unless those persons express their views on the issues. I ask rhetorically: could it be that members of Congress who represent us should recuse themselves from voting on legislation because they have expressed their views, pro or con, regarding bills that have not yet reached the floor for a vote? On the contrary, the public wants and needs to know how its leaders, even those like you chosen to serve on local boards, feel about issues important to the communities that they serve.

Second, you referred to a contention that "personnel issues" constitutes a proper subject for consideration in executive session. Based on judicial precedent, a motion identifying the subject to be considered in executive session in that manner is inadequate.

By way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be

accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

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

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

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

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

When §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "personnel" or "personnel issues" is insufficient, 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 issue" is inadequate, for it fails to enable the public or even members of the Board to know whether subject at hand may properly be considered during an executive session.

The remaining issue involves the fee charged by the Town for a DVD containing a reproduction of a Town Board meeting. You wrote that "some if not all of the computers at town hall have the capability to burn a DVD." As it pertains to fees for copies of records, §87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations

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

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

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

Based upon the foregoing, it is likely that a fee for "burning a DVD" would involve the cost of a DVD.

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.

RJF:tt

cc: Town Board
Michael Leone, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16751

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

August 21, 2007

E-MAIL

TO: Tim Golan

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Golan:

I have received your letter in which you referred to a series of requests made under the Freedom of Information Law to the Town of Irondequoit, and the Town's response that "no such records exist."

In this regard, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency is not required to create a record in response to a request for information. In many instances, people have requested "lists" of certain items. If no list exists, an agency would not be required to prepare a list containing the items sought. Similarly, that law does not require government officers or employees to supply information in response to questions. Often people will seek information by asking, for example, "What was the total cost of constructing.....?" In that situation, there may be no record indicating a total, and the agency would not be required to supply information by responding to a question or creating a "total" that does not exist. If you have not done so, in the future, it is suggested that you request existing records or portions of records that contain the information 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." You might request such a certification if you consider it worthwhile to do so.

Lastly, while I am not suggesting that they are applicable, I point out that §240.65 of the Penal Law entitled "Unlawful prevention of public access to records" and §89(8) of the Freedom of Information Law deal with the concealment or destruction of records requested pursuant to the Freedom of Information Law. The former states that:

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

From my perspective, the preceding may be applicable in two circumstances: first, when an agency officer or 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. As in the case of any violation of the Penal Law, a violation may be prosecuted by a district attorney.

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16752

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

August 21, 2007

Mr. William J. Walsh
President
CSEA ,Suffolk Local 852
625 Middle Country Road
Suite 201
Coram, NY 11727

The staff of the Committee on Open 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:

I have received your letter and the materials attached to it involving requests for records made by the CSEA to the Town of Brookhaven. In brief, although the receipt of the requests was acknowledged, the Town "did not provide an approximate date when access to these records would be either granted or denied." You appealed, and when your letter was addressed to this office, nearly two months after the submission of the appeal, no determination had yet been made by the Town.

You have asked whether the Town has complied with the Freedom of Information Law and whether the documents requested must be disclosed.

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.

I note that, legislation became effective in 2006 that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law. 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.

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 records sought, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 I am not familiar with the specific contents of the records sought, it appears that most deal in some manner with payments made to public employees. If that is so, I believe that they should be made available by the Town in great measure, if not in their entirety, to comply with law. In my opinion, two of the grounds are relevant to an analysis of rights of access. Neither, however, would likely serve to enable the Town to withhold the substance of the records.

Relevant would be §87(2)(g). Although that provision potentially serves as a basis for denying access to records, due to its structure, it often requires disclosure, and I believe that would be so with regard to the most significant aspects of the records. 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.

As I understand the content of the records at issue, they likely consist of factual information available under §87(2)(g)(i). If that is so, that factual information must be disclosed, unless a separate exception permits a denial of access.

The other exception relevant to the matter is §87(2)(b), which permits an agency to deny access insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While that standard is flexible, 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, 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 made available [see §87(3)(b)]. Similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be

available, for those records in my view would be relevant to the performance of one's official duties. It is noted that one of the decisions cited above, Capital Newspapers v. Burns, supra, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer. The Appellate Division found that those records must be disclosed, and the Court of Appeals affirmed. The decision indicates that the public has both economic and safety reasons for knowing whether public employees perform their duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of payment of overtime must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties.

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Jim La Carrubba
Hon. Pam Betheil
Karen Rana

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16753

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 22, 2007

E-MAIL

TO: Dan Ciccone

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Ciccone:

As you are aware, I have received your inquiry relating to the Freedom of Information Law. Please accept my apologies for the delay in response.

You wrote that you "would like to know if a school district had a password protected blog for teachers to use to communicate with each other to express new ideas, ask questions of their peers and present or solicit advice - an 'electronic collegial circle' of sorts, would that blog be obtainable under FOIL." 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, and §86(4) defines the term "record" expansively to mean:

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

Based on the foregoing, the content of the blog would in my opinion consist of agency records that fall within the coverage of the Freedom of Information Law.

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

Communications between or among school district officers or employees would fall within one of the exceptions, §87(2)(g). That provision permits an agency, such as a school district, to withhold records that:

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

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

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16754

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

August 22, 2007

E-MAIL

TO: Margaret McGreevy

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. McGreevy:

I have received your inquiry concerning a request by a person terminated following a section 75 hearing who requested her time cards. You have asked whether you may "deny this request." Based on the judicial interpretation of the Freedom of Information Law, the time cards are accessible not only to the subject of those records, but also to any member of the public who requests them.

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.

Although two of the grounds for denial relate to attendance records or time cards, neither in my opinion would justify a denial of access.

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

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

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

Attendance records could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning the issue of leave time or absences, the times that employees arrive at or leave work, or which identify employees by name would constitute "statistical or factual" information accessible under §87(2)(g)(i).

Also relevant is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." This office has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of 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 Co. v. County of Monroe, 59 AD2d 309 (1977), aff'd 45 NY2d 954 (1978); Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)].

With regard to time cards or attendance records, in a decision pertaining to a particular police officer and records indicating the day and dates he claimed as sick leave, which was affirmed by the State's highest court, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." (Capital Newspapers v. Burns, supra, 94-95).

Insofar as attendance records or time cards include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise

available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates and times of attendance or absence, would not in my view represent a personal detail of an individual's life and would be relevant to the performance of one's official duties. Therefore, I do not believe that §87(2)(b) could be asserted to withhold that kind of information contained in an attendance record.

In sum, I believe that time cards, attendance and similar records pertaining to public employees must be disclosed, subject to the qualifications described above.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16755

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 23, 2007

Mr. Anthony Breedlove
03-B-3102
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. Breedlove:

I have received your letter in which you referred to an absence of responses by the Chemung County Court Clerk to your requests for records made pursuant to the Freedom of Information Law.

Please be advised that 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 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, again, 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 might renew your request, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16756

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

August 24, 2007

Mr. German Fuentes
92-B-0555
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

Dear Mr. Fuentes:

I have received your letter in which you sought guidance in your attempt to obtain copies of court records under the Freedom of Information Law.

In this regard, as you may be aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, and others, including those of your interest, which may be held as clerk of a court.

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

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

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

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

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

It is suggested that you seek the records from the clerk of the appropriate 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-16757

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August 24, 2007

E-Mail

TO: Mr. Sean M. Mitts

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Mitts:

As you are aware, I have received a variety of correspondence concerning your requests made under the Freedom of Information Law to the Village of Brewster.

The issue that you raised relates to a request to gain access to contracts pertaining to the construction of a wastewater treatment plant. You wrote that some of the documents made available were not among those requested, and that, "upon inspection, it appeared to [you] that in excess of 4,000 pages consisted of plans and specifications relating to the plant." Although you specifically excluded the plans and specifications from your request, you were informed that the Village Clerk "was under no obligation to undertake a detailed examination of the documents being copied to determine what items should be excluded from the request", and that "in an 'abundance of caution' it was determined that everything should be produced." You were informed in response to a different request that it would not be honored "until [you] paid for the 6,400 pages that already been copied, including the plans and specifications that [you] had excluded from [your] request."

You wrote that "it was clear from [your] examination of the contracts [you] requested that the plans and specifications were easily identifiable, so that any effort to exclude these from the copying process would be de minimis." Consequently, you have sought an opinion suggesting that you "should not be required to pay for the copies of these items as a condition precedent to receiving the balance of [your] FOIL requests."

In this regard, many situations have been brought to the attention of this office in which a large volume of records is requested, and upon inspection and review, the applicant determines that s/he would like copies of a small number of pages. For instance, it has been suggested that those

interested in audits that may consist of hundreds of pages review them in order to determine which portions he or she might want to have copied. That kind of exercise is, in my view, beneficial to both the applicant and the government agency in receipt of the request, for the applicant is able to diminish what would otherwise be a substantial fee for copying, and the agency reduces the labor associated with copying the records.

In this instance, it appears that you reviewed the records and specified that you did not want copies of certain portions. Assuming that your contention is accurate, that the plans and specifications that you did not want to be copied are "easily identifiable", I do not believe that you can justifiably be required to pay for copies for those portions of the records. In short, if Village officials had the ability, with reasonable effort, to segregate those portions of the records that you did not want to be copied, it would have been unreasonable, in my view, to copy them nonetheless and impose a fee of twenty-five cents per photocopy. Further, if you have paid for the copies of the records that you did in fact ask to be copied and owe the Village no additional monies, I believe that the Village would be required to honor any pending or future requests. I note that it has been advised and held judicially that an agency may require payment of the requisite fees in advance of the preparation of copies of requested records (see e.g., Sambucci v. McGuire, Sup. Ct., New York County, Nov. 4, 1982).

I hope that the foregoing serves to resolve the matter and that I have been of assistance.

RJF:jm

cc: Peter B. Hansen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 16758

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

August 24, 2007

Ms. Fina Del Principio
Principal Assistant County Attorney
Rockland County Attorney's Office
11 New Hempstead Road
New City, NY 10956

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

Dear Ms. Del Principio:

I have received your letter in which you requested an advisory opinion pertaining to the Freedom of Information Law.

You wrote that the Rockland County Board of Elections has received a complaint concerning a "challenge of someone's (a candidate for office) registration." Consequently, pursuant to §5-702 of the Election Law, the Board conducted an investigation and sent a "voter's check card" to the local police department, which conducts an investigation as well. Subdivisions (1) and (2) of that statute provide in relevant part as follows:

> "1. The board of elections shall cause a bipartisan team of regular or special employees of such board to conduct an investigation of the qualifications to register and vote, or cause a voter's check card to be prepared for each voter who was registered after being challenged or who was challenged after resignation and, if requested by any member of the board, for any other voter. The board shall forthwith deliver each such voter's check card to the head of the police department in the city, town or village in which the voter resides, or, if there be no such police department, to the sheriff or head of the police department of the county. The board shall make and retain an inventory list of all cards so delivered.
>
> "2. The head of the police department or sheriff, forthwith shall cause an investigation to be made to determine, in each instance,

> whether the registrant resides, and how long he has resided, at the address at which he claims a residence, and to check the facts relating to why the voter was challenged."

Subdivision (3) of §5-702 requires that the police department return the voter's check card to the Board of Elections, which it has done.

You have asked whether the letter of complaint and the voter's check card must be disclosed. In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 relative to complaints, 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. It has also been advised that a complaint might properly be withheld in its entirety if, due to its contents, disclosure would permit a recipient of the record to determine the identity of the complainant.

I point out that the Freedom of Information Law is permissive. As a general matter, even though an agency *may* withhold records or portions thereof in accordance with the grounds for denial of access, 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)].

With respect to the "voter's check card", pertinent is §89(6) of the Freedom of Information Law, which 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." Therefore, if a different provision of law specifies rights of access to records, nothing in the Freedom of Information Law may be asserted to withhold those records. One such provision of law is §3-220 of the Election Law. Subdivision (1) of that statute provides in relevant part that:

> "All registration records, certificates, lists and inventories referred to in, or required by, this chapter shall be public records open to public inspection under the immediate supervision of the board of elections or its employees..."

"This chapter" is the entirety of the Election Law, and the voter's check card, as indicated earlier, must be prepared concerning any registered voter who is challenged. From my perspective, that record is a "registration record...required by, this chapter," specifically, §5-702(1) of the Election Law. If my analysis is accurate, the voter's check card must be disclosed pursuant to §3-220(1) of the Election Law, notwithstanding the provisions of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO- 16759

From: Jobin-Davis, Camille (DOS)
Sent: Friday, August 24, 2007 3:18 PM
To: Bill Lofquist
Cc: Mercer, Janet (DOS)
Subject: RE: Advisory Opinion

Dear Professor Lofquist:

In response to your request, please be advised that when an agency contends that a request does not reasonably describe records in its possession, pursuant to regulations adopted by the Committee on Open Government, which have the force and effect of law, an agency's designated 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]). The records access officer is further required "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][3]). Accordingly, it is our suggestion that you contact the records access officer in an effort to ascertain the nature of records indicated in the affidavit of Ron Hull as "client files" and revise your request accordingly.

On behalf of the Committee, I hope this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
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OML-AO-4174
FOIL-AO-1620

From: Freeman, Robert (DOS)
Sent: Monday, August 27, 2007 5:08 PM
To: [redacted]

Dear Mr. Lambert:

I have received your inquiry and can understand how the question has arisen. The provision concerning the preparation of a record indicating the manner in members of agencies (public bodies) cast their votes appears in the Freedom of Information Law, §87(3)(a). That provision does not indicate where the record of votes must be kept or where it must appear, but rather only that it must be maintained. The Open Meetings Law, §106, pertains to minutes of meetings of public bodies and indicates that minutes must include reference to "motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." The "vote thereon", does not necessarily have to be the vote of each member, but rather may be the tally, i.e., 3 in favor, 2 opposed.

Although the record of the votes of each member typically is included in minutes, the Court of Appeals, citing the language quoted above, held in Perez v. City University of New York that "A final determination may easily be recorded in the meeting's minutes without an accounting of each participant's ballot. Though we construe the provisions of the Open Meetings Law liberally, will not add a requirement to the text of the statute" [5 NY3d 522, 530 (2005)].

In short, although a record of the votes of each member must be maintained in a record, that record may, but need not be, the minutes of a meeting.

I hope that I have been of assistance.

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

FOIL-AO-16761

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

August 27, 2007

Ms. Roselyn Katz
[redacted]

The staff of the Committee on 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. Katz:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to your ability to know the "true reason" why the White Plains High School was placed on the "Needs Improvement List" by the State Education Department last year, and the issue raised involves your ability to gain access to statistical information concerning the results of tests since the "No Child Left Behind Act" went into effect. In this regard, I offer the following comments.

First, a request should be directed to the "records access officer" at the District that you believe maintains the records. The records access officer has the duty of coordinating an agency's response to requests.

Second, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency, such as a school district, is not required to create a record in response to a request. Therefore, if there is no record specifying the reason for the performance of students, the District would not be required to prepare a new record to explain the reason.

Third, I point out, however, that §86(4) of the Freedom of Information Law is applicable to agency records and defines the term "record" expansively to include:

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

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.

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

Assuming that the statistics that you seek do exist or can be generated, I believe that they would be available, for §87(2)(g)(i) of the Freedom of Information Law requires that "intra-agency materials" consisting of "statistical or factual tabulations or data" must be disclosed.

Lastly, in an effort to offer guidance, I perused the State Education Department website to learn how you might locate information of value to you. In step by step progression, you might enter <www.nysed.gov>; in the search box, type "no child left behind"; then "Frequently Requested Information"; then "Educational Data and Statistics"; and finally, "How Do I Interpret the Scores."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 28, 2007

Ms. Michelle D. Verdicchio
[redacted]

The staff of the Committee on 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. Verdicchio:

I have received your letter and hope that you will accept my apologies for the delay in response. You have sought assistance concerning a request made under the Freedom of Information Law to Rensselaer County relating to the County's self-insurance program, workers' compensation claims, and the administration of the program for the County by an entity known as Benetech.

Having reviewed the request, which is attached to your letter, you sought items often falling within broad categories from the period of 1990 or 1992 to the present. In several instances, you wrote "Looking for mine" on the copy of the request. Based on that review, I offer the following comments.

First, a key issue, particularly in consideration of the time periods that you identified, 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 recordkeeping systems of the County, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. It is possible with respect to some aspects of your request that records may be maintained in several locations by a variety of units within the County, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding workers' compensation, since the beginning of its existence, in a single file, it may be a simple task to locate the records. If, however, records are not maintained by subject, but rather are kept chronologically or in files retrievable by employees' names, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

In a related vein, between 1990 and today, agencies have moved from paper to electronic information systems, and in many instances, it may be relatively easy to locate records prepared recently that are maintained electronically. However, it may be extremely difficult to locate other records that might be maintained only on paper. Further, in consideration of the time period of your requests, I point out that agencies do not necessarily have to keep records permanently. Rather, schedules indicating minimum retention periods are developed pursuant to the Arts and Cultural Affairs Law, Article 57-A. In brief, the schedules generally relate to the significance of records or perhaps statutes of limitations. Some records may be required to be maintained permanently, while others may be destroyed within particular time periods based on their value. I would conjecture that many records falling within the scope of your request have legally been destroyed.

Second, when records can be located with reasonable effort, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. In my opinion, two of the grounds for denial are particularly relevant in considering your request.

Section 87(2)(b) authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." In turn, §89(2)(b) provides examples of unwarranted invasions of personal privacy, the last of which pertains to "information of a personal nature contained in workers' compensation record, except as provided in section one hundred ten-a of the workers' compensation law." In brief, §110-a of the Workers' Compensation Law, requires that records concerning workers' compensation claims be kept confidential, except in specified circumstances, one of which involves disclosure to the subject of such records. Therefore, while you cannot invade your own privacy, the County would be permitted to withhold records or portions of records concerning persons other than yourself in relation to matters involving workers' compensation.

The other exception that is relevant, §87(2)(g), pertains to communications between and among officers and employees of government agencies in New York. 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.

It is suggested that you might contact the County for the purpose of narrowing your request and focusing on the items of primary significance to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Peter Kehoe

STATE OF NEW YORK
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August 28, 2007

E-MAIL

TO: John Kane

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. Kane:

As you are aware, I have received your letter and the materials relating to it. Please accept my apologies for the delay in response. You have sought an opinion concerning "the refusal of [your] FOIL by the Fulton County Board of Supervisors for records when FCIDA's website would be available." The FCIDA is the Fulton County Industrial Development Agency, and your request involves records pertaining to its website "as required by the New York State Public Authority Law", §2800(2)(b). You were informed that no such records exist.

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

Second, the provision to which you referred in the Public Authorities Law requires that state and local public authorities must make available certain information on its website "to the extent practicable." The quoted phrase in my view indicates that entities subject to that requirement must post information on their websites when they have the ability to do so; there is no obligation to create a website if an authority has none.

Last and perhaps most importantly in the context of the matter, I do not believe that FCIDA is a public authority subject to the provisions of the Public Authorities Law; rather, it is an industrial development agency created by §895-c of the General Municipal Law.

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

RJF:tt
cc: Jon Stead
James E. Mraz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16764 PPPL-AO-338

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August 29, 2007

Barry P. Zezze, Fire Commissioner
New Castle Fire District No.1
77 Orchard Ridge Road
Chappaqua, NY 10514

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

Dear Mr. Zezze:

I have received a variety of correspondence from you relating to your request to the New Castle Fire District, which you serve as a member of the Board of Commissioners, involving the "conduct and actions of the Fire Chief." Based on a review the materials, I offer the following general remarks.

First, you cited the Personal Privacy Protection Law in your request. That statute pertains only to state agencies and specifically excludes local government from its coverage [see definition of "agency" for purposes of the Personal Privacy Protection Law, §92(1)]. The Freedom of Information Law, however, includes entities of state and local government within its coverage [see definition of "agency", §86(3)].

Second, the responses to your request indicate that the item of interest may be withheld because it an "intradepartmental communication." In my view, the characterization of a document as "intradepartmental" does not necessarily mean that it may be withheld under 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 (j) of the Law.

Although one of the exceptions to rights of access deals with communications between or among government officers or employees, the extent to which those communications may be withheld or, conversely, must be disclosed, is dependent on their content. Specifically, §87(2)(g) authorizes an agency, such as a fire department, to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 record at issue appears to be a final determination relating to the conduct of the Chief. If that is so, it must be disclosed, except to the extent that a different exception might apply. Pertinent is §87(2)(b), which permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear that those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that they 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 such person'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 NYS2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD d 309 (1977), aff'd 45 NY2d 954 (1978); Sinicropi v. County of Nassau, 76 AD2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS2d 309, 138 AD2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY2d 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 NYS2d 460 (1980)].

In sum, if indeed there is a written determination indicating misconduct or a penalty imposed in the context of the situation to which you referred, I believe that the determination would be accessible to the public under the Freedom of Information Law, with the possibility of the deletion of certain portions. While there is no judicial decision of which I am aware dealing with such a situation, it has been advised that portions of determination indicating misconduct or discipline may be withheld that refer to a medical or mental health condition. For instance, if part of a determination requires that an individual enter a program or seek treatment involving drug or alcohol abuse, I believe that portion of the record may be withheld on the ground that disclosure of so intimate a personal detail would constitute an unwarranted invasion of privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Daniel A. Doran

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 29, 2007

Mr. Ted Phillips
Reporter
Bond Buyer
One State Street - 27th Floor
New York, NY 10014

The staff of the Committee 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. Phillips:

As you are aware, I have received your letter relating to a request made under the Freedom of Information Law to the New York State Department of Transportation, as well as a variety of material relating to it.

By way of background, in March of 2006, the Department issued a request for proposals ("RFP) for financial consulting services, and the deadline for submission of proposals was April 3, 2006. You requested the proposals on April 3 of this year, and the request was denied in its entirety by the Department's records access officer on May 1 based on §87(2)(d) of the Freedom of Information Law. You appealed, and the appeal was denied, also in its entirety, and the determination states that: "Inasmuch as no contract was awarded in conjunction with this Request for Proposal, release of the responses would reveal the competitive positions taken by the responding commercial entities and place them at a competitive disadvantage should this or a similar RFP be issued in the future." Since the receipt of your correspondence, I have contacted the Department and was informed that the RFP was withdrawn.

While there may be elements of the proposals submitted to the Department that may justifiably be withheld, the remainder in my opinion must be made available. In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 Department has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. Again, I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by 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, I believe that the explanation for the denial of access to the records sought offered in response to your appeal is inadequate. In the initial denial, the records access officer referred to §87(2)(d) of the Freedom of Information Law, indicating that the records were "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 response to the appeal, which was cited at the beginning of this opinion, offers nothing more in explaining the Department's rationale for denying access. Because §89(4)(a) requires that a determination following an appeal must "fully explain in writing...the reasons for further denial...", the determination in my view did not "fully explain" those reasons.

Third, §87(2)(d) permits an agency to withhold records to the extent that they:

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

Therefore, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

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

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

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

From my perspective, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

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 a review of the RFP distributed to commercial entities that might have been interested in providing financial feasibility consulting services for the Department, I believe that a variety of information submitted to the Department must be disclosed. Among the items that I believe must be disclosed would be, for example, the names and addresses of those entities and the names of their employees who prepared the proposals or were authorized to negotiate (p. 4); minority/woman-owned/disadvantaged business enterprise status (p. 6); consultant identification number (p.6). There are likely other elements of the proposals which if disclosed would not cause "substantial injury to the competitive position" of the submitting entity. In those instances, I believe that those portions of the records must also be disclosed.

In sum, in my opinion, there are aspects of the records sought that must be disclosed, and to comply with law, the Department is required to review the records in their entirety to determine which portions may properly be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Janice A. McLachlan
John Dearstyne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16766

41 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, 2007

Hon. Chester A. Dudzinski, Jr.
Supervisor
Town of Cicero
P.O. Box 1517
Cicero, NY 12231

The staff of the Committee on 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 Dudzinski:

I have received your letter and hope you will accept my apologies for the delay in response. You have raised the following question:

> "Does a public official have an obligation to provide a copy of correspondence addressed specifically to that public official to fellow public officials serving in the same or similar capacity, or is it sufficient to make such correspondence available along with other public documents as such are maintained in the ordinary course of business?"

In short, I know of no provision of law that addresses the question. However, I note that the Freedom of Information Law 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."

Based on the foregoing, if, for example, correspondence is addressed to you, in your capacity as Supervisor, and received at your home, the correspondence would constitute a Town "record" that falls within the coverage of the Freedom of Information Law.

From my perspective, the treatment of correspondence addressed to a particular member of the Town Board may be subject of a rule or policy adopted pursuant to §63 and/or §64 of the Town Law. The former states in part that "The board may determine the rules of its procedure..."; the latter in subdivision (3) provides that the Town Board "Shall have the management, custody and control of all town...property..."

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-16767

41 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, 2007

Mr. John L. Minogue
[redacted]

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

Dear Mr. Minogue:

I have received your most recent correspondence, which again deals with a request for records used by the Nassau County Executive in developing certain projections. Although minimal information was communicated to you, no records were made available. It was advised in an opinion of April 13 that you may seek a certification from an agency indicating that it does not maintain or cannot locate the records of your interest. You have asked whether you are "entitled to a response/information/certification."

In this regard, as indicated in the earlier opinion, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency is not required to create a record in response to a request. In short, if records have not been prepared that contain the information that you are seeking, the County would not be obliged to create new records on your behalf. If no records exist, again, you may request a certification that so indicates. Since the law, also a portion of §89(3), states that an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search," by use of the term "shall", it is clear in my opinion that it is mandatory that a certification be prepared on request.

I note that the regulations promulgated by the Committee on Open Government, which have the force and effect of law, require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and among that person's duties under the regulations, 21 NYCRR §1401.2(b), is the responsibility "for assuring that agency personnel....(7)Upon failure to locate records, certify that: (i) the agency is not the custodian for such records; or (ii) the records of which the agency is a custodian cannot be found after diligent search."

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.

It is likely that any existing records that you requested would fall within one of the exceptions. However, due to its structure, that provision often requires disclosure. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mark Young

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16768

41 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, 2007

E-MAIL

TO: William Joseph Reynolds

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Reynolds:

As you are aware, I have received your letter concerning an incident that occurred in the Town/Village of Ossining earlier this year.

You wrote that ten days after vacating a building in which you and other tenants resided, "there was an incident...where the fire department and building inspector were called to the scene." As I understand the matter, your request for records relating to the incident was denied, and it was suggested that you should not pursue the matter further.

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 my perspective, assuming that records might have been prepared by the fire department or a building inspector, one of the grounds for denial is particularly relevant. Due to its structure, however, that provision often requires substantial disclosure. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

I would conjecture that much of the information contained in records relating to the incident would consist of factual information accessible under subparagraph (i) of §87(2)(g). Further, if a record indicates a final determination concerning the cause of the incident, I believe that portion of the record would be accessible under subparagraph (iii) of §87(2)(g).

I hope that I have been of assistance.

RJF:tt

cc: Mary Ann Roberts, Clerk

FOIL-AO-16769

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, August 30, 2007 3:03 PM
To: Justin Chase
Subject: Freedom of Information Law - certify diligent search

Justin:

When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect, for Public Officers Law §89(3)(a) 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."

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
41 State Street
Albany NY 12231
(518) 474-2518
(518) 474-1927 fax
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16769A

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

September 4, 2007

Mr. Antony Rouse
04-R-1400
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 12733

Dear Mr. Rouse:

I have received your letter and the materials attached to it. You indicated that you were told to appeal to this office and asked that I "direct" staff at your facility to provide the information that you requested. It appears that you were misinformed about the functions of 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 compel an agency to disclose records or otherwise comply with law.

Having reviewed your request, you asked that the records access officer complete a form that you apparently prepared by supplying information and filling in a series of blanks. In my opinion, that is not a request for records as envisioned by the Freedom of Information Law. While staff at the facility could choose to supply the information sought by filling in the blanks, there would be no obligation to do so to comply with the Freedom of Information Law. That statute pertains to existing records, and §89(3) states in relevant part that an agency is not required to create a record in response to a request. In the future, it is suggested that you request existing records.

When existing records are withheld, the person denied access has the right to appeal in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16770

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

September 4, 2007

Mr. Douglas Ruhlin
Resource Management Associates
P.O. Box 512
Forked River, NJ 08731

Dear Mr. Ruhlin:

I have received your letter in which you requested certain records from this office. In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the New York Freedom of Information Law. This office does not have custody or control of records generally, and we have no records falling within the scope of your request.

When seeking records, a request should be made to the "records access officer" at the agency that is likely to maintain the records of your interest. The records access officer, pursuant to regulations promulgated by the Committee (see 21 NYCRR §1401.2), has the duty of coordinating an agency's response to requests. When requesting records, an applicant is required by §89(3) of the Freedom of Information Law to "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records. I am unfamiliar with the property that is the subject of your request, and it might be worthwhile to specify the time period relating to the records of your interest.

In consideration of the nature of the request, I would conjecture that the records would be maintained by the New York City Department of Environmental Protection and/or the New York State Department of Environmental Conservation. The latter has designated a records access officer at its New York City office, and the address is One Hunter's Point Plaza, 47-40 21st St., Long Island City, NY 11101.

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-1677

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

September 4, 2007

Mr. Shawn Jordan
04-A-6841
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

Dear Mr. Jordan:

I have received your letter concerning a request made to the City of Albany Police Department for certain records. You wrote that you "expect that [this office] will send [you] all nonexempt records that [you] have requested..."

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 it is not empowered to obtain records on your behalf.

When an agency denies access to records in writing or due to a failure to respond within the statutory time, the person denied access has the right to appeal in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16772

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

September 4, 2007

Mr. Patrick Morrison
83-A-3436
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 12231

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

Dear Mr. Morrison:

I have received your letter in which you indicated that the Queens County District Attorney has failed to respond to your request for records.

In this regard, first, the regulations promulgated by this office 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), and requests should ordinarily be made to that person. In my view, the person in receipt of the request should have either responded directly or transmitted the request to the records access officer.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in

> writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-16773

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

September 4, 2007

Mr. Anthony Lewis
00-A-0639
Livingston Correctional Facility
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 facts presented in your correspondence.

Dear Mr. Lewis:

I have received your letter in which you wrote that the office of the Steuben County District Attorney has failed to respond 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-16724

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

September 4, 2007

Mr. Kenneth Portee
04-A-6497
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. Portee:

I have received your letter concerning your request for a "master index" maintained by the City of Schenectady.

In this regard, as a general matter, the Freedom of Information Law pertains to existing records, and §89(3) states that an agency generally is not required to create a record in response to a request. An exception to that general rule relates to the record in question. The phrase "master index" is used in the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law. Those regulations are based upon §87 (3)(c) of the Freedom of Information Law, which requires that each agency maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, although a subject matter list is not prepared with respect to records pertaining to a single individual, such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested. Rather than seeking a "master index" from an agency, it is suggested that you request the subject matter list maintained pursuant to §87 (3)(c) of the Freedom of Information Law. I note, too, that many agencies have, at the suggestion of this office, adopted their schedule involving records retention and disposal as their subject matter lists. The schedule is often more detailed than the subject matter list must be.

When a request is denied, either in writing or due to a failure to respond in a timely manner, the request may be deemed denied and the applicant has the right to appeal. I believe that the person designated to determine appeals in the City of Schenectady is John Norden, Corporation Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Carolyn Friello
John Norden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16775

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

September 4, 2007

Mr. Richard Jones
94-B-1002
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

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

Dear Mr. Jones:

I have received your letter in which you requested various records from this office. 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 maintain records generally, and we have no records falling within the scope of your request. However, I offer the following comments.

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

Second, when records are withheld at the facility level, the denial of access may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Lastly, you cited the federal Freedom of Information and Privacy Acts in your request. Those acts apply only to federal agencies; the applicable statute in this instance is the New York Freedom of Information Law. I note that the federal Act includes provisions concerning the waiver of fees, but that the New York Law includes no similar provision.

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-16776

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

September 4, 2007

E-MAIL

TO: Janon Fisher

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Fisher:

I have received your letter concerning a request made pursuant to the Freedom of Information Law to the New York City Police Department for records indicating "off-limits locations" by precinct and the reason for their "off-limits" status. Police officers are forbidden to patronize those locations "because the department has determined them to be corruption-prone or having a reputation that would taint the department should an officer be seen patronizing." You wrote that your request has not been denied, but that, based on a conversation with the Department's records access officer, you have been led to believe that it will be rejected because "it is an internal document."

From my perspective, that a document is characterized as "internal" is not determinative of rights of access. On the contrary, based on the language of the key provision in the law relative to the records at issue, the content of internal communications is the critical factor in ascertaining rights of access. In this instance, as I understand their content, the records sought 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 (j) of the Law. The provision to which I alluded in the preceding paragraph is among the grounds for denying access to records. However, due to its structure, it often requires disclosure. Specifically, §87(2)(g) authorizes an agency, such as the Department, to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

A list or lists identifying "off-limits" locations would in my view consist of factual information available under subparagraph (i) of §87(2)(g). I believe that it would also constitute an "instruction to staff that affects the public" indirectly that would be accessible under subparagraph (ii). Further, as you suggested, the list and the reason for certain locations being off-limits would in my opinion represent a final agency determination available under subparagraph (iii).

In sum, it appears that the records of your interest should be disclosed, notwithstanding their status as "internal."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Sgt. James Russo

FOIL-AO-16777

From: Freeman, Robert (DOS)
Sent: Wednesday, September 05, 2007 12:06 PM
To: Stephen Hughes
Subject: email addresses

I have received your inquiry in which you referred to a town's collection of residents' email addresses used to provide them with information about town events and commerce and asked whether the town could deny access to those addresses.

In this regard, although the Freedom of Information Law provides broad rights of access to government records, an exception, §87(2)(b), involves the ability to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." While there are no judicial decisions of which I am aware dealing with issue, I believe that a request for residents' email addresses could be withheld pursuant to the provision cited in the preceding sentence. It is noted, however, that the Freedom of Information Law is permissive; even when an agency, such as a town, may withhold records, it is not required to do so.

I hope that I have been of assistance.

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

FOIL-AO-16778

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, September 05, 2007 1:48 PM
To: Wilbard, Helen (DOS)
Subject: RE: re: FOIL request

Hi Helen,

In response to your request, I refer you to section 87(1)(b)(iii) of the Freedom of Information Law which 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 three 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; 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; and the third is 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.

In your case, I believe you might be permitted to charge for the disk based on the latter two standards. You would have to determine whether the Department is permitted to charge for searching any of the records provided on the disk pursuant to Executive Law section 96, and also what the cost of the disk is to the Department. If the fee provisions of the Executive Law do not apply, in my opinion, you may only charge for the cost of the CD.

A recent change to the law, and this may be what Kathleen is referring to, involves the requirement that agencies receive and respond to requests via email when possible. When records are produced electronically, there are no photocopies made and the agency is not paying for an information storage medium. When there are no photocopies and no actual costs, the agency, in my opinion, could not charge a fee.

I hope this is helpful to you. Please let me know if you have further questions.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
41 State Street
Albany NY 12231
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16729

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

September 5, 2007

E-Mail

TO: Ms. Joann Ryan, NYS Department of State

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Joann:

I have received your letter in which you referred to a member of a planning board who "wants to see ALL building permits issued" (emphasis yours) and asked whether "a FOIL request [is] required."

In this regard, by way of background, when records are available under the Freedom of Information Law, it has been held that they must be made equally available to any person, without regard to one's status or interest [see M. Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75 (1984); Burke v. Yudelson, 51 AD 2d 673 (1976)]. The Law does not generally distinguish among applicants.

In my view, however, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a public body, such as a planning board, should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

Nevertheless, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A public body 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 member acting unilaterally, without the consent or approval of a majority of the total membership of the public body, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a member by means of law or rule. In 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 a public body 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 required to seek the records in writing and assessed fees at the same rate as any member of the public.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16780

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

September 5, 2007

Ms. Diane Lauzon
[redacted]

The staff of the Committee on 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. Lauzon:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to certain requests you made to the Niagara County Legislature and District Attorney's office. In this regard, we offer the following.

First, 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, while an agency may respond to oral requests, it may require that requests be made in writing. Similarly, although an agency may respond instantly to a request, it is not required to do so. Section 89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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 however, 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 short, there may be instances in which agencies can and should in our opinion respond quickly to requests, as in the case in which it is clear that records are available by law and which they are readily retrievable. In the context of the situation that you described, it is not known whether the record could be located easily, or whether issues existed concerning rights of access. While we do not believe that agencies should unnecessarily delay disclosure, under §89(3), it is clear that an agency has up to five business days to respond to a request and that it may require that a request be made in writing.

With respect to your question regarding the agency's form, we do not believe that an agency can require that a request be made on a prescribed form. As indicated previously, §89(3) of the law, as well as the regulations promulgated by the Committee (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Neither the law nor the regulations refers to, requires or authorizes the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

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

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

As noted above, when a request is denied, it may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. Further, the regulations promulgated by the Committee state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

If a request is considered in the first instance by the appeals officer, there may be no effective appeal if the request is denied.

Again, in any instance in which records sought pursuant to the Freedom of Information Law are withheld, the applicant for the records has the right to appeal the denial in accordance with §89(4)(a). The regulations promulgated by the Committee on Open Government, which have the force and effect of law, specify that an agency must inform the applicant of the right to appeal [see 21 NYCRR §1401.7; also Barrett v. Morgenthau, 144 AD2d 1040, 74 NY2d 907 (1990)].

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-16781

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

September 5, 2007

Mr. Thomas DeVivio
03-R-2331
Sullivan Annex
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. DeVivio:

I have received your letter in which you sought guidance concerning a request for records made to the Nassau County Police Department that has not been answered.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

It is my understanding that the person designated by the County to determine appeals is the County Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16781

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

September 5, 2007

Mr. Thomas DeVivio
03-R-2331
Sullivan Annex
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. DeVivio:

I have received your letter in which you sought guidance concerning a request for records made to the Nassau County Police Department that has not been answered.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

It is my understanding that the person designated by the County to determine appeals is the County Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16732

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

September 6, 2007

Ms. Susan R. Greenberg
[redacted]

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

Dear Ms. Greenberg:

As you are aware, I have received your letter and the materials relating to it. Please accept my apologies for the delay in response.

The matter relates to your request for records of the New York State Department of Health concerning an investigation by its Office of Long Term Care of the Jewish Home of Rochester. The investigation was precipitated by your complaint involving the treatment of our mother, a resident at the facility, and it was determined that there was no evidence indicating a violation of either state or federal regulations. You specified in our conversation that you were given power of attorney by your mother and designated as her health care proxy. Nevertheless, in an initial response, you were informed that the records sought could not be disclosed, and that the only information that may be disclosed would be pursuant to "the State Operations Manual, 3308." You were also informed that you could contact the Department's records access officer, Robert LoCicero, to obtain information concerning the appeal process.

You did so, and Mr. LoCicero reiterated that the records are "not to be releasable because of privacy concerns and pursuant to POL § 87.2(a) and Department regulation 10 NYCRR 50-2.6(g)..." He also indicated that "[t]he federal records withheld were in accordance with an agreement with the Secretary of Health and Human Resources under Section 1864 of the Social Security Act." As I understand the situation and the provisions cited by Mr. LoCicero, none would justify a denial of access to the records at issue. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all records of an agency, such as the Department of Health, and §86(4) of that statute defines the term "record" expansively to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever

> including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, records in possession of or prepared for the Department constitute Department records subject to rights conferred by the Freedom of Information Law, irrespective of their origin or function.

The Department regulations to which Mr. LoCicero referred states that: "Persons requesting records in the possession of the department but which records originated in any other State or federal agency shall be referred to the originating agency when there is a question concerning confidentiality requirements." In my view, based on the language of the Freedom of Information Law and its judicial interpretation, the fact that records in possession of the Department originated in a different agency has no bearing on the Department's responsibility to honor a request for those records and determine rights of access.

I note that the Court of Appeals, the state's highest court, has construed the definition of "record" as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared, the function to which it relates, or its origin are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

In consideration of judicial precedent, when documents come into the possession of the Department, even though they may have been forwarded by another agency, I believe that they constitute "records" of the Department subject to the Freedom of Information Law.

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

"POL § 87.2(a)" is the first ground for denial and states that an agency may 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 the Department's regulations render records or portions of records deniable in a manner inconsistent with the Freedom of Information Law or some other statute, those regulations would, in my opinion, be invalid. Regulations cannot operate, in my view, in a manner that provides fewer rights of access than those granted by the Freedom of Information Law.

In addition, insofar as there may be an agreement which limits rights of access conferred by a statute, such as the Freedom of Information Law, I believe that they are void and unenforceable. 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, supra, 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).

I note, too, that §1864 of the Social Security Act, the provision cited by Mr. LoCicero, refers to the ability of a state agency to engage in an agreement with the federal government to maintain a unit for investigating complaints such as yours. However, there is nothing in its language that pertains to or requires confidentiality. That being so, I do not believe §1864 may be characterized as a statute that exempts records from disclosure.

Lastly, Mr. LoCicero referred to "privacy concerns". Although §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", that exception in my opinion would not serve as a basis for withholding records identifiable to your mother. Since you have been given power of attorney, I believe that you serve as the alter ego of your mother and, therefore, enjoy whatever rights of access she may have.

In an effort to encourage the Department to reconsider its response to your request, copies of this opinion will be forwarded to Department officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Robert LoCicero
Paul Stavis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16783

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

September 6, 2007

Mr. Marc Winkler
[redacted]

The staff of the Committee 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. Winkler:

I have received your letter and the material related to it. You have asked whether the Ontario County Attorney may require that you inspect records at the County jail.

In this regard, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate rules and regulations concerning the procedural implementation of that statute. The Committee has done so, and the regulations can be found in 21 NYCRR Part 1401. In turn, §87(1) requires that each agency adopt rules and regulations consistent with those promulgated by the Committee and the Freedom of Information Law. I have confirmed that County did so by adopting Resolution 435-1978 soon after that requirement was imposed in 1978, the year that the current version of the Freedom of Information Law became effective.

The Committee's regulations require in 21 NYCRR §1401.3 that agencies in their rules indicate the locations where records are available for inspection and copying. In compliance with that provision, the County in Paragraph 4(a) of the resolution referenced above identified the locations where County records are available for inspection and copying, and the County Sheriff's office is such a location. It is my understanding that the County jail is a component of the Sheriff's office. If that is so, based on the need to engage in "full-time surveillance during your review of the materials you have requested", it appears that the County's directive concerning your inspection of records is reasonable and consistent with law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16784

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

September 6, 2007

Mr. Harris Holmes, Jr.
07-A-3778
Five Points Correctional Facility
P.O. Box 119
Romulus, NY 14541

Dear Mr. Holmes:

I have received your letter in which you requested various records from this office. 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 maintain records generally, and we have no records falling within the scope of your request. However, I offer the following comments.

First, when records are withheld at the facility level, the denial of access may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Second, you cited the federal Freedom of Information and Privacy Acts in your request. Those acts apply only to federal agencies; the applicable statute in this instance is the New York Freedom of Information Law. I note that the federal Act includes provisions concerning the waiver of fees, but that the New York Law includes no similar provision.

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-16785

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

September 7, 2007

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 information presented in your correspondence.

Dear Mr. Neratko:

I have received your letter in which you referred to a request for records and an ensuing appeal, neither of which had been answered by the Village of Westfield.

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.

Lastly, a search for our records indicates that the Village did not send a copy of your appeal to this office as required by §89(4)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

FOIL-AO-10786

From: Freeman, Robert (DOS)
Sent: Tuesday, September 11, 2007 4:11 PM
To: [redacted]
Subject: FOIL - problem

Dear Ms. Ferguson:

I have received your letter and believe that you misunderstand the statute of limitations relating to the Freedom of Information Law. When a request is initially denied, an applicant has thirty days to appeal the denial. However, when an appeal is denied, the person denied access has four months from that final agency determination to initiate an Article 78 proceeding.

There is no judicial decision of which I am aware dealing with the situation in which an appeal is ignored and the applicant as much as a year later seeks to challenge the constructive denial of the appeal in court. As you may be aware, when an agency receives an appeal, it has ten business days to determine the appeal. If the agency fails to do so, the applicant may consider the appeal to have been denied and may initiate an Article 78 proceeding. Therefore, at the very least, he or she would have four months from the date that the appeal should have been determined to initiate such a proceeding. If, however, the facts indicate that an agency repeatedly indicated that it would respond to an appeal but failed to do so, I believe that a court would find that the applicant relied to his/her detriment on the representations of the agency and that, therefore, the statute of limitations would be extended accordingly.

I hope that I have been of assistance.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16787

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

September 11, 2007

Mr. Norman Booth
03-A-6438
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. Booth:

I have received your letter concerning a failure on the part of the Office of the Schenectady County District Attorney 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

FOIL-AO-16788

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, September 13, 2007 1:56 PM
To: Carol Thompson, The Valley News'
Subject: Freedom of Information Law

Carol:

In response to your email of 9/12, please note that Mr. Freeman is out of the office until Thursday, 9/20.

In the meantime, perhaps I can help you. I share your opinion that HIPAA would not protect a list of the names of county legislators who receive health insurance, or those who receive the $1,000 annual benefit. Below are links to two advisory opinions that are related to your question, that I believe you will find helpful. Although we have not issued a written opinion to date, concerning application of HIPAA, again, based on my understanding of the law, HIPAA is designed to protect individually identifiable health information, not whether a benefit is conferred upon an elected official. It has long been our opinion that compensation paid to or benefits bestowed upon a public employee are matter of public record.

http://www.dos.state.ny.us/coog/ftext/13653.htm

http://www.dos.state.ny.us/coog/ftext/f9390.htm

If you have further questions, please call me today or tomorrow. I will be out of the office all of next week. Thank you.

Camille

Camille S. Jobin-Davis, Esq.

Assistant Director

NYS Committee on Open Government

Department of State

41 State Street

Albany NY 12231

(518) 474-2518

(518) 474-1927 fax

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16789

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

September 20, 2007

Mr. R.A. Castrechino
03-B-0546
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

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

Dear Mr. Castrechino:

I have received your letter in which you asked that the Monroe County Sheriff's office and the Town of Greece Justice Court "answer your F.O.I.L Request."

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions relating to the Freedom of Information Law. The Committee is not empowered to direct an agency to grant or deny access to records.

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

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

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

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

Based on the foregoing, although a sheriff's office is an "agency" required to comply with the Freedom of Information Law, courts are not subject to that law. This is not intended to suggest that courts need not disclose records, for there are other statutes that generally require that courts disclose

their records. Since one of your requests involves a justice court, it is suggested that you resubmit your request, citing §2019-a of the Uniform Justice Court Act as the basis for the request.

With respect to the request to the Sheriff's office, the the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Lastly, I point out that the Freedom of Information Law pertains to existing records. Since the records to which you referred would relate to an event that occurred in 1970, it is possible that they no longer exist.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Greece Town Court
Records Access Officer, Office of Monroe County Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16790

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

September 20, 2007

Mr. Verl J. Hite
Raptor International
1921 Corporate Center Circle
Longmont, CO 80501

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

Dear Mr. Hite:

I have received your letter concerning a request made under the Freedom of Information Law to the New York City Police Department in which you asked that the Committee on Open Government "overturn [your] denied appeal and make the requested information available to [you]."

The request encompassed "incident reports of all bank, thrift, and credit union robberies that have occurred in (NYC) between the period January1, 2006 and May 15, 2007." You specified that the information sought concerning each incident should contain the name of the bank, the address "latitude longitude, X/Y coordinates", the dates and times of incidents, "modus operandi (note passed, armed, takeover)" etc., and the "age and gender of the offender." In response to the request, you were informed that it "did not sufficiently describe records in a manner that can lead to their retrieval" and "failed to reasonably describe a record, as required by Public Officers Law §89(3)."

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 compel an agency to grant or deny access to records.

Second, as suggested in the response to your request, the primary issue involves whether the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals, 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 Department, to extent that the information 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 items of information requested are not maintained in a manner that permits their retrieval with reasonable effort, I do not believe that the request would have reasonably described the records as required by §89(3).

Lastly, I note that the Freedom of Information Law pertains to existing records and that §89(3) also states in part that an agency need not create a record in response to a request. If the Department does not maintain records containing the items of information that you requested, it would not be required to prepare a new record to satisfy your 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:tt

cc: Jonathan David
Sgt. James Russo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16791

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 20, 2007

Mr. Brendan J. Lyons
Senior Writer
Times Union
News Plaza
Box 15000
Albany, NY 12212

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Lyons:

I have received your letter and the materials relating to it. You have sought an advisory opinion concerning a "blanket denial" of a request for records of the City of Albany relating to an accident leading to the death of a former City police officer, Kenneth Wilcox.

The records sought include:

> "• Public Safety Officers' Death Form completed by the head of APD and or their designee.
>
> • Detailed statement of circumstances from the initiation of the incident to the pronouncement of the officers' death.
>
> • Investigation, incident and accident reports.
>
> • Death certificate.
>
> • Autopsy report or a statement from the head of the APD or his designee explaining that no autopsy was performed.
>
> • Toxicology report or a statement from the head of APD or the medical examiner explaining that no analysis was completed."

It is noted that, "in order to avoid unnecessary delay and litigation", you suggested in your request that there would be no objection to the redaction of personal information pertaining to witnesses or others, such as social security numbers, residence addresses or dates of birth.

The City denied the request in its entirety based on "Civil Rights Law §50-a, Public Officers Law §87(2)(b), (2)(e)(iv), and (2)(g), Public Health Law §4173 and §4174, and County Law §677..." Following the receipt of your letter, a determination of your appeal was sent to this office, and the appeals officer, with no additional detail, sustained the initial denial for the same reasons as those specified by the records access officer.

Based on the language of the Freedom of Information Law and judicial precedent, I believe that the City's response to your request is inconsistent with law. In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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, 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 certain reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from that referenced in response to your requests. 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 requests, the State Police have 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 State Police for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In sum, I believe that the blanket denials of your requests indicate a failure to comply with law. I note that New York City Department of Investigation was criticized in Lewis v. Giuliani (Supreme Court, New York County, NYLJ, May 1, 1997) for a denial of access based merely on a reiteration of the statutory language of an exception, stating that "DOI may not engage in mantra-like invocation of the personal privacy exemption in an effort to 'have carte blanche to withhold any information it pleases'".

In a related vein, §89(4)(a) of the Freedom of Information Law concerning appeals requires that a determination to uphold a denial of access must "*fully explain* in writing to the person requesting the record the reasons for further denial..." The determination prepared by the appeals officer merely reiterates the reasons for denial offered by the records access officer; it clearly did not "fully explain" the reasons for further denial.

Second, I do not believe that §50-a of the Civil Rights Law could properly have been asserted as a basis for a denial of access. That statute provides, in brief, that personnel records pertaining to police officers that "are used to evaluate performance toward continued employment or promotion" are confidential and cannot be disclosed absent consent by the police officer who is subject of the

records or pursuant to court order. Because the officer involved died as a result of the accident, the records that you requested would not be used to evaluate continued employment or promotion. That being so, §50-a of the Civil Rights Law is, in my view, irrelevant and cannot serve as a means of denying access [see Village of Brockport v. Calandra, 745 NYS2d 662, 191 Misc.2d 718 (2002; aff'd 758 NYS2d 877, 305 AD2d 973 (1988)].

I note, too, that except in unusual circumstances, motor vehicle accident reports prepared by police agencies are in my 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 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." Further, 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 2d294, 491 NYS2d 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.

There is no indication that any crime was committed in relation to the accident that resulted in the officer's death. That being so, I believe that the accident report in this instance must be disclosed in its entirety to comply with §66-a of the Public Officers Law.

The denials by the City also cited §87(2)(b) concerning the ability to withhold records or portions of records the disclosure of which would constitute "an unwarranted invasion of personal privacy." A great deal of information concerning the deceased officer's life and death has been disclosed and widely publicized in relation to the accident as well as other of his activities. The more that information is disclosed to the public, less is the ability of the City to withhold records pertaining to him. While some details relating to the officer might properly be withheld, it has been

held in a variety of circumstances that public employees enjoy less protection of privacy than others, and that items relating to the performance of their duties would, if disclosed, result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD2d 309 (1977), aff'd 45 NY2d 954 (1978); Sinicropi v. County of Nassau, 76 AD2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS2d 309, 138 AD2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY2d 562 (1986)]. Therefore, again, a blanket denial of access to personally identifiable information is in my opinion unjustifiable.

Also cited is §87(2)(e)(iv), which authorizes an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would...reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In the leading decision involving that exception, it has been held that the purpose is to prevent violators of the law from being apprised of nonroutine procedures by which law enforcement officials gather information, specifying that:

> "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***" [Fink v. Lefkowitz, 47 NY2d 567, 572 (1979)].

Under the circumstances, it seems unlikely that the disclosure of scientific or laboratory test results or the investigative techniques or procedures employed in relation to the accident would enable potential lawbreakers to evade detection or encourage criminal activity. If that is so, §87(2)(e)(iv) would not serve as a basis for denying access.

The City also referred to §87(2)(g) in its denial. That provision pertains to communications between or among officers and employees of state and local agencies. Specifically, it permits an agency to 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.

One of the contentions offered by the New York City Police Department in Gould v. New York City Police Department was that certain reports could be withheld because they were not final. 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)..." [99 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) id., 276-277).]

In addition, in a situation in which opinions and factual materials were "intertwined" within intra-agency materials, Ingram v. Axelrod, a decision cited by the Court in Gould rendered by the Appellate Division, Third Department, indicated that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD2d 568, 569 (1982)]; see also Miracle Mile Associates v. Yudelson, 68 AD2d 176, 48 NY 2d 706, motion of leave to appeal denied (1979); Xerox Corporation v. Town of Webster, 65 NY2d 131, 490 NYS2d 488 (1985)].

Based on the direction provided by the courts, even though statistical or factual information contained within a record may be "intertwined" with opinions, the statistical or factual portions would in any opinion be available under §87(2)(g)(i).

The court in Gould also referred to portions of records reflective of opinions of witnesses and others and found that they could not be withheld under §87(2)(g), because that provision pertains to an "internal government exchange" between or among state and local government officers or employees, as opposed to opinions offered by persons not employed by government (id., 277).

Because federal government offices are not "agencies" falling within the definition of the term "agency" in §86(3) of the Freedom of Information Law, communications between the City and federal offices would not in my opinion fall within §87(2)(g).

Lastly, with respect to access to an autopsy report or death record, those records appear to be exempted from disclosure pursuant, respectively, to §677(3)(b) of the County Law and §4174 of the Public Health Law.

In sum, it is my opinion that many of the records sought must be disclosed in part and in some instances in their entirety to comply with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Harold Greenstein
John C. Marsolais

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 20, 2007

Mr. James W. Kametler
[redacted]

The staff of the Committee 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. Kametler:

I have received your letter in which you requested an advisory opinion concerning the disclosure of a police officer's personnel records, those pertaining to you, in 2004 by the Westhampton Beach Village Clerk without having received either a court order or your consent. You have contended that disclosure of the records constituted a violation of the Civil Rights Law, §50-a.

Having contacted the Village to obtain additional information, I was informed that you retired from your position as a police officer in 2003. That being so, I do not believe that §50-a would have applied or, therefore, that it would have served as a bar to disclosure.

In this regard, §50-a of the Civil Rights Law 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 was inapplicable in the situation to which you referred.

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: Kathleen McGinnis, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 20, 2007

Ms. Karen Martin
[redacted]

The staff of the Committee on 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. Martin:

As you are aware, I have received your letter concerning your ability to obtain records from the Town of Almond Assessor. Please accept my apologies for the delay in response.

By way of background, you purchased a home in the Town in 2000, but your property "has been selectively assessed every other year", even though no improvements to the property have been made. You have filed grievances and prevailed in court "all three times." As the matter pertains to the Freedom of Information Law, you wrote that you have twice requested the Assessor's 2007 annual report of the final assessment roll and the statement changes determined by the Board of Assessment Review. According to your letter, the Assessor has neither responded in a timely manner nor disclosed the records. She also contends that you must "go to Allegany County (25 miles away) to obtain this information."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all records of an agency, such as a town, for §86(4) of that statute defines the term "agency" expansively 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, insofar as the Assessor maintains the records of your interest, I believe that they constitute Town records subject to rights of access and that the Town must deal with your request appropriately.

Second, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., a town board, to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access 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.

In the great majority of towns, the town clerk is the records access officer. By statute, the clerk is the legal custodian of all town records [see Town Law, §30(1)] and the records management officer (see Arts and Cultural Affairs Law, §57.19). If the clerk is the records access officer, it is his/her responsibility to coordinate the Town's response to requests. Further, if the Assessor has not been designated as the records access officer by the Town Board, I do not believe that she has the authority to deny your request.

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, 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 response will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk
Martha A. Thompson, Assessor

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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September 20, 2007

Mr. Anthony M. Mignone
[redacted]

The staff of the Committee 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. Mignone:

I have received your letter, as well as a variety of correspondence attached to it. The materials relate to requests for records pertaining to a particular location made under the Freedom of Information Law to the Town of Babylon, and you have sought guidance "to assure the Town is complying with the law."

As I understand the matter, you submitted "26 individual requests" to the Town, and you were informed with respect to 25 of the requests that the records were being reviewed and would be made available by a specific date. You appealed with regard to the remaining request on the ground that it was constructively denied. However, you were informed that the constructive denial of the request was inadvertent, and the Town Attorney added that:

> "In view of the literal reams of documentation requiring significant review and the resulting voluminous compilation required in order to respond to your 26 requests, we have committed to accommodating you, not only within a reasonable timeframe, but an extraordinarily brief one.
>
> "Understand that despite your current large number of requests, as well as the significant number of requests you have made previously and the ensuing substantial administrative burden on my staff, my office is not denying your request based on its voluminous nature nor are we requesting a good faith deposit for copying fees, both of which are actions supported by advisory opinions of the Committee on Open Government."

Following the receipt of the response by the Town Attorney, you expressed dissatisfaction and expressed the belief that the Town failed to locate records falling within the scope of your request.

In this regard, first, from my perspective, it appears that the Town strenuously attempted to respond properly to your request. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Second, if my recollection is accurate, it was advised by phone that when a 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 appears that you asked that the Town certify that certain records you believe to be maintained could not be located, for correspondence

received by this office indicating that "a diligent search" for certain records was made, but that no documentation was found.

In short, based on the Town's responses, it appears that substantial efforts were made to comply with the Freedom of Information Law and that, in general, the Town complied with law.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mr. Dennis Cohen
Ms. Chelley Gordon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16795

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 20, 2007

Ms. Cassie B. Artale
Library Development Specialist
New York State Library
Division of Library Development
Cultural Education Center
Albany, NY 12230

The staff of the Committee on 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. Artale:

I have received your correspondence concerning "whether documents prepared by an association library specifically for a request for library registration by NYS are public documents." You indicated that, during our discussion of the matter, it was advised that "such documents become public when they are submitted by the library board to any public entity but that, with the exception of an annual report to the community (CR 90.2) they are not public documents if they have not been submitted to any public entity."

The issue, in my view, involves the scope of the Freedom of Information Law, and 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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests

> belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division in French v. Board of Education, in which the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

I recognize that the decision and associated opinions cited above were rendered some time ago. However, in view of the court's unequivocal language, absent a new decision specifying that association or free association libraries are indeed "agencies", it cannot be advised that those entities are "agencies" required to comply with the Freedom of Information Law.

Lastly, when records come into the possession of an agency, the agency in my view is required to disclose those records in accordance with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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September 20, 2007

E-Mail

TO: Mr. Gary L. Rhodes

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. Rhodes:

I have received your letter in which you wrote as follows:

> "would a disc of pictures of the pages of old town records, minute books of the first years of town board meetings, be copyrighten [sic]? Can this disc be given to a library so that it can be transcribed so that people can read it and have access to it."

I know of no judicial decision that focuses on the relationship between the Freedom of Information Law and the Copyright Act in this kind of situation or any similar series of facts. An attempt will be made, however, to respond to your questions, and I offer the following comments.

First, a disc in my opinion clearly falls within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, since a disc stores information and is maintained by the Town, I believe that it would constitute a Town record subject to rights conferred by the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. In consideration of the age and nature of the records, none of the exceptions to rights of access could, in my view, be asserted to deny access.

Third, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY2d 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.

The contents of the disc, like all other records maintained by or for the Town, are subject to rights of access, and the fee for copies is restricted by §87(1)(b)(iii) of the Freedom of Information Law to twenty-five cents per photocopy up to nine by fourteen inches, or, in the case of records that cannot be photocopied, such as computer tapes or disks, the actual cost of reproduction. I note, too, that the Court of Appeals, the state's highest court, determined years ago that "Meeting the public's legitimate right of access to information...is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" and that access cannot be conferred "on a cost-accounting basis" [Doolan v. BOCES, 48 NY2d 341, 347 (1979)].

While I am not an expert with respect to the Copyright Act (17 U.S.C §101 *et seq.*), it is important in my opinion to consider the history and intent of copyright protection. The basis of copyright is Article I, §8 of the United States Constitution, which indicates the framers' intent: "To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In construing the 'copyright clause', the United States Supreme Court has stated that its purpose is as follows: 'The

economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'' [Mazer v. Stein, 347 U.S. 201, 219 (1954)].

The only decision of which I am aware concerning the relationship between the Freedom of Information Law and a claim of copyright protection by an agency involved tax maps prepared by Suffolk County that were used by a private company in its commercial products [County of Suffolk v. First American Real Estate Solutions, U.S. Court of Appeals, 2nd Circuit, 261 F.3rd 179 (2001)]. The court in that case reviewed the elements necessary to claim copyright protection and found that:

> "To allege a claim of copyright infringement, Suffolk County must claim that substantial similarity exists between the defendant's work and the protectible elements of its work. To be 'protectible', these elements must be original. *See Feist Publ'ns v. Rural Tel. Serv., Co.,* 499 U.S. 340, 345-49 (1991) (holding that a compilation of facts does not qualify for copyright protection unless it possesses sufficient originality, that is, 'it possesses at least some minimal degree of creativity')..."

If indeed the disc contains "old town records", such as minutes of meetings, and there is no originality or creativity on the part of the Town, it does not appear that the content of the disc would be subject to copyright protection. Moreover, even if a work does qualify for protection under the Copyright Act, according to the decision cited above, the "protectible elements" of the work must be used by another person in a manner involving "substantial similarity" that would infringe upon the copyright.

In sum, I believe that the disc and its contents constitute "records" that fall within the scope of the Freedom of Information Law. Further, it does not appear that the contents would qualify for protection under the Copyright Act.

Lastly, in my opinion, the town would have the authority to duplicate the content of the disc and donate it to a library. Further, for reasons indicated above, I believe that any person could request and would have the right to obtain a copy of the disc pursuant to the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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September 20, 2007

Mr. Daniel L. Hoffman
City Attorney
City of Ithaca
108 East Green Street
Ithaca, NY 14850-5690

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hoffman:

I have received your letter and hope that you will accept my apologies for the delay in response. You have sought an advisory opinion concerning the policy of the City of Ithaca concerning the assessment of fees in relation to requests for records of the City's Police Department.

According to your letter, the *Ithaca Journal* "filed 22 separate FOIL requests" for "multiple types of...reports generated" during a certain period, and that each request requires the review of the content of the records to determine which portions require or permit redaction. Following redactions made by hand, copies are made. You added that the Department's forms "are not deliberately set up such that redactable information appears on the same page as non-redactable information,...nor would it be practical to do so."

In response to a series of requests for records, many of which involved redactions, "[o]f their 198 pages of records...requested", the *Journal* reporter "said he wanted copies of only 63 pages (and would only pay for those pages)." Although the City acceded to that request, you "subsequently issued a notice to the Journal that in the future [the City] would provide copies (of redacted records) only if the entire set (of requested records) were paid for."

In this regard, I offer the following comments.

First, pursuant to §87(2) in conjunction with §87(1)(b)(iii) of the Freedom of Information Law concerning fees for copies, when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the records at no charge. That being so, if among requested records, certain of them are accessible in their entirety, I do not believe that the City may assess a fee when the request is to inspect the records.

As you pointed out, however, there are many instances in which portions of records may properly be redacted in accordance with the exceptions to rights of access delineated in §87(2). In those situations, it has been advised by this office and held judicially that the applicant does not have the right to inspect the records (see VanNess v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999). Rather, in order to obtain the accessible information contained within records that have undergone redaction, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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September 20, 2007

Hon. Kathy Cairo-Davis
Town of Marbletown
3775 Main Street, Route 209
Stone Ridge, NY 12484

The staff of the Committee on 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. Cairo-Davis:

I have received your correspondence in which you asked that a draft "FOIL policy for Town Hall staff" be reviewed. Please accept my apologies for the delay in response. Based on a review of the proposal, I offer the following comments.

First, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute and the Committee has done so (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., a town board, to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Section 1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public form continuing from doing so."

As such, the Town Board 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 provisions quoted above, the records access officer must "coordinate" an agency's response to requests. In most towns, the town clerk is designated as records access officer. If you have been designated by the Town Board as records access officer, as part of your duty to coordinate response to requests, I believe that other Town officials and employees are required to cooperate with you in an effort to enable you to carry out your official duties.

Second, it is unclear whether the draft policy is intended to serve as the Town's rules of procedure with which the public must comply, or whether it is intended solely for internal use by staff. In either case, I believe that various aspects of the proposal are inconsistent with the Freedom of Information Law and the Committee's regulations. It is suggested that the Town Board refer to model regulations prepared by the Committee as a method of ensuring compliance. Although the model is available on our website, it is suggested that the following inconsistencies or recommendations might serve to encourage the board to focus on the areas of possible reconsideration.

Section 1 requires all requests be made in writing and "must be reasonably specific." While §89(3) of the Freedom of Information Law permits an agency, such as a town, to require that requests be made in writing, flexibility often better serves the public and eases the burden on Town officers and employees. For instance, if minutes of recent Town Board meetings are sought, because those records are clearly public and readily retrievable, there may be no need to require a written request. Similarly, residents often seek records relating to there assessments, and those records also are often routinely and informally made available by an assessor or clerk. Again, written requests may be unnecessary.

It is also noted that §89(3) requires that an applicant must "reasonably describe" those records sought. Therefore, when agency staff has the ability to locate and identify requested records with reasonable effort, irrespective of the volume of the records, the request would be consistent with law.

Section 1 also states that requests made to persons other than the Clerk or the Supervisor "will not be accepted." In short, the Law refers to requests made to an agency, and I believe that the public may request records from any Town officer or employee. If the recipient of the request is not authorized or unable to respond directly, the request should be forwarded to the records access officer.

That provision also refers to records that may not be available. Because the Freedom of Information itself lists grounds for withholding records [see FOIL, §87(2)\, it is suggested that reference be deleted. I note, too that there is no exception in the law concerning "draft working documents"; the contents of those records determine the extent to which they may be withheld [see §87(2)(g).

Section 8 requires that the Town Clerk furnish copies of records to the Supervisor before disclosing them. If the Town Board designates you as a records access officer, there appears to be no reason for imposing this requirement.

Lastly, there is no reference to the right to appeal a denial of access to records. A provision of that nature must be included in the Town's rules of procedure.

Again, it is strongly recommended that consideration be given to review of the Committee's model regulations.

I hope that the foregoing will be useful and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO-4489
FOIL-AO-16799

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September 20, 2007

E-MAIL

TO: Peter Meyer

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Meyer:

I have received your letter and hope that you will accept my apologies for the delay in response.

You wrote that you were recently elected to serve on the Board of Education of the Hudson City School District and that, in that capacity, you received a memorandum stating in part that:

> "Board members are reminded that information acquired in the course of an executive session, or in their Board packet, may neither be disclosed nor used to further a member's personal interest, pursuant to S805-a(1)(b) of the General Municipal Law, and Board Policy except as may be required pursuant to a lawfully served subpoena or court order to testify regarding the subject matter at issue."

You have questioned the propriety of the statement.

From my perspective, the portion of the statement pertaining to disclosure of the "Board packet" is clearly inconsistent with law. Further, while my opinion may differ from that of others, the portion of the statement concerning disclosure after an executive session is, as you suggested, "a bit broad", and in my view, overbroad. In this regard, I offer the following comments.

It is emphasized that in most instances, even when records *may* be withheld under the Freedom of Information Law or when a public body, such as a board of education, *may* conduct an executive session, there is no obligation to do so. 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 disclose records or 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 a ruling by the Commissioner of Education indicates that members of a board of education who breach confidentiality of an executive session may be removed from office. 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).

In my experience, there are often records or portions of records in a "board packet" that are accessible to the public. For instance, although portions of a memorandum from a superintendent to a board consisting of advice, opinion or recommendations may be withheld pursuant to §87(2)(g) of the Freedom of Information Law, that same provision specifies that other portions of the same record consisting of statistical or factual information must be disclosed (see subparagraph (i)]. Other records in a board packet may be accessible to the public in their entirety. In short, the content of the statement that you quoted is in my opinion, inconsistent with law.

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. Further, assuming the validity of the preceding analysis, I believe that the statement to which you referred is overbroad.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

FOIL-AO - 16800

From: Jobin-Davis, Camille (DOS)
Sent: Monday, September 24, 2007 4:40 PM
To: Cathi Williams, Village of Canastota
Subject: RE: Prevailing Wage Data

Cathi, thank you for giving me the opportunity to clarify my opinion.

To the extent that the document indicates the identity of the contractor, it would be public. To the extent that the document indicates only the hours worked and wages paid, but does not identify either the employee by name or address, I believe it would also be public. If there are a relatively large number of employees so that their identities would not be apparent from the information in the record, or if the record does not indicate employee names and/or addresses, then there would be no unwarranted invasion of personal privacy.

It appears I answered your question in haste, and should have considered that the employees' identifying information was not part of the record. Please accept my apology.

Feel free to call or write back if you have further questions. I hope this reaches you in time!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
41 State Street
Albany NY 12231
(518) 474-2518
(518) 474-1927 fax
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-1680

From: Freeman, Robert (DOS)
Sent: Tuesday, September 25, 2007 8:23 AM
To: Alan Isselhard
Subject: RE: FOIL

If the individual in question has possession of records that he received or prepared in his capacity as a town board member, first, a request should be made to the records access officer. In most towns, the records access officer is the town clerk, and that person has the duty of coordinating the town's response to requests. Second, in any instance in which a request is denied, either in writing or by means of a failure to respond, the person seeking the record has the right to appeal. In the case of a town, the appeal may be made to the town board, the governing body, or to a person designated by the town board. The clerk should be able to inform you of the person or body that determines appeals.

I hope that this will be of assistance to you.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16802

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 25, 2007

Mr. Kevin Williams
04-R-4135
Mohawk Correctional Facility
P.O. Box 8451
Rome, NY 13442-8451

Dear Mr. Williams:

I have received your letter in which you appealed a denial of access to records by the inmate records coordinator at your 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 otherwise compel an agency to grant or deny access to records.

The provision concerning the right to appeal, §89(4)(a), states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

As indicated at the bottom of the response to your request, an appeal in this instance may be made to the Office of Counsel at the Department of Correctional Services.

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-16803

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 25, 2007

Mr. Ubaldo Romero
02-A-1716
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. Romero:

I have received your letter in which you sought an opinion concerning whether an indigent defendant may obtain records pursuant to the Freedom of Information Law without paying the fee envisioned by that statute.

In this regard, the Freedom of Information Law does not distinguish among those who seek records, and it has been held that an agency may charge its established fee, even though the person seeking the records is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that the foregoing enhances your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16804

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 25, 2007

Mr. Craig. S. Rose
00031585
P.O. Box 10
Valhalla, NY 10595

Dear Mr. Rose:

I have received your letter concerning a failure to respond to a request made pursuant to the Freedom of Information Law. The correspondence attached to your letter indicates that the request was made to Aramark Vending.

In this regard, please be advised that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law is applicable to records maintained by entities of state and local government. It is not applicable to private companies, such as Aramark Vending.

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-16805

From: Freeman, Robert (DOS)
Sent: Wednesday, September 26, 2007 10:37 AM
To: Susan Cockburn, Supervisor, Town of Montgomery
Subject: RE: I'm baaacckk.
Attachments: f12910.wpd

Hi Susan - -

I'm glad to learn that things are generally going smoothly. As for me, although there are too few hours in the day, I feel as you do.

With respect to your question, there is nothing in the Freedom of Information Law or any statute of which I am aware that deals specifically with the obligation of a member of a town board to seek records by submitting a request citing FOIL. That being so, it has been suggested that when a request is reasonable and made in the performance of a board member's duties, there should be no need or requirement to file a FOIL request. As Supervisor, you have specific statutory duties, and in my view, when you seek records in that capacity, you are not requesting them as a member of the public pursuant to FOIL, but rather as a government officer in the performance of your official duties, and there should be no barrier to disclosure. I note that situations have arisen in which board members, acting without the approval or direction of the boards they serve, have requested large volumes of records or records that are not ordinarily accessible to the public. In those cases, absent a rule or policy to the contrary, I believe that the board member has the same rights, no more or less, than the public generally and that he/she may be required to request the records pursuant to the FOIL.

I hope that this will be helpful, and attached is an opinion that deals with the issue more expansively.

By the way, I'll be speaking before the Orange County Planning Federation on Monday evening, October 1, at the BOCES in Goshen and hope to see you there!

All the best.
Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16806

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 26, 2007

Mr. Braulio Pallet
06-A-4595
Wyoming Correctional Facility
P.O. Box 501, Dunbar Road
Attica, NY 14011-0501

Dear Mr. Pallet:

I have received your letter in which you appealed a denial of access to certain records by the Bronx County Supreme Court.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee is not empowered to determine appeals. The provision concerning the right to appeal an agency's denial of a request, §89(4)(a), states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Second and more importantly, the Freedom of Information Law excludes the courts from its coverage. That statute applies to agencies, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts are not subject to the Freedom of Information Law.

I note that court records are often accessible under different provisions of law (see e.g., Judiciary Law, §255), and it is suggested that court records be requested by citing an applicable statute as the basis for the request.

I hope that the preceding remarks serve 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-16807

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

September 26, 2007

Mr. Anthony Daniels
04-A-5920
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-0010

Dear Mr. Daniels:

I have received your letter in which you requested records from this office relating to the Ten Commandments, the Bill of Rights and other similar historical documents.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee does not maintain custody or control of records generally, and we do not possess records falling within the scope of your request.

For future reference, requests for records should be made to the "records access officer" at the agency or agencies that would likely maintain the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

In consideration of the nature of your request, it is suggested that you confer with your facility librarian.

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-16808

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 26, 2007

Ms. Jennifer Hughes
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts described in correspondence sent to this office.

Dear Ms. Hughes:

This office has received a copy of the denial of your appeal by the New York State Police. Specifically, you requested records relating to "any New York State Police responses (Livingston Troop K) - In reference to Prilipper Rd. Addresses: '50' - 120 & 160. (Bucci/Quackenbush - Bower & Majercsik) pertaining to *all* road & animal Incidents and calls from 2000 - present." In this regard, we offer the following comments.

With respect to the substance of the request, we 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, at least in part. 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 we are aware that directly refers to or mentions police blotters or "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 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 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 (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 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 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 requested 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 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).

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 our 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, we 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 a particular address at a certain time, without more, would, in our 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 New York State Police.

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: William J. Callahan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16809 PPPL-AO-339

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 28, 2007

Ms. Carol Thompson
The Valley News
67 South Second Street
Fulton, NY 13069

Dear Ms. Thompson:

I have received a copy of your letter addressed to Richard Mitchell of the Oswego County Legislature in which you appealed a denial of access to records, citing the Personal Privacy Protection Law as the basis for the appeal.

In this regard, the Personal Privacy Protection Law pertains only to state agencies. For purposes of that statute, §92(1) defines the term "agency" to mean:

> "...any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Based on the foregoing, the Personal Privacy Protection Law specifically excludes units of local government from its coverage.

Nevertheless, the Freedom of Information Law pertains to all units of state and local government, including counties [see definition of "agency" for purposes of that law, §86(3)]. 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.

From my perspective, insofar as records contain the information of your interest, "the names of legislators who are receiving taxpayer-funded health insurance benefits", none of the grounds for denial of access could justifiably be asserted. Attached is a copy of an advisory opinion previously rendered that deals with the issue in detail.

I hope that the preceding serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Mitchell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16810

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 28, 2007

Mr. Michael McCarthy
98-B-1992
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. McCarthy:

I have received your letter in which you referred to a request and an appeal that had not been answered by employees of the Department of Correctional 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-16081

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 28, 2007

Mr. Omar Ocasio
94-A-6267
Clinton Correctional Facility
P.O. Box 2000
Dannemora, NY 12929

Dear Mr. Ocasio:

I have received your letter which you describe as an appeal. Although I do not fully understand your remarks, I offer the following comments.

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.

Second, it appears that an appeal was made to the Department of Correctional Services. In such a case, if an appeal is denied either in writing or by means of a failure to respond within the statutory time, 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.

Third, although the federal Freedom of Information Act, which applies only to federal agencies, includes provisions concerning the waiver of fees, the New York Freedom of Information Law contains no similar provision. Further, it has been held that an agency may charge its established fee for copies of records, even when an applicant is 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1681?

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 28, 2007

Mr. Anthony Lewis
00-B-0639
Livingston Correctional Facility
Box 1991
Sonyea, NY 14556

Dear Mr. Lewis:

I have received your letter and would like to clarify the role of the this office. In short, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to compel an agency to grant or deny access to records or otherwise comply with law.

If an agency has denied access to records following both a request and an appeal, either in writing or by means of a failure to respond within the statutory time, 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 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-16813

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 1, 2007

Mr. Karim Abdullah
Stenger & Finnerty
70 Niagara Street, 3rd Floor
Buffalo, NY 14202-3407

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in correspondence received by this office, unless otherwise indicated.

Dear Mr. Abdullah:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Erie County Medical Center Corporation (ECMCC), copies of correspondence between your firm and ECMCC, and correspondence from Mr. Anthony Colucci with additional attachments, submitted subsequent to your request, which we have briefly discussed. In an effort to be clear and comprehensive, we address each of the allegations raised in conjunction with related issues, below, describing opposing perspectives when appropriate.

As you know, 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 this opinion is educational and persuasive, and that it serves to resolve problems and promote understanding of and compliance with the law. We appreciate your attention to these matters, and offer the following in an effort to continue toward resolution of these matters in an amicable manner.

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.

Based on our review of the correspondence between you and ECMCC, it is our impression that on those occasions that ECMCC failed to acknowledge receipt of requests within the statutory five business day period, together you resolved these issues in a mutually satisfactory manner. Our calculations also indicate that ECMCC never failed to respond to an appeal within the requisite ten business days. (A list of correspondence in our possession, by date, is enclosed.)

While the nature of the records requested, and the volume of documents identified and produced in response to the requests you made, relates to the length of time an agency takes to respond to a request, it is our opinion that documents provided to you may not have been provided within reasonable time frames. Specifically, we note the extraordinary amount of time required to respond to your September 22, 2006 request for copies of requests made pursuant to the Freedom of Information Law and responses thereto. While we appreciate ECMCC's concerns with attorney-

client privileged notes on the requested materials and application of the Health Insurance Portability and Accountability Act, it is our understanding that the bulk of these materials were initially provided to ECMCC pursuant to its Freedom of Information Law requests, and forwarded from ECMCC to you on disk, therefore making it a relatively easy task to locate and transmit note-free copies. In our opinion, it is unlikely that materials produced to ECMCC would disclose information protected by state or federal law. It is also our understanding that upon disclosure to you, ECMCC did not make any redactions of the requested records. If this is correct, we find the months of delay unreasonable, and an inappropriate basis upon which to further delay responses to subsequent requests.

ECMCC's explanation that there was confusion over which requests were to be filled first, and that this confusion mandated further delay, in our opinion, should have no bearing on the time required to respond to the requests in full.

Turning now to substantive issues of access to particular records, for clarity sake, we set forth your requests followed by a brief summary of the responses, and our opinion, below.

October 6, 2006 Request No. 13:

> "13. For the period of September 1, 2001 through the present, all studies and/or analyses performed by or on behalf of Erie County Medical Center concerning Erie County Medical Center employee and/or staff salaries and benefits, including but not limited to those comparing the salaries and benefits of Erie County Medical Center employees and/or staff to the general labor market."

ECMCC denied access to such records based on Public Authorities Law (PAL) §3628(12)(a) and Public Officers Law (POL)§87(2)(d) on the grounds that the requested information constitutes protected trade secrets, as defined in applicable law.

On appeal, ECMCC contended that as a public authority competing in the private sector, it has greater vulnerability than a typical government agency, and therefore, was granted certain statutory protections that would also protect study and analyses of employee salaries and benefits, as follows:

> "For purposes of applying section eighty-seven of the public officers law to the corporation, the term "trade secrets" shall include marketing strategy or strategic marketing plans, analyses, evaluations, and pricing strategies or pricing commitments of the corporation relating to business development, including strategic alliances and contracts for managed care and other network arrangements, capitation contracts, and other similar arrangements relating to business development which, if disclosed, would be likely to injure the competitive position of the corporation" [Public Authorities Law §3628(12)(a)].

ECMCC further intimated that the underlying data regarding employee salaries would be protected, as disclosure would effectively subvert the purpose of the exemption, based on the court's decision in Nalo v. Sullivan, 125 AD2d 311, 509 NYS2d 53 (2nd Dept 1986).

First, as you know, 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 (j) of the law.

Second, pertinent to an analysis is §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. 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.

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. In this instance, in our opinion, any opinions and recommendations made in the studies would not be required to be released, regardless of application of Public Authorities Law §3628(12)(a).

Because disclosure of the factual information contained in the reports, ECMCC alleges, would be equally as damaging, we now turn to another provision of the Freedom of Information Law, that requires disclosure of salary information regarding public employees.

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... "

Pertinent to the matter is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in our view be maintained and made available upon request. Similarly, if that information is included in the reports or studies at issue here, in our opinion, it would be required to be released.

We turn now to ECMCC's position that PAL§3628(12)(a) expands the application of POL §87(2)(d), commonly referred to as the "trade secret" exception, and that based on this provision, salary information is not required to be released . Section 87(2)(d) allows an agency to deny access to records that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;"

As set forth previously, Public Authorities Law §3628(12)(a) permits the agency to deny access to marketing strategy or plans, pricing strategies or commitments relating to business development, and other arrangements relating to business development, including strategic alliances and contracts for managed care. Nothing about this language leads us to believe that the legislature

intended to include salary information within the definition of "trade secrets". This provision, in our opinion, does not extend to payroll information and sufficiently explicit to override the explicit provision contained in POL §87(3)(b), requiring disclosure of salary information. In short, we believe that the Legislature intended that the salaries of all public employees must be disclosed.

The Nalo case, on which ECMCC relies in further support of its decision to deny access to the requested records, involves a request by an inmate for copies of records maintained by the Department of Correctional Services pertaining to himself. Specifically, the inmate requested copies of records indicating that as a member of organized crime he was an escape risk. The court upheld the Department's decision to deny access to the records on two grounds, one, that the records were inter or intra agency records and exempt from disclosure under §87(2)(g), and two, that disclosure could endanger the life or safety of certain individuals. The court ruled that it is not necessary for an agency to describe the contents of the records to the applicant in order to assure the applicant that the denial is lawful, and that the court's *in camera* inspection did not constitute error. This ruling is in keeping with our experience, that only the court has the authority to enforce the law or compel an entity to comply with the statutory provisions. Accordingly, it does not pertain to nor affect our opinion.

October 6, 2007 Request Nos. 1,2,3,6 and 16:

> "1. For the period of September 1, 2001 through the present, any analysis, whether internal or external, made by or on behalf of Erie County Medical Center concerning the impact of any prospective Government Accounting Standards Board pronouncements.
>
> 2. Complete copies of the audited financial statements of Erie County Medical Center for fiscal and/or calendar years 2004 and 2005, including all footnotes, notes, discussion and analysis.
>
> 3. All correspondence concerning any internal, external or annual audits of the Erie County Medical Center for fiscal and/or calendar years 2004 and 2005, including but not limited to letters of engagement and legal representation.
>
> 6. To the extent not provided in the responses to the above requests, for fiscal and/or calendar years 2005 and 2005, copies of any communications by and between Erie County Medical Center (including any person or entity acting on its behalf) and its external auditors, including but not limited to draft and/or final reports, and copies of the management letter and management's response.
>
> 16. For the period of September 1, 2004 through the present, complete copies of all Erie County Medical Center Board minutes."

In response, ECMCC indicated that after conducting a diligent search, it determined that it was not in possession of any records responsive to these requests. On appeal, ECMCC clarified its response, stating that the requests "are defined broadly or overbroadly," that it "is not required to engage in Herculean or unreasonable efforts to locate records to accommodate a person seeking records, nor it is required to create a record in response to a request..." or "to make assumptions regarding FOIL requests that are unclear or unspecific." ECMCC asserts its right to construe requests in the plain language in which they are received. For example, ECMCC describes, while it is in possession of several institutional cost reports from several facilities related to various health systems, and provided one with respect to your client, Kaleida Health Inc., that your firm never clarified which, if any of the remaining reports were requested.

In its July 6, 2007 correspondence to this office, ECMCC describes the distinction between Erie County Medical Center Corporation (ECMCC), a public benefit corporation created to manage and operate most Erie County health care assets, and the Erie County Medical Center, (the Center), an acute-care hospital and one of the assets now controlled by ECMCC. It is ECMCC's position that because there are no responsive documents pertaining solely to the Center, or audited financial records separate and distinct from those of ECMCC, that your request was limited to ECMCC the response was adequate.

From our perspective, ECMCC's assertion, at this late date, that it was clear from your requests that you sought records pertaining to ECMCC, not the Center, represents an attempt to delay and frustrate access to otherwise public records. In our opinion ECMCC had an obligation to clarify this technical distinction at an earlier date. While not required to answer questions, 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)].

In short, the appointed records access officer has an obligation to clarify, when appropriate, the manner in which the records are kept so as to avoid unnecessary confusion, frustration and delay. ECMCC's letterhead, indicating the name of both the Corporation and the Center, with ECMCC's responses to various requests for records of the Center, lend credibility to your opinion that this distinction represents an attempt to delay and/or eventually deny access to records that should have been made available. ECMCC's failure to provide you with a copy of its July 6, 2007 submission to our office further confirms our opinion that it is not acting to resolve this matter in an expeditious manner.

Moreover, it appears that ECMCC has caused further confusion by not clarifying whether the requested records exist, either as portions of other records or as records in their entirety, or whether they are not maintained or indexed in a manner that would permit locating the requested

records with reasonable effort. Because it is important to distinguish these issues, as the latter permits the applicant to appeal a denial of access, we offer the following.

To reiterate, in our view, an appeal may be made when an agency denies access by informing an applicant that it has a record, but the applicant does not have the right to inspect or copy that record based on one or more of the grounds for withholding the record appearing in §87(2) of the Freedom of Information Law. By means of example, if you requested your income tax records from this office, the response would be that this office does not maintain records of that nature. We do not believe that a response to that effect constitutes a denial of access to records, or that it would make legal or logical sense to appeal.

Whether the request reasonably describes records, on the other hand, involves the obligation of an agency to search for its records. By way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. We point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In our view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While we are unfamiliar with the record keeping systems of ECMCC, to the extent that the records sought can be located with reasonable effort, we believe that the request would have met the

requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

For purposes of further illustration, assuming that the Erie 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 our opinion, would not "reasonably describe" the records as required by the Freedom of Information Law.

In response to requests made in September 2006, for copies of materials submitted to the agency in response to its own FOIL requests, and in part justifying its delay in responding, ECMCC reportedly searched through thousands of records to locate attachments and enclosures that had been separated. While we agree that agency staff are not required to engage in "herculean" or unreasonable efforts in locating records to accommodate a person seeking records, if ECMCC can locate the records sought with a reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, it would be obliged to do so based on judicial precedent. As indicated in Konigsberg, only if it can be established that the agency 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, it is our opinion that ECMCC's conflicting responses that it does not have records responsive to the request and then later, that the request is not reasonably described, only adds confusion and delay concerning final resolution of the matter, and effectively denies access without any basis in law.

We have received no evidence that ECMCC indicated that it had several institutional cost reports, or that it requested that the applicant clarify which reports it was requesting, once identified. ECMCC's complaint, therefore, that "despite four months of correspondence and specific directives

to ECMCC regarding the manner in which records should be produced, Mr. Finnerty never specified which reports he was seeking," in our opinion, is not based on the written record.

October 6, 2007 Request Nos. 8,9 and 15:

> "8. For the period of September 1, 2001 through the present, complete copies of all settlement agreements entered into between Erie County Medical Center and the County of Erie.
>
> 9. For the period of September 1, 2001 through the present, complete copies of all settlement agreements entered into between Erie County Medical Center and the County of Erie.
>
> 15. For the period of September 1, 2001 through the present, all documents concerning any financial transactions or relationships, including contracts, between Erie County Medical Center and Erie County, or any related organizations (including but not limited Greater Buffalo Niagara Surgical Center Venture, LLC) and any Board member of Erie County Medical Center or any employee of any Board member of Erie County Medical Center."

ECMCC denied access to the records requested, stating "we are not in possession of any records responsive" to these requests. In addition to the response by ECMCC concerning the distinction between the two legal entities, as outlined above, ECMCC provided further clarification in its July 6, 2007 correspondence to this office, that the Center does not possess the power to contract with third parties, and therefore, any contracts between the Center and any third party would not exist.

As indicated previously, by failing to advise that ECMCC was responding to your requests based on this technical distinction, as is required by 21 NYCRR §1401.2(b), outlined above, it is our opinion that ECMCC perpetuated unnecessary confusion and delay, and constructively denied access without basis in the law.

Again, there is no information in the correspondence from ECMCC concerning the manner in which ECMCC's records are maintained or can be generated, and no information clarifying the difficulty in extracting information pertaining to the Center from records pertaining to ECMCC . Clearly, your requests initially pertained to the Center and were answered by ECMCC. Especially in light of the letterhead which ECMCC consistently used to respond to your request, which indicates "ECMC"in the upper right corner, and "Erie County Medical Center Corporation" in the left margin, it is our opinion that ECMCC should have provided this explanation at an earlier date. Further, based on the above regulations and the analysis provided in response to the requests discussed previously, and due to ECMCC's inconsistent responses, it is our opinion that ECMCC is under a continuing obligation to grant or deny access to the requested records based on the law.

October 27, 2006 Request No. 4:

"4. All documents pertaining to ECMC advertising expenditures."

In response, ECMCC indicated that "records responsive to this item are exempt from disclosure under N.Y. Pub. Auth. Law § 3628(12)(a) and N.Y. Pub. Off. Law §87(2)(d). The information responsive to this request constitutes protected marketing trade secrets related to business development as defined in applicable law."

On appeal, ECMCC indicated that a plain reading of the request would indicate that you seek disclosure of "not only advertising expenditure figures, but also contracts with advertising agencies, marketing plans, market analysis, etc., as these records all 'pertain to' advertising expenditures" and that in addition to seeking those records from 2001 to the present, the request would also encompass forward-looking marketing information. ECMCC further indicated, that even if the request were not prospective, if disclosed, ECMCC's competitors could use the information, at minimal cost, to make highly valuable inferences on marketing trends and expenditures in specific regions, allowing them to adjust their own marketing strategies to either avoid or target a particular area, thus hindering ECMCC's ability to compete in the manner of a private sector actor and causing ECMCC substantial competitive injury."

As we understand its functions, ECMCC is a unique public benefit corporation created to manage and direct various health care systems of the County of Erie, with characteristics set forth in Public Officers Law §3625, *et seq.* Members of the board of directors are appointed by the Governor and the Erie County Executive, its corporate contracts are governed by Article 5-A of the General Municipal Law and further provisions of PAL §3628, and it will receive "full funding of the network's existing capital program" from Erie County for 2004, 2005 and 2006, as authorized in the county's 2003 capital budget (PAL §3628[13]). As ECMCC points out, however, in its July 6, 2007 correspondence, "ECMCC does not possess the power to tax, nor does it receive recurring income in the form of annual legislative appropriations." Further, we note that the business of providing health care has become particularly competitive...

The Legislature created ECMCC and provided in part:

> "5. The needs of the residents of the state of New York and of the county of Erie can best be served by the operation of the Erie County Medical Center healthcare network through a public benefit corporation having the legal, financial, and managerial flexibility to take full advantage of opportunities and challenges presented by the evolving health care environment.
>
> 6. In order to accomplish the purposes recited in this section of providing health care services and health facilities for the benefit of the residents of the state of New York and the county of Erie, including persons in need of health care services without the ability to pay, as required by law, a public benefit corporation to be known

> as the Erie County Medical Center Corporation shall be created. PAL §3626."

In light of the intense competition in the health care market, the Legislature further articulated specific information that would be included under the definition of "trade secret", as noted above, permitting the agency to refuse access to documents that reference the agency's marketing strategy or strategic marketing plans, analyses, evaluations, and pricing strategies or commitments relating to business development,... etc. [PAL §3628(12)(a)].

And, as you are aware, the relevant provision of the Public Officers Law 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." [POL §87(2)(d)].

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" [(Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to

the submitting commercial enterprise. On the other hand, as explained in Worthington:

> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

Accordingly, it is our opinion that if disclosure of any advertising expenditures would result in substantial injury to ECMCC's competitive position, the inquiry would likely only involve projected advertising costs. In our opinion, evidence of advertising expenditures made last year, or from previous years, would not constitute sufficient evidence to predict future marketing strategy or plans, and therefore, would be unlikely to cause substantial competitive harm.

In our view, while the request for "all records pertaining to" such costs may be construed as not reasonably describing records, it would not permit ECMCC to deny access to all records indicating past advertising expenditures, and at a minimum would require disclosure of some records indicating such costs.

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: Anthony J. Colucci, III

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16814

41 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 1, 2007

Mr. Samuel Sommer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sommer:

I have received your letter and the materials attached to it. You have sought an opinion concerning your right to obtain the "face pages" of indictments signed by the foreman of a grand jury.

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.

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."

Based on the foregoing, records "attending a grand jury proceeding" would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16815

41 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 1, 2007

Mr. Gregory Radcliffe
96-A-7960
Wende Correctional Facility
3622 Wende Road, P.O. Box 1187
Alden, NY 14004-1187

Dear Mr. Radcliffe:

I have received your letter in which you appealed a denial of access to certain records.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee is not empowered to determine appeals. The provision concerning the right to appeal an agency's denial of a request, §89(4)(a), states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Second, the Freedom of Information Law excludes the courts from its coverage. That statute applies to agencies, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts are not subject to the Freedom of Information Law.

I note that court records are often accessible under different provisions of law (see e.g., Judiciary Law, §255), and it is suggested that court records be requested by citing an applicable statute as the basis for the request. Also note that when court records come into the possession of an agency, it has been held by the state's highest court that the records are agency records subject to rights conferred by the Freedom of Information Law [Newsday v. Empire State Development Corp., 98 NY2d 746, 359 NYS2d 855 (2002)].

Lastly, to reiterate, when a request for records is denied by an agency that is subject to the Freedom of Information Law, such as the office of a district attorney, that statute enables the applicant to appeal in accordance with §89(4)(a) of the Freedom of Information Law.

I hope that the preceding remarks serve to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Servino
John J. Carmody

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16816

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 1, 2007

Ms. Jane Sokolow
Ms. Karen Argenti
[redacted]

The staff of the Committee on 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. Sokolow and Ms. Argenti:

I have received your letter concerning unanswered requests for records of the New York City Department of Parks and Recreation and the Department of Environmental Protection.

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, 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: Amy Kleitman
Marie Dooley

FOIL-AO-16817

From: Freeman, Robert (DOS)
Sent: Monday, October 01, 2007 12:26 PM
To: Lori.lawlis@archongroup.com
Attachments: o3499.wpd

Dear Ms. Lawlis:

Your inquiry has been forwarded to the Committee on Open Government, a unit within the New York State Department of State authorized to provide advice and opinions concerning the state's Freedom of Information and Open Meetings Laws.

You inquired with respect to "board of review meeting minutes." It is assumed that you are referring to an assessment board of review. Based on that assumption, I have attached an advisory opinion previously rendered that focuses on the issue.

Each agency (a unit of state or local government) subject to the Freedom of Information Law 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 the records access officer at the agency that maintains the records of your interest. I note that §89(3) of the Freedom of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail (i.e., the time period relating to the minutes of your interest) to enable agency staff to locate and identify the records.

I hope that I have not misinterpreted your remarks and hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-16818

From: Jobin-Davis, Camille (DOS)
To: mary Roodenburg
Sent: Monday, October 01, 2007 6:49 AM
Subject: RE: Open Meetings Law

Mary:

Thank you for your email.

In response, in short, the law directs that the initial request should be made to the Records Access Officer of the school district, and any appeal, if the response is unsatisfactory, directed to the Superintendent and the Board. The request and appeals process is explained in the following link:

http://www.dos.state.ny.us/coog/explaination05.htm

With respect to any documents which you believe have been omitted from the school district's 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."

Please let me know if you have further questions.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
41 State Street
Albany NY 12231
(518) 474-2518
(518) 474-1927 fax
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-16819

From: Freeman, Robert (DOS)
Sent: Wednesday, October 03, 2007 1:07 PM
To: Hon. Rebecca A. Connolly, Town Clerk
Subject: RE: FOIL

If it would take more than twenty business days from the date of acknowledgment of receipt of the request, your obligation is to indicate the reason for the delay and a "date certain" stating a deadline by which the request will be granted in whole or in part. The law specifies that the date must be reasonable based on the facts and circumstances. See the material regarding time limits for response on our "What's New" page for a detailed response, as well as our regulations.

Hope all is well.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16820

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 4, 2007

Mr. William Hinson
99-A-1626
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 12733

Dear Mr. Hinson:

This office has received your request for guidance concerning a request made under the Freedom of Information Law to Casual Male Big & Tall that has not been answered.

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."

Based on the foregoing, the Freedom of Information Law pertains to records maintained by entities of state and local government. It does not apply to private entities, such as the commercial establishment to which you referred.

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-16821

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 4, 2007

E-Mail

TO: Mr. Richard Sweet

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. Sweet:

I have received your letter in which you referred to an unanswered inquiry in which you asked the Nassau County Assessor "what percentage of homeowners' taxes increased and what percent decreased since reassessment of same."

In this regard, first, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute provides that a government agency is not required to create a record in response to a request. If records exist that contain the items that you requested, I believe that they must be disclosed. However, if no such records exist, the Assessor would not be required to prepare a new record containing the information sought on your behalf.

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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the

> event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I believe that the person designated to determine appeals in Nassau County is the County Attorney.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4493
FOIL-AO-16822

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 4, 2007

E-Mail

TO: Mr. Todd Elzey

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. Elzey:

I have received your most recent letter, and in consideration of the time constraints that you described, I offer the following comments.

You have inquired with respect to Ontario County's obligation "under the Open Meetings Law, or Freedom of Information Law to make the details of a proposal available for review in advance of Board of Supervisor Committee or full Board meetings." You indicated that the details of a particular proposal were not disclosed with notice or agendas pertaining to meetings. In this regard, the Open Meetings Law, §104, requires that every meeting of a public body, such as the Board of Supervisors or a committee consisting of members of the Board, must be preceded by notice of the time and place given to the news media and by means of posting. The Open Meetings Law is silent with respect to agendas. In short, that law does not require that a public body provide details relating to the subject that it will be considering at an upcoming meeting or meetings.

With respect to the disclosure of records, the Freedom of Information Law does not require that a government agency disclose records or provide information on its own initiative. An agency may choose to do so, but it is not required to do so by that statute. Any person may, however, request records from an agency, and the agency must respond to a request in some manner within five business days of the receipt of a request.

Since you referred to proposals, it is likely that some aspects of records of that nature may be withheld. The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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.

Pertinent under the circumstances would be §87(2)(g), which authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

RJF:jm

cc: Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16823

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 4, 2007

William McGintee
Town Supervisor
Town of East Hampton
159 Pantiago Road
East Hampton, NY 11937

Dear Supervisor McGintee:

The following is a brief summary of the legal issues I identified and verbal advice given in our telephone conversation earlier today:

First, this office never characterizes the actions of an agency or its personnel as a "violation", for the Committee on Open Government has no authority to issue determinations. Only a court can determine whether there has been a violation of the law. While the Committee on Open Government is authorized to issue advisory opinions concerning application of the Freedom of Information Law, this office is not empowered to enforce the law or compel an entity to comply with the statutory provisions. It is my hope that our opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law.

Second, to the extent that your town may have adopted a local law or ordinance that permits it to withhold a record that is otherwise available under the Freedom of Information Law until the town board has had a chance to review it, in my opinion, based on judicial precedent, it would be superseded by the Freedom of Information Law. It has been held that a local law, charter provision, rule or regulation promulgated by an agency is not a "statute" that would serve to exempt records from disclosure [see Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982) and Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976)].

You asked that I confirm that your agency has five business days to respond to a request for records, and I confirmed that the agency must respond within five business days. To further clarify the law, I note that §89(3) of the Freedom of Information Law states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

> acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

I point out, too, that §84 of the Freedom of Information Law, its statement of legislative intent, indicates that government agencies should make records available "wherever and whenever feasible." There may be instances in which agencies can and should in my opinion respond without delay, as in the case in which it is clear that records are available by law and in which they are readily retrievable. In other cases, issues may exist concerning rights of access, or records may not be readily located. From my perspective, in those circumstances, the law neither requires nor would it be reasonable to expect that rights of access be determined or records disclosed immediately.

Finally, to reiterate, if a town denies access to a record that is otherwise public because the record has not yet been reviewed by the town board, my opinion remains that the denial cannot be justified by the law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16824

41 State Street, Albany, New York 12231
(518) 474-2518
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October 5, 2007

Mr. Robert Travis
07-A-1356
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. Travis:

I have received your letter in which you described difficulty in obtaining transcripts of judicial proceedings from Columbia County.

In this regard, the functions of this office pertain 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."

Based on the foregoing, the Freedom of Information Law does not apply to courts.

This is not intended to suggest that court records are not accessible to the public. On the contrary, most court records must be disclosed pursuant to other provisions of law (see e.g., Judiciary Law, §255).

With respect to transcripts, it is my understanding that often no transcript is prepared unless there is an appeal.

If there is difficulty obtaining court records, the agency that oversees the court system is the Office of Court Administration, and the American Bar Association does not deal directly with the conduct of attorneys. Complaints regarding attorneys may be made to the grievance committee in the Appellate Division in which an attorney practices.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 5, 2007

Mr. Keith Henry
02-A-1428
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Henry:

We are in receipt of your request for an advisory opinion concerning you efforts to obtain a copy of your pre-sentence report. In this regard, we offer the following comments.

Although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law, which, in our 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, we 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.

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- 16826

From: Mercer, Janet (DOS)
Sent: Tuesday, October 09, 2007 1:14 PM
To: 'ken vogel'
Subject: RE: 5 days

Dear Mr. Vogel:

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, (89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see (89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with (89(4)(a), which states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Janet M. Mercer
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - Fax
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 10, 2007

Supervisor Heyman
Town of Irondequoit
1280 Titus Avenue
Rochester, NY 14617

Dear Supervisor Heyman:

This is in response to your telephone call yesterday, in which you did not ask a question, but indicated that the Irondequoit Town offices and the Town Comptroller were very busy, this being "budget season", and that you were having difficulty responding to the volume of requests made for records pursuant to the Freedom of Information Law. To clarify the legal advice offered by this office, please note the following:

The Court of Appeals has held that compliance with the Freedom of Information Law is an obligation of government, and "not a gift of, or waste of, public funds" (Doolan v. BOCES, 48 NY2d 341 347 [1979]).

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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).

Further, in United Federation of Teachers v. New York City Health and Hospitals Corp. [428 NYS 823 (1980)], it was determined that a shortage of staff did not constitute a valid defense for denying a request, for acceptance of such a defense would "thwart the very purpose of the Freedom of Information Law and make possible the circumvention of the public policy embodied in the act" (id., 824).

If neither a response to a request 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, 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.

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-16828 OML-AO-4496

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October 12, 2007

Mr. James W. Buck
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Buck:

I have received your letter concerning a delay in responding to your requests for records of the Livingston Manor Fire District.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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.

Lastly, since your requests involve minutes of meetings, I note that §106 of the Open Meetings Law specifies that minutes of meetings must be prepared and made available within two weeks of the meetings to which they pertain.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16829

41 State Street, Albany, New York 12231
(518) 474-2518
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October 12, 2007

Mr. Raymond Hobdy
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hobdy:

I have received your letter concerning an unanswered request for medical records maintained by the Rikers Island Correctional Facility.

In this regard, first, that facility is part of the New York City Department of Correction, and it is suggested, therefore, that a request be made to the Department's records access officer. The records access officer has the duty of coordinating an agency's response to requests.

Second, the Freedom the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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 (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 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
> Office of Professional Medical Conduct
> 433 River Street, Suite 303
> Troy, NY 12180-2299

It is suggested that any new request refer to both the Freedom of Information Law and §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

FOIL-AO-16830

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 12, 2007

Mr. Paul Cipriani
06-A-0678
Franklin Correctional Facility
62 Bare Hill Road, P.O. Box 10
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cipriani:

I have received your letter in which you referred to an unanswered request for records made to the office of the Schenectady County Sheriff.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Harry Buffardi, Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16831

41 State Street, Albany, New York 12231
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October 12, 2007

Mr. Raul Santos
06-A-3350
Eastern Correctional Facility
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 facts presented in your correspondence.

Dear Mr. Santos:

I have received your letter in which you complained with respect a delay in responding to a request for records of the New York City Police Department.

In this regard, first, since you referred to the federal Freedom of Information Act, 5 USC §552, I point out that that statute pertains only to federal agencies. The applicable statute relating to entities of state and local government agencies in New York is this state's Freedom of Information Law.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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: Sgt. James Russo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1608

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 12, 2007

Mr. Eric Harris
03-B-0846
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Harris:

I have received your correspondence concerning a request made under the Freedom of Information Law to a newspaper, the *Finger Lakes Times*.

In this regard, the Freedom of Information Law pertains to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law is applicable to records of state and local government. It does not apply to private entities, such as a newspaper. Therefore, I do not believe that the *Finger Lakes Times* is required to give effect to your request.

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Editor, *Finger Lakes Times*

FOIL-AO-16833

From: Mercer, Janet (DOS)
Sent: Friday, October 12, 2007 8:58 AM
To: 'charlie fenson'
Subject: RE: 5 day requirement

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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.

Janet M. Mercer
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - Fax
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4497
FOIL-AO-16834

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(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 15, 2007

E-Mail

TO: Hon. Andrea Haxton, City of Lackawanna

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Councilwoman Haxton:

I have received two items of correspondence from you.

The first involves the need to seek records pursuant to the Freedom of Information Law in consideration of your role as a member of the Lackawanna City Council.

By way of background, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a council or board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A city council, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board, member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

It is also noted that under §89 (1) of the Freedom of Information Law, 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 City Council has the duty to promulgate rules and ensure compliance. Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. As part of that coordination, I believe that other City 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.

The second pertains to meetings held "without 72 hour public notices." Here I direct your attention to the Open Meetings Law. That statute requires that notice be posted and given to the news media prior to every meeting of a public body. Specifically, §104 provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements

can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

I note that the judicial interpretation of the Open Meetings Law suggests that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Based upon the foregoing, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-16835

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, October 17, 2007 8:58 AM
To: 'mary Roodenburg'
Cc: Freeman, Robert (DOS)
Subject: RE: Open Meetings Law

Dear Mary:

The enforcement mechanism in the Freedom of Information Law, as referenced earlier, is to send a written appeal to the head, chief executive or governing body, i.e., the Superintendent or the School Board. In your case, because the Superintendent responded to your initial request, I advise that you send your written appeal of the constructive denial of your request to the President of the School Board, with a copy to the Board. Attach a copy of your request and the response you received.

I recommend that you also attach a copy of the advisory opinion at the following link to your written appeal, as it explains the basis in the law for access to the certificates:
http://www.dos.state.ny.us/coog/ftext/F16262.htm

In your written appeal, you can ask that the Board certify that it does not have copies of any other certificates, as referenced previously, pursuant to section 89(3).

Please note that I have copied Bob Freeman in on this chain of emails. 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. If you would like a written advisory opinion in response to your particular situation, please advise by return email. I hope this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
41 State Street
Albany NY 12231
(518) 474-2518
(518) 474-1927 fax
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO- 16836

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, October 17, 2007 12:12 PM
To: Darleen Dougher, Town Clerk, Town of Queensbury
Subject: Freedom of Information Law

Dear Darleen:

As per our telephone conversation, I have received your fax. In my opinion, the October 9, 2007 letter from FitzGerald, Morris to Supervisor Stec and Town Board Members is not protected by the attorney-client privilege. In the correspondence, counsel to the Town sets out his/the firm's position with respect to the contract between the Town and the firm, and various discussions and agreements reached in relation to the contract. I believe therefore, that this correspondence is not legal advice, and therefore, is subject to disclosure pursuant to the Freedom of Information Law.

I hope this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
41 State Street
Albany NY 12231
(518) 474-2518
(518) 474-1927 fax
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16837

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 18, 2007

Mr. Lee Wilkinson
05-R-5360
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wilkinson:

I have received your letter in which you complained that a request made under the Freedom of Information Law to the Office of the New York County District Attorney had not been answered.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Charles E. King, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16838

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 18, 2007

Mr. Mark Reed
05-R-4073
Franklin Correctional Facility
62 Bare Hill Road
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Reed:

I have received your letter in which you have sought an opinion concerning your right to obtain records relating to grand jury proceedings.

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.

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."

Based on the foregoing, records "attending a grand jury proceeding" would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16839

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 18, 2007

Mr. Ronald Diggs
04-R-3906/07007743
East Meadow Correctional Facility
100 Carman Avenue
East Meadow, NY 11554-1146

The staff of the Committee on Open 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 referred to requests made under the Freedom of Information Law to the Division of Criminal Justice Services that have not been answered.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-16840

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 18, 2007

Mr. Vincent Terio
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Terio:

We are in receipt of your October 4, 2007 correspondence addressed to Daniel Shapiro, regarding your request to the Putnam County Clerk for access to certain deeds.

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. 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, attached is an advisory opinion previously issued by the Committee on Open Government, which addresses the substance of your request. Should you require an advisory opinion specific to your situation, please advise in writing. Thank 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

Enc. FOIL- AO- 15208

cc: Daniel Shapiro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16841

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 22, 2007

E-MAIL

TO: George Heidcamp

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. Heidcamp:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request you made to the Saugerties Central School District for copies of records pertaining to unsuccessful applicants for employment as a custodial worker for the District. In this regard, we offer the following comments.

First, 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, as in your case, in your capacity as a member of the Board of Education, 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.

Viewing the matter from a more technical perspective, however, 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 our 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 our 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, we 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, §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 to disclose the identities of the applicants who were not hired, and they are not "confidential", it is not obliged to do so. To be sure, there is nothing the Freedom of Information Law that would prohibit the disclosure of applicants' names.

Third, 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, 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. One of the relevant grounds for denial here, §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 note that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Additionally, in Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's 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 many aspects of the resume of the incumbent must be disclosed, while others could be withheld to protect 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

FOIL-AO-16842

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October 22, 2007

Hon. Nancy Calhoun
96th Assembly District
1012 Little Britain Road
Suite 900
New Windsor, NY 12553

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Assemblymember Calhoun:

We are in receipt of you request for an advisory opinion concerning application of the Freedom of Information Law to a request you made to the Village of Kiryas Joel for plans and inspection reports regarding two construction projects.

Specifically, in response to your first request, dated August 15, 2007, and to your follow up phone call to the village attorney, you were informed that "the Village will be advising you within the next few weeks what responsive documents exist and the costs for reproducing them." You have not received a response to an identical second request, dated September 21, 2007. 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 in May of 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." 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.

We 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.

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: Gedalye Szegedin
Howard Protter

FOIL-AO-16843

From: Freeman, Robert (DOS)
Sent: Tuesday, October 23, 2007 12:27 PM
To: Badner, Lisa
Subject: RE: vitamins, etc.
Attachments: f14306.wpd; apples.doc

Hi - -

I don't know that the subject merits "training". However, I've described FOIL as an apple and discovery as an orange. They are, very simply, separate vehicles. Any person may seek records under FOIL, including a litigant. However, when records are sought pursuant to that statute, the applicant is as a member of the public; the fact that he/she may be a litigant neither enhances nor diminishes that person's rights under FOIL as a member of the public. In contrast, what an individual may obtain pursuant to discovery is due to his/her status as a litigant, and that person obtains what is material or necessary to the litigation.

Attached is an advisory opinion dealing with the issue that focuses on the key decision, Farbman v. NYC [62 NY2d 75 (1984)], as well as an article that I prepared in anticipation of the Court of Appeals decision in Newsday v. NYS Department of Transportation [5 NY3d 84 (2005)].

If you'd like to discuss the issue, you know where I am.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16844

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October 23, 2007

E-MAIL

TO: Beth Pease

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Pease:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to a request made to the Village of Hempstead Community Development Agency for copies of "the disks that contained the transcript of the Village visioning process." You were informed that you "could not have a copy of the disks because they contained an official record, and [you] could change the record." In a separate request, you were informed that a fee of twenty-five cents per page would be charged to have records faxed to you, "because faxing the records was using Village resources."

In this regard, I offer the following comments.

First, that a disk may be an "official" record or that its content might be changed if a copy of data stored on a disk may be altered would not, in my view, constitute grounds for either withholding records or failing to make copies.. The agency that reproduces the data has an original version of the content of the disk. That being so, the possibility that a recipient of a copy may alter the data on the copy that he or she receives is irrelevant. The possession of an original record serves as a means of ensuring that the Village's data is accurate.

Second, the Freedom of Information Law pertains to all records, irrespective of their physical form or medium, for §86(4) defines the term "record" expansively to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations,

> memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, whether records are characterized as "official" or otherwise, and whether they are maintained on paper or electronically, they fall within the coverage of the Freedom of Information 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 or duplicated with reasonable effort, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disc.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 I understand the situation, none of the grounds for denial of access would be pertinent. If that is so, I believe that the information that you requested must be made available on disks in the manner in which you requested it.

Lastly, with respect to the fee to which you referred, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
>
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

When records are faxed, ordinarily no photocopy is made. If no photocopies are prepared, an agency cannot, in my view, charge twenty-five cents per page. I note, too, that although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals, the state's highest court, has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

RJF:tt

cc: Sherina Gonzalez
Tanya Ford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16845

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October 24, 2007

Ms. Janis Lauria
Accu-Counting Services, LLC
149-51 Westchester Ave.
Rye Brook, 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 Ms. Lauria:

I have received your correspondence concerning an apparent failure by the Village of Port Chester to respond to your requests for records in a timely manner.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: William F. Williams
Joan Mancuso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16846

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 24, 2007

E-MAIL

TO: Peter Scher

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scher:

I have received your letter in which you sought advice concerning:

> "...exactly what the DHCR is required to reveal in a Freedom of Information Request and what they can omit...I would like to obtain information regarding an MCI (Major Capitol Improvement) decision involving contracts, payments, copies of checks and other documents used to make this determination in addition to DHCR internal reports."

Since I am unaware of the exact content of the records of your interest, precise guidance cannot be offered. 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.

Since it appears that your focus involves "internal" records used to reach a decision concerning a substantial project, it is likely that the provision of primary significance would be §87(2)(g). Although that provision potentially serves as a basis for denying access, due to its structure, it often requires disclosure. Specifically, §87(2)(g) authorizes an agency, such as DHCR, to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 you can provide additional information regarding the records in which you are interested, perhaps I could offer more specific guidance.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-6847

41 State Street, Albany, New York 12231
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October 24, 2007

E-MAIL

TO: Peter Scher

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scher:

I have received your letter in which you asked whether "an elected official State Senator or State Assemblyman [may] make a FOI request the same way a regular citizen does or do they have different avenues to obtain the same information in general and specifically regarding documents from the DHCR?"

In this regard, first, I know of no provision that pertains specifically to DHCR and its responsibility to disclose records to state legislators.

Second, in my view, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. It has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. In my experience, it is not unusual for a state legislator to request records pursuant to the Freedom of Information Law. 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, agencies have often disclosed records to state legislators and other government officers or employees informally and without submission of a request citing the Freedom of Information Law.

Lastly, I note that §62-a of the Legislative Law gives the "chairman, vice-chairman or a majority of a legislative committee" the authority to subpoena persons, as well as "a book or paper."

I hope that I have been of assistance.

RJF:tt

FOIL-AO-1684

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, October 24, 2007 10:00 AM
To: 'Joe Ely'
Subject: RE: Town of Rhinebeck FOIL appeal response

Joe:

Based on his October 19, 2007 correspondence, it appears that the Supervisor is trying to do the right thing. You are correct, however, on the language of the law. Section §89(4)(a) states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In sum, 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.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16848

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 25, 2007

E-MAIL

TO: Susan Cahill

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Cahill:

I have received your inquiry in which you sought an opinion concerning rights of access to draft documentation submitted to the City of Kingston by a developer. The developer's attorney has contended that the documentation may be withhold on the ground that it consists of inter-agency material that is exempt from disclosure pursuant to §87(2)(g) of the Freedom of Information Law.

Based on the language of the law, I disagree with the developer's attorney and believe that the documentation must be disclosed. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Second, although one of the grounds for denial may frequently be cited to withhold records characterized as "draft" or "preliminary", for example, that provision would not be applicable in a situation in which records are not prepared by an agency or a consultant retained by the agency. Specifically, §87(2)(g) deals with "inter-agency and intra-agency materials." Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials").

Since the documentation was prepared by or for the developer and submitted to the City, even in draft form, I do not believe that any of the grounds for denial would be applicable. In short, the developer is not an agency and, therefore, the exception pertaining to inter-agency and intra-agency materials would be inapplicable. If that is so, to comply with the Freedom of Information Law, I believe that the City must disclose the documentation at issue on request.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16849

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October 25, 2007

E-MAIL

TO: Janon Fisher

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. Fisher:

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 Office of the New York City Comptroller.

The request involves New York City agency responses to the Comptroller's Office "calendar year 2006 checklist agency evaluation of internal controls Directive #1." You described the "checklist" as "a series of questions regarding the fitness of the agencies' computer systems, its financial accounting and ability to follow inventory, licenses & permits, violations, monitor petty cash, procurement and overall performance." The checklist, a copy of which was transmitted, includes six questions as follows:

"1. Does your agency have an Internet Connectivity Plan?
Has it been updated?
If the answer is 'Yes,' please provide the date
2. Has your agency submitted the plan to DOI/CISAFE for review and approval?
3. Has DOI/CISAFE approved the plan?
4. Does your staff periodically access DOI/CISAFE's site to download their latest procedures and guidelines?
5. Has the plan been tested?
If the answer is 'Yes,' please provide the date
6. Do you keep a record of any attempts of external unauthorized access?"

Agencies responded by marking boxes indicating "yes", "no", "partial compliance", or "not applicable."

The Comptroller's Office denied the request "in full, citing §87(2)(g) and (i) of the Freedom of Information Law. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Second, in my view, one of the grounds for denial cited by the Office of the Comptroller is wholly without merit, and its ability to justify the assertion of the other is questionable.

Although §87(2)(g) potentially serves as a basis for denying access to records, due to its structure, it often requires disclosure. That provision pertains to communications within, between and among government agencies 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 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 a record is predecisional or does not represent a final determination, does not signify an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

From my perspective, the responses on the checklist represent factual information that must be disclosed under subparagraph (i) of §87(2)(g), unless a different exception may properly be asserted. In each instance, an agency's response represents a fact; clearly the responses do not reflect opinions, nor in my view would they be reflective of what would be characterized as a deliberative process.

Section 87(2)(i) 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." While there is a possibility that responses to the questions on the checklist would suggest vulnerabilities, they do not include details concerning the nature of any such vulnerabilities or weaknesses. There no codes, passwords, descriptions of security measures or software or other specific information that would clearly enable a hacker, for example, to know exactly where vulnerability exists. That being so, it would be difficult, in my opinion, for

the Office of the Comptroller to demonstrate that disclosure would indeed "jeopardize the security" of an agency's information technology assets.

I note that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals nearly three decades ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

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 meaningful review of the matter, copies of this opinion will be forwarded to the Office of the Comptroller.

I hope that I have been of assistance.

RJF:tt

cc: Lewis Finkelman
Allen Fitzer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16850

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October 30, 2007

Mr. Edward Elkins
03-B-0152
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. Elkins:

I have received your letter in which you sought an advisory opinion concerning your right to obtain a "transfer order."

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. I point out that the Department's regulations specify that "personal history data" concerning an inmate is available to the inmate.

Of relevance to records relating to transfers is §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I point out that a decision rendered in 1989 might have dealt with the kinds of records concerning transfers in which you are interested. In that case, it was stated that:

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Kheel v. Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

Insofar as the record sought is equivalent to those described in Rowland D., it appears that it could be withheld.

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-16851

41 State Street, Albany, New York 12231
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October 30, 2007

Mr. Michael A. Callinan
Bruno, Gerbino & Soriano, LLP
445 Broad Hollow Road, Suite 220
Melville, NY 11747

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Callinan:

I have received your letter and hope that you will accept my apologies for the delay in response. You have sought assistance in relation to a request made by *Newsday* to SUNY Stony Brook for a variety of records relating to the Stony Brook Foundation. The request was initially denied by Stony Brook's records access officer and later affirmed following Newsday's appeal. In short, it was concluded that "the Stony Brook Foundation should not be considered a State agency for FOIL disclosure purposes" and that "[e]xcept for agency accounts managed for the University in accordance with SUNY Policy 7000, the Foundation's operations, function and activities are not subject to University direction or control."

From my perspective, based on the language of the law and its judicial interpretation, the records of the Foundation fall within the coverage of the Freedom of Information Law. In this regard, I offer the following comments.

First, even if the Foundation has no independent responsibility to comply with the Freedom of Information Law, I believe that its records fall within the coverage of that statute.

The Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

While the status of the Foundation as an "agency" has not been determined judicially, it is clear that the State University is an "agency" required to comply with the Freedom of Information Law.

Pertinent with respect to rights of access is §86(4), which defines the term "record" expansively to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, the Court of Appeals found that documents maintained by a not-for-profit corporation providing services for a branch of the State University were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxillary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)]. Therefore, if a document is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency. In the context of the question that you raised, irrespective of whether the Foundation is an "agency", its records appear to be maintained for the City University. If that is so, the records would, based on Encore, constitute agency records subject to the Freedom of Information Law.

Second, while for profit or not-for-profit corporations would not in most instances be subject to the Freedom of Information Law because they are not governmental entities, there are several judicial determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are "agencies" that fall within the scope of the Freedom of Information Law.

In the first decision in which it was held that a not-for-profit corporation may be an "agency" required to comply with the Freedom of Information Law, [Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the State's highest court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad

> declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

In Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

Perhaps most analogous to the situation described is a decision in which it was held that a community college foundation associated with a CUNY institution was subject to the Freedom of Information Law, despite its status as a not-for-profit corporation. In so holding, it was stated that:

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> "The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Verified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:
>
> > '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.
>
> "Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

As in the case of the foundation in Eisenberg, the Foundation would not exist but for its relationship with SUNY Stony Brook. Due to the similarity between the situation you have described and that presented in Eisenberg, as well as the functions of the Foundation and its relationship to the University, I believe that it is subject to the Freedom of Information Law.

I am mindful of the contention that the relationship between SUNY Stony Brook and the Foundation differs from that of another SUNY institution and the Auxiliary Services Corporation, also a not-for-profit corporation, which performs a variety of functions that institution would otherwise carry out on its own. Nevertheless, I believe that the distinction is artificial, for the Foundation would not exist but for its relationship with SUNY Stony Brook, and its records, in my view, are clearly maintained for SUNY Stony Brook. As stated on its website:

> "The Stony Brook Foundation is a not-for-profit 501(c)(3) corporation established in 1965 as the official fundraising and private gift receiving agency for the State University at Stony Brook. Working closely with the Office for University Advancement, the Foundation receives gifts of cash, securities, real and personal property, and deferred gifts such as bequests, life insurance and life income agreements. The funds received by the Foundation support every aspect of university endeavor, including: research, education, public service, faculty and student development, economic and cultural development, and health care."

Additionally, the University's website states that "Stony Brook's endowment [is] managed by the Stony Brook Foundation."

In sum, while I believe that the Foundation constitutes an "agency" required to comply with the Freedom of Information Law, even if it is not characterized or found to be an agency, it is clear in my opinion that its records are maintained *for* SUNY Stony Brook and, therefore, fall within the definition of "record" cited earlier and the coverage of the Freedom of Information Law. As indicated above, the Foundation supports "every aspect of university endeavor."

Lastly, when the Freedom of Information Law is applicable, 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.

While it may be that some of the records or portions thereof requested by *Newsday* might properly be withheld, I disagree with the rationale offered in the determination of the appeal concerning "donor records." It was contended that tax records submitted to the New York State Department of Taxation and Finance and the Internal Revenue Service that are exempted from disclosure by state and federal statutes remain confidential when copies are sent or made available to others, i.e., the University or the Foundation. It has been advised and determined, however, that the confidentiality statutes pertain only to the tax agencies and not to others. When a related issue arose several years ago, 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, for example. 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. The same response was offered by a representative of the State Department of Taxation and Finance. Most recently, it was determined in relation to records maintained by a state agency that administered a grant program that "the fact that...data...may be derived from tax forms or may be compiled in the same manner as the information on the tax forms does not place such data within the protection of the confidentiality provisions of the Tax Law " (The Herald Company v. NYS Department of Economic Development, Supreme Court, Albany County, February 8, 2007).

In consideration of the foregoing, I do not believe that records involving donors are exempted from disclosure by statute, but rather that rights of access are governed by the Freedom of Information Law. That being so, in my opinion, those portions of the records that identify donors who are natural persons may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" in accordance with §87(2)(b) of the Freedom of Information Law, for I do not believe that the public has the right to know of the nature or amount of charitable contributions an individual might choose to make. The exception concerning privacy, however, pertains to natural persons. Therefore, insofar as the donor records pertain to entities, such as corporations, in my opinion, there would be no basis for denying access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Stacey Hengsterman
Karol Kain Gray

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16852

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October 31, 2007

Mr. Johnny Caldwell
07-A-5151
Oneida Correctional Facility
P.O. Box 44580
Rome, NY 13442-4580

Dear Mr. Caldwell:

I have received your letter in which you appealed a denial of access to records by the Suffolk County Police Department to this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to 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 a denial of access to records, §89(4)(a), states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, I believe that an appeal in this instance may be made to the Suffolk County Attorney.

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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November 13, 2007

Mr. Edward J. Harrington
[redacted]

Dear Mr. Harrington:

I have received your letter concerning the release of a recording of a 911 emergency call that you made to the Oswego County 911 Center. The chronology is as follows:

> "I called 911 to report a fire on 1 July 07.
>
> On 2 July 07 the Oswego City Fire Chief requested a recording of that call.
>
> That same day, Mr. Michael Allen, director of the Oswego County 911 Center, sent a copy to Chief Geers via email. Two hours and twenty-three minutes later, Chief Geers forwarded the email to firefighter Thomas Amedio, who is the head of the firefighter's union.
>
> On 3 July 07 Mr. Amedio forwarded the email and the audio file to the local media, as well as the law firm representing the firefighter's union.
>
> Mr. Allen claims there was a confidentiality clause attached to the email, when he sent it, and Mr. Amedio claims, that there was no such clause, when he received it from Geers."

You have sought opinions "as to whether the Oswego (city) fire chief was qualified...to have received a copy of the call from the (county) 911 Center" in accordance with §308(4) of the County Law, whether "Chief Geers should have passed it on to the head of the firefighter's union and should he in turn have passed it to the media", and whether an assertion of "confidentiality" is relevant to any of the foregoing.

In this regard, first, the Freedom of Information Law pertains to all government records maintained by or for an agency, such as a city or a county, and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or

portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Pertinent in my opinion in this instance is §87(2)(a), the initial ground for denial of access, which concerns records that "are specifically exempted from disclosure by state or federal statute."

One such statute is §308(4) of the County Law, which states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

Based on the foregoing, it is clear that a records of a call made to the County's 911 Center is exempt from disclosure to the public, that the Freedom of Information Law does not govern access, and that the ability to disclose such a record is limited to the County's public safety agency, another government agency or body" or a person or entity "providing medical, ambulance or other emergency services."

Second, the advisory authority of the Committee on Open Government involves public access to records, primarily in relation to the Freedom of Information Law. As indicated earlier, due to the direction provided in §308(4) of the County Law, the Freedom of Information Law does not govern in this instance. That being so, I do not believe this office has the jurisdiction to advise regarding the propriety of the receipt of the record at issue by Chief Geers or whether he or others had the authority to have "passed it on."

Lastly, as a general matter, I believe that statutes, provisions of law enacted by the State Legislature or Congress, determine whether records may be kept confidential. A promise, assertion or request for confidentiality, absent statutory direction, is in my opinion meaningless.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Michael Allen
Chief Geers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4511

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November 13, 2007

Mr. Roy A. Mallette
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mallette:

I have received your note and a copy of your request for records made to the Cicero Town Clerk. In addition, you questioned the propriety of an executive session held by the Town Board.

The first issue relates to the appointment of two new officers to the Town's police department. Your request for documentation concerning those officers, including "background investigations", was denied.

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. Most relevant is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

In conjunction with the foregoing, I note that it has been held by the Appellate Division that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

Additionally, in the lower court decision rendered in Kwasnik v. City of New York, (Supreme Court, New York County, September 26, 1997), the court cited and relied upon an opinion rendered by this office and held that those portions of applications or resumes, including information detailing one's prior public employment, must be disclosed. The Court quoted from the Committee's opinion, which stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

Quoting from the opinion, the court also concurred with the following:

> "Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

Items within an application for employment or a resume that may be withheld in my view would include social security numbers, marital status, home addresses, hobbies, and other details of one's life that are unrelated to the position for which he or she was hired.

In affirming the decision of the Supreme Court, the Appellate Division found that:

> "This result is supported by opinions of the Committee on Open Government, to which courts should defer (*see, Miracle Mile Assocs. v. Yudelson,* 68 AD2d 176, 181, *lv denied* 48 NY2d 706), favoring disclosure of public employees' resumes if only because public employment is, by dint of FOIL itself, a matter of public record (FOIL-AO-4010; FOIL-AO-7065; Public Officers Law §87[3][b]). The dates of attendance at academic institutions should also be subject to disclosure, at least where, as here, the employee did not meet the licensing requirement for employment when hired and therefore had to have worked a minimum number of years in the field in order to have qualified for the job. In such circumstances, the agency's need for the information would be great and the personal hardship of disclosure small (*see*, Public Officers Law §89[2][b][iv])" [262 AD2d 171, 691 NYS 2d 525, 526 (1999)].

In sum, again, I believe that the details within an employment application 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.

It is likely that various elements of a background investigation include comments from previous employers, as well as neighbors, family members or other acquaintances of the officers. Here I note that the introductory language of §89(2)(b) indicates that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the examples that follow.

Section 89(2)(b)(i) refers to the disclosure of "personal references of applicants for employment" as an unwarranted invasion of personal privacy. In my view, insofar as the background investigation includes identifying details pertaining to those who might have offered information or comments relating to the candidates, records may be withheld, for disclosure would result in an unwarranted invasion of personal privacy.

The second issue, as I understand your comments, relates to an executive session held to discuss the possibility of the acquisition of real property by the Town. Relevant is §105(1)(h), which permits a public body, such as the Town Board, to enter into an executive session to discuss the proposed acquisition, sale or lease of real property, "but only when publicity would substantially affect the value" of the property.

Although the materials do not offer sufficient detail to offer unequivocal guidance, in general, I believe that §105(1)(h) is intended to enable a public body to ensure that it can engage in a transaction optimal to the public. When the site of a parcel that may be purchased is known to the public, it is unlikely that public discussion or, therefore, publicity, would substantially affect the

value of the parcel. On the other hand, if the site of a parcel that may be acquired is not known to the public, it is possible that open discussion or publicity would lead to speculation or offers from others, and that a municipality may be unable to reach an optimal agreement on behalf of the public, or that a transaction cannot be consummated. In those kinds of circumstances, I believe that §105(1)(h) could validly be asserted as a basis for entry into executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Tracy Cosilmon
Chief Joseph Snell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-16855

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November 13, 2007

E-Mail

TO: Ms. Ann Fanizzi

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Fanizzi:

I have received your letter and appreciate your kind words. Please accept my apologies for the delay in response.

You wrote that, over the course of three years, you sought information "concerning any road changes that would result from Patterson Crossing, a 400,000 sq. ft. 'Big Box' retail center to be situated at the edge of densely populated Lake Carmel in Kent..." Although you were informed by local representatives "that they had no knowledge of applications for changes or communications from officials", you learned "that the developer...and probably some town of Kent officials and Patterson have had discussions with DOT concerning the 'road improvements' all outside the purview of residents of the town." You also referred to an admission by the Kent Town Supervisor "that negotiations had indeed taken place.

You have sought suggestions relating to the matter. In this regard, I offer the following comments, some of which are technical in nature.

First, the title of the Freedom of Information Law is somewhat misleading, for it does not require the disclosure of information per se. Rather, it is a vehicle under which the public may request and generally obtain existing records. In short, the Freedom of Information Law does not require that a government agency create a new record in response to a request for information. Similarly, although government officials may choose to supply information by responding to questions and often do so, there is nothing in the Freedom of Information Law that requires they must do so.

Second, the Freedom of Information Law pertains to all government records, for §86(4) of that statute defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of the foregoing, as soon as records are prepared by or for or come into the possession of an agency, irrespective of their source or that they may be characterized as "draft" or "preliminary", they fall within the coverage of the Freedom of Information Law. 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 (j) of the Law. Therefore, when records come into the possession of a town official in relation to the performance of his or her duties, they are subject to rights of access conferred by the Freedom of Information Law.

Third, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Lastly, since you referred to "discussions" among government officials, I point out that the Open Meetings Law pertains to meetings of public bodies. A public body, according to §102(2), is an entity consisting of at least two members that conducts public business and performs a governmental function collectively, as a body. Town boards, city councils, boards of education and legislative bodies, for example, are "public bodies" subject to the Open Meetings Law. A "meeting" is a gathering of a quorum, a majority of a public body's total membership, for the purpose of conducting public business. Every meeting of a public body must be preceded by notice given in accordance with §104 of the Open Meetings Law, and held open to the public, unless there is a basis for entry into an executive session.

It is emphasized that when a gathering of less than a quorum of a public body occurs, the gathering would not constitute a "meeting", and the Open Meetings Law would not apply.

I hope that the foregoing serves to enhance your understanding and that I have been of assistance.

RJF:jm

cc: Kent Town Board
Patterson Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 13, 2007

Ms. Tobey Weissman
[redacted]

The staff of the Committee on 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. Weissman:

I have received your letter and hope that you will accept my apologies for the delay in response.

You wrote that you have encountered difficulty in gaining access to new building permits in the Village of Brewster. Those records are used "for a publication called the Blue book, published by McGraw-Hill." It is your intent, after receiving the name and address of the builder, contractor or architect listed on the permit, to include those items in the Blue Book. You wrote that you "are not asking for the names of the homeowners" and that you are willing to state in writing that you "will not use this information to contact the owners at their homes" and have "absolutely no intent to use this information to contact the homeowners for fund raising or commercial purposes."

Under the circumstances that you described, I believe that the records sought must be made available.

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 section 87(2)(a) through (j) of the Law. In my view, a building permit or permits should ordinarily be disclosed, for none of the grounds for denial would apply.

As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

The only exception to the principles described above involves one provision pertaining to the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant and the purposes for which a request is made are irrelevant to rights of access, and an agency cannot ordinarily inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names of natural persons and their residence addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an assurance that a list of names and addresses will not be used for commercial or fund-raising purposes. In that decision, it was stated that:

> "The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

In addition, it was held that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgement for that of the respondents" (id.).

Based on the foregoing, if it is clear that the records sought do not involve a list of names and addresses of homeowners, and/or if you assert in writing that any such list would not be used for commercial or fund-raising purposes, I believe that the Village would be required to disclose them.

Lastly, it is emphasized that the Freedom of Information Law is permissive. Even when an agency may withhold records or portions of records in appropriate circumstances, it is not required to do so. As stated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling which the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 13, 2007

Mr. Jay Oher
Cooper, Oher and Associates
68-38 Yellowstone Boulevard
Forest Hills, NY 11375-3417

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Oher:

I have received your correspondence in which you raised issues relating to several "fact patterns" concerning your requests made under the Freedom of Information Law to the Department of Taxation and Finance.

Several aspects of your comments involve the time within and the manner in which the Department responds 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.

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 there is no requirement that an agency's denial of a request identify or particularize the records that have been withheld. There is nothing in the Freedom of Information Law or judicial decision construing that statute that would require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each document. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index.

Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

Lastly, you referred to a situation in which records are withheld under the Freedom of Information Law, but then were introduced by the Department later in an administrative proceeding. As I understand your question, records accessible to the public pursuant to the Freedom of Information Law may differ from those used or made available in an administrative, judicial or quasi-judicial proceeding. When records are sought under the Freedom of Information Law, the applicant is as a member of the public and enjoys the rights of the public generally. On the other hand, disclosures made in the context of litigation or an administrative proceeding may be based on the status of a person or entity as a party to such a proceeding.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Christina Seifert
David Milstein
Daniel Smirlock
Barbara G. Billet
Deborah Liebman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 13, 2007

Mr. Antony Tseng
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tseng:

I have received your letter and hope that you will accept my apologies for the delay in response.

You have sought clarification with respect to rights of access to "police blotters" and "dispatch reports."

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 dispatch 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 dispatch or 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 (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 [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, dispatch or 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 dispatch 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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November 13, 2007

Hon. Deborah Bjorkman
Town Clerk
Town of Pleasant Valley
1554 Main Street
Pleasant Valley, NY 12569

The staff of the Committee on 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. Bjorkman:

I have received your letter and hope that you will accept my apologies for the delay in response. You have sought an opinion "on releasing the findings filed by [y]our Town's Ethics Committee." You added that two separate issues were forwarded to the Ethics Committee for review and that it filed written opinions with respect to both.

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.

If the Town's Ethics Committee is typical of similar entities, it does not have the power to render final and binding decisions, but rather is authorized to offer opinions to the Town Board. Based on that assumption, I believe that two of the grounds for denial of access are pertinent in responding to your inquiry.

Perhaps most significant is §87(2)(g) of the Freedom of Information Law, which authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Also relevant, as inferred above, is §87(2)(b), which authorizes an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

As records pertain to public officers or employees, the courts have provided substantial direction. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those persons are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of a public official's duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which final determinations indicating the imposition of some sort of disciplinary action pertaining to particular public officials were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Applying the foregoing to the matter at issue, an advisory opinion prepared by the Ethics Committee could in my view be withheld, except in two circumstances. One situation in which the opinion of the Ethics Board would be public would involve the case in which the Town Board clearly adopts the opinion as its own, thereby making the opinion a final determination, and finds that an officer or employee engaged in misconduct (see e.g., Miller v. Hewlett-Woodmere Union Free School District, Supreme Court, Nassau County, NYLJ, May 16, 1990, in which

recommendations were uniformly adopted as the agency's final determination). The other would involve a situation in which a local law requires disclosure.

In consideration of the preceding commentary, in the typical situation in which the Freedom of Information Law determines rights of access, opinions offered by the Ethics Committee may be withheld, unless and until an opinion is adopted by the Town Board or a local enactment requires disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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November 13, 2007

Mr. Charles R. Voels
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Voels:

I have received your letter and hope that you will accept my apologies for the delay in response. You have sought an advisory opinion concerning a failure by the Town of Huntington to supply information in response to a series of questions.

From my perspective, it appears that you misunderstand the Freedom of Information Law. In consideration of the nature of your request, I note that the title of the Freedom of Information Law may be somewhat misleading. That statute pertains to existing records, and §89(3)(a) states in relevant part that an agency, such as a town, is not required to create a record in response to a request for information. Similarly, while agency staff or officials may provide information in response to questions, and may often do so, there is no obligation to do so to comply with the Freedom of Information Law. In short, the Freedom of Information Law is a vehicle that provides the public with the right to request records and that requires a government agency to make records available for inspection and or copying in accordance with its provisions.

In the future, rather than seeking to elicit answers to questions, it is suggested that you request records. By means of example, instead of asking: "who is the owner and what is his business address", you might request a record that includes the name and business address of the owner.

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: Ellen Schaffer

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November 13, 2007

E-Mail

TO: Ms. Kathryn Burke

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. Burke:

I have received your letter and hope that you will accept my apologies for the delay in response.

You indicated that you attend Farmingdale State College, and you raised several issues concerning compliance with the Open Meetings Law and the Freedom of Information Law by the Farmingdale Student Government ("FSG").

You referred first to a "fully-drafted, anonymously created budget" given to FSG members at the beginning of a budget meeting. Following the meeting, the FSG President referred to the draft as a "proposal" and that "its creation did not need to take place in an open meeting." You asked whether such a proposal may be accepted and voted upon and whether doing so would be "in compliance with the Open Meetings Law."

The Open Meetings Law is silent with respect to the ability to accept or approve such a proposal. The issue, in my view, involves the manner in which the proposal was prepared. The Open Meetings Law is applicable to meetings of public bodies, and it has been held that a student government body functioning within a branch of a public university constitutes a "public body" required to comply with the Open Meetings Law [see Smith v. CUNY, 92 NY2d 707 (1999)]. A "meeting" of a public body is a gathering of a majority of its total membership for the purpose of conducting public business, even if there is no intent to take action, and irrespective of the characterization of such a gathering.

If, for example, the proposal was drafted by persons other than members of FSG, or by members of FSG constituting less than a majority of FSG, I do not believe that the Open Meetings Law would have applied. On the other hand, if a majority of the FSG or a committee consisting of two or more FSG members gathered to draft or discuss the proposal, any such gathering, in my view, would have constituted a meeting subject to the requirements of the Open Meetings Law.

Second, an executive session was held, referring to "consolidation of accounts" and "salaries" as the justification. You wrote that:

> "No particular employee's salary was referred to within this proposal at anytime before or after the executive session. After the executive session was held, and non-voting members returned to the room, voting results of this executive session were declared. Amounts for accounts entitled 'salaries' (again, referred to as a lump sum for an undisclosed group of employees), 'co-sponsorship - FSG' and 'CD Units' were declared. I believe that 'CD Units' refers to certificates of deposit held by FSG."

From my perspective, it is unlikely that there was a proper basis for entry into executive session.

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.

I note that one of the grounds for entry into executive session often relates to personnel matters, but that the language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment,

> promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

When a discussion concerns financial matters, such as the consolidation of accounts or similar issues, none of the grounds for entry into executive session would apply. Similarly, if a discussion involves salaries for a group of employees and does not focus on the performance of a "particular person", again, I do not believe that there would have been a proper basis for conducting an executive session.

Lastly, if a public body allegedly has failed to comply with the Open Meetings Law, judicial review may be sought. Section 107(1) of the Open Meetings Law states in relevant 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."

I note that the actions of a public body remain in effect unless and until a court renders a contrary determination.

I hope that I have been of assistance.

RJF:jm

cc: Farmingdale Student Government

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November 14, 2007

Mr. Keith Lettley
97-A-5657
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. Lettley:

I have received your letter concerning an appeal made under the Freedom of Information Law to the Department of Correctional Services that apparently has not been answered.

In this regard, please note that the functions of the Committee on Open Government are largely advisory. The Committee does not have the staff or resources to conduct investigations, and it is not empowered to compel an agency to grant or deny access to records or otherwise comply with law.

I point out, however, that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in

> writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-16863

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 14, 2007

Mr. Anthony Medina
99-A-2999
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. Medina:

I have received your letter in which you indicated that you have not received any responses to your Freedom of Information Law requests directed to the NYS Department of Correctional 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-16864

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 14, 2007

Mr. LeRoy Keith Owens
05-R-3513
Queensboro Correctional Facility
47-04 Van Dam Street
Long Island City, NY 11101-3081

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Owens:

I have received your letter in which you indicated that the Village of Nyack Justice Court has failed to respond to your Freedom of Information Law requests.

In this regard, the New York Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law may grant broad public access to those records (see e.g., Uniform Justice Court Act, §2019-a). 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-16865

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 14, 2007

Mr. Malcolm Walters
02-A-0176
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Dear Mr. Walters:

I have received your letter in which you appealed a denial of access to records by the inmate records coordinator at the Southport 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 otherwise compel an agency to grant or deny access to records.

The provision concerning the right to appeal, §89(4)(a), states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

It is noted that the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16866

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 14, 2007

E-Mail

TO: Joe

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Joe:

I have received your inquiry and hope that you will accept my apologies for the delay in response. You asked whether "the information created as a result of mixed-use travel [is] available under FOIL" as referenced in an opinion of the entity formerly known as the State Ethics Commission.

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. In my view, one of the grounds for denial is pertinent to an analysis of rights of access to the kinds of records of your interest.

Section 87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and subject to a variety of interpretations, the courts have provided direction through their review of challenges to agencies' denials of access. In brief, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, it has been held that, as a general rule, records that are relevant to the performance of 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)].

In conjunction with the preceding remarks, I direct you to a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals, the State's highest court, found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the foregoing, I believe that the need to enable the public to make informed choices and provide a mechanism for exposing waste or abuse generally overrides any concerns involving personal privacy in relation to the use of state aircraft. The ability to do so is based on the condition that use of state aircraft for a "State purpose" is "the primary reason for the trip." Because that is so, I agree with the Commission's view that the records at issue are accessible to the public, for in my opinion disclosure would result in a permissible rather that an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16867

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 15, 2007

Mr. Garney Hayes, Jr.
00-A-6313
L.S.I.C. Facility
P.O. Box T
Brocton, NY 14716-0679

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hayes:

I have received your letter in which you sought guidance concerning the means by which you might obtain records relating to your parents' ascendants.

In this regard, the laws concerning access to the records differ from one state to another. However, a good source of genealogical information is the Mormon Church.

With respect to access to genealogical records in New York, although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, provisions of the Public Health Law deal specifically with birth and death records and fees for services rendered relating to searches for and copies of those records; the Domestic Relations Law includes provisions pertaining to marriage records. In brief, §4173 of the Public Health Law permits the disclosure of birth records by a registrar only upon issuance of a court order, or to the subject of the birth record or the parent or other lawful representative of a minor. Similarly, §4174 of the Public Health Law limits the circumstances under which the Commissioner of the Department of Health or registrars of vital records (i.e., town clerks) may disclose death records and specifies that those records are not subject to the Freedom of Information Law. As such, birth and death records are generally confidential and exempt from the disclosure requirements found in the Freedom of Information Law. Section 19 of the Domestic Relations Law pertains to marriage records maintained by town and city clerks and provides that some aspects of those records are available to the public, while others may be withheld unless there is a showing of a "proper purpose" that would justify disclosure.

The Public Health Law includes provisions that deal directly with genealogical records. Specifically, subdivision (3) of §4174 refers to searches for and the fees for records sought for

genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., a registrar designated in a city, or town. That provision states that:

> "For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

Further, the Commissioner of Health has promulgated "Administrative Rules and Regulations" pertaining to genealogical research indicating that birth records need not be disclosed unless the subject of the birth record is known to have been deceased prior to 1924; death records need not be disclosed regarding deaths occurring after 1949. The summary also includes a restriction regarding the disclosure of marriage records. However, in an opinion rendered by this office with which the Department of Health has agreed, it was advised that basic information contained in marriage records, such as the names of the parties, the dates of a marriage or marriage application, the duration of the marriage and the municipality of residence of licensees should be made available to any person, unless a request is made for commercial or fund-raising purposes. More intimate information would only be disclosed upon a showing of a "proper purpose."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16868

41 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 16, 2007

Mr. Peter De Felice
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. De Felice:

I have received your letter and the materials attached to it. You complained that neither the Board of Fire Commissioners in Eastchester nor the Eastchester Professional Fire Fighters union had responded to your requests for records made under the Freedom of Information Law.

In this regard, first, 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."

A fire district, whose governing body is a board of fire commissioners, clearly is a governmental entity and, therefore, an "agency" required to comply with the Freedom of Information Law. A union, however, is not part of the government and is not an agency that is required to comply with or give effect to that law.

Second, as it applies to agencies, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the

> approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Lastly, I point out that the Freedom of Information Law pertains to existing records and that §89(3)(a) states in part that an agency is not required to create a record in response to your request. There may be elements of your request that do not involve existing records. If that is so, the Board would not be obliged to prepare new records containing the information sought on your behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Cara M. Tiliero
Michael Chiappa

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16869

41 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 16, 2007

Mr. Leon Smith
248893
P.O. Box 300
Marcy, NY 13403-0300

Dear Mr. Smith:

I have received your letter in which you appealed a denial of access to records by the Office of the Kings County District Attorney.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee is not empowered to determine appeals or to 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 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-16870

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 20, 2007

E-Mail

TO: Ms. Tara Lupoli

FROM: Robert J. Freeman, Executive Director RJF

Dear Ms. Lupoli:

I have received your inquiry in which you asked whether we are "aware of any regulations on search fees for document requests which fall outside the scope of FOIL."

In this regard, as you may be aware, §87(1)(b)(iii) of the Freedom of Information Law pertains to fees and limits agencies' charges to twenty-five cents per photocopy up to nine by fourteen inches or the actual cost of reproducing any other records (i.e., when records are not or cannot be photocopied), unless a different is prescribed by statute. I note that the term "statute" has been construed by the courts to mean an enactment of the State Legislature [see e.g., Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS2d 214, 226 AD2d 339 (1996); Sheehan v. City of Syracuse, 521 NYS2d 707 (1987)]. A policy, a local law or state agency's regulation would not constitute a "statute" that would authorize an agency to assess a search fee or a fee higher than twenty-five cents per photocopy or the actual cost of reproduction.

I am aware of relatively few statutes that authorize or establish search fees. Among them are §66-a of the Public Officers Law, which enables the State Police to charge a search fee regarding accident and incident reports; §202 of the Vehicle and Traffic Law, which establishes a variety of fees concerning records maintained by the Department of Motor Vehicles; §4174(3) of the Public Health Law concerning genealogical searches; and §19 of the Domestic Relations Law relating to marriage records.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16871

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 20, 2007

E-Mail

TO: Mr. Mark Buffington

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Buffington:

I have received your letter in which you asked whether a "Youth Football Organization" can be "forced" to disclose its by-laws and fiscal records pursuant to the Freedom of Information Law.

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) of the Law defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law pertains to entities of state and local government. It does not apply to private entities, such as the organization to which you referred. If, however, the entity in question is a not-for-profit corporation, I believe that it is required to complete and disclose to any person a form 990 in order to comply with IRS regulations.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16872

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 20, 2007

Mr. James Dorsey
06-A-2454
Eastern New York Correctional Facility
Box 338
Napanoch, NY 12458

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dorsey:

I have received your letter in which you sought guidance concerning the time in which an agency must respond to an 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-16873

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 20, 2007

E-MAIL

TO: Adam Paquet

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Paquet:

I have received your letter in which you wrote that you are "wondering about a 'subject matter list' for producing information."

In this regard, first, as a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)].

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. The State Archives and Records Administration may be contacted by calling (518)474-6926.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16874

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 20, 2007

E-MAIL

TO: Jeffrey M. Negron

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Negron:

Your letter addressed to Secretary of State Cortes-Vazquez has been forwarded to the Committee on Open Government. The Committee, a unit within the Department of State upon which the Secretary serves, is authorized to provide advice and assistance relating to the Freedom of Information Law.

In brief, you wrote that you were the victim of a crime in front of your residence and that the perpetrator was arrested at the scene by an officer assigned to the 68th Precinct in Brooklyn. When you requested a copy of the report concerning the incident from the New York City Police Department, the request was denied. You have asked how and why that could be so.

From my perspective, it is possible that portions of the report might validly be withheld. However, I believe that the remainder should have been disclosed. In this regard, I offer the following comments.

First, in any instance in which a request for records is denied, the applicant has the right to appeal the denial in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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 name and address of the person designated by the Police Department to determine appeals are as follows:

Mr. Jonathan David
Records Access Appeals Officer
The City of New York Police Department
One Police Plaza, Room 1406A
New York, New York 10038

Second, with respect to the substance of your request, I believe that a record indicating that an incident precipitated a visit to a certain address and an arrest by a police officer must be disclosed, again, at least in part. This is not to suggest that detailed or personal information must be made available, but rather that a record including the fact that an arrest was made 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 arrest 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. Nevertheless, a booking record, the records of an arrest by the arresting agency, must be disclosed in great measure, if not in its 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 (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, 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.).

If a police blotter or arrest report includes more information than the traditional content of those records, 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 names of witnesses or informants might properly be withheld for a time or perhaps permanently, depending on the facts.

In considering the nature of the record 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:

"...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 Department in my view cannot claim that the report may be withheld in its entirety because it is "intra-agency" material.

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.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

In sum, police blotters and arrest reports, by their nature, differ in content from one situation or incident to another. To suggest that they may be withheld in their entirety, 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.

In an effort to encourage reconsideration of your request, copies of this response will be forwarded to the Department.

I hope that I have been of assistance.

RJF:tt

cc: Jonathan David
Sgt. James Russo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16875

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 20, 2007

E-MAIL

TO: Lisa Brauner

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. Brauner:

I have received your inquiry in which you raised the following question: "If a municipality makes requested documents available for review and the requesting party does not come to review them, for how long must the municipality keep those records available for review."

In this regard, there is nothing in the Freedom of Information Law that focuses on the issue or specifies the time period for which an agency must keep records retrieved pursuant to a request for review but which have not yet been inspected. That being so, it has been recommended that the applicant should be advised in writing that the records are available for review and that, unless he/she does so by a specific date, the request will be considered to have been withdrawn. In my view, so long as the deadline date for review is reasonable, i.e., two weeks, the agency would be acting in a manner consistent with law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16876

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 26, 2007

E-MAIL

TO: Joy Pruiksma

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Priuksma:

I have received your letter in which you sought guidance concerning "what is exactly deniable under the heading 'interagency material'" and referred to a plan presented at an open meeting of a board of education that was withheld on the ground that it "was not a finalized document."

In this regard, §87(2)(g) pertaining to inter-agency and intra-agency materials of the Freedom of Information Law involves communications between or among officers or employees of state and local government agencies. That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could

appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In 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).

Lastly, insofar as the contents of records are disclosed verbally or otherwise during an open meeting, I believe that an agency waives its ability to deny access.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1687

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 26, 2007

Mr. James R. Wooten
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wooten:

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. In our view, your straightforward request to the Department unnecessarily resulted in an incomplete answer to your request for two records, and reflects the Department's repeated failures to comply with the time limits required by law.

Your initial request, dated January 31, 2007, was for "a copy of the 911 transcript regarding a police complaint made on June 15, 2006, at approximately 2:20 PM by Mr. Erik Ferencz, a store manager at Duane Reade store located at 155 East 34th Street, New York, NY 10001", as well as a copy of the resulting written police report. The Department's response indicated that a large volume of pending FOIL requests and the many offices of the Department that maintain records prevented the Department from responding to your request before June 5, 2007.

On March 2, 2007, you appealed the Department's constructive denial of access to the requested records. On March 20, 2007, your appeal was denied as premature, and the Department determined that the approximate date by which the records would be provided to you was reasonable in light of the number of requests received by the agency, the scope of the request, and the resources available. The Department referenced the limited availability of staff members to process requests.

You received nothing further from the Department until, after requesting assistance from the Office of the Lt. Governor, by correspondence dated July 17, 2007, the Department sent what appears to be a computer generated summary of the 911 call for which you requested a transcript and police report. It is a half-page "Sprint report" consisting mostly of abbreviations and numerical references, including three blacked-out references. In its correspondence, the Department failed to explain its intention to provide the two records that you had requested, failed to provide a key to decipher the numerical references or abbreviations in the "Sprint report", and failed to offer any explanation for providing the "Sprint report" and withholding the blacked-out material. It is our

opinion, based on this response, that the Department failed to comply with law and constructively denied access to the requested records, as further explained below.

By correspondence dated August 14, 2007 you appealed the denial of access to the two requested records based on your understanding of the time limits required by law, the Department's failure to explain why it provided the "Sprint report" without a key or description of the codes referenced in the report, and its failure to deny or grant access in writing to the two records you had requested.

By correspondence dated September 14, 2007, the Department indicated that because the Department is only obligated to store recordings of 911 calls and police radio transmissions for 180 days from the date of occurrence, the tapes were automatically destroyed prior to your January 31, 2007 request. And, finally, on September 26, 2007, in response to your appeal the Department indicated that redactions from the "Sprint report" were made based on unwarranted invasion of personal privacy, that after a diligent search, the Department was unable to locate the written police report resulting from this particular phone call, that disclosure would interfere with judicial proceedings, and that other exemptions may apply to permit the Department to withhold the written report. These explanations were provided almost eight months after your request.

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.

In our opinion, the Department failed to provide access to the requested records, and in this case yo deny access within a reasonable time, as required by the Freedom of Information Law. The Department indicated that it would take approximately four months to locate and process a transcript of a 911 phone call and a related written report, despite the amount of identifying information provided in the request. The Department was unable to meet its self-imposed four month deadline and failed to provide notice or an explanation of any basis for further delay. And finally, only upon appeal did the Department indicate the basis for denying access to the requested records.

Although we have no information about the manner in which the Department's records are organized, indexed or stored, in our opinion, it is unlikely that almost eight months would be necessary to determine that tape recordings were destroyed in the normal course of business, except, perhaps, if inadequate personnel were dedicated to responding to such requests. In terms of its philosophy and intent, the Freedom of Information Law is intended 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.

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 city, town or village, etc.) to adopt rules and regulations consistent

with those promulgated by the Committee and with the Freedom of Information Law. Section 1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, 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.
> (3) 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.
> (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.

Finally, when a key or a code is required in order to decipher the contents of a record, it would be unreasonable, in our opinion, for the agency to provide access to the record but deny access to the key, and it is our opinion that such a key or code 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 noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. A key or code would appear to consist of factual information that must be disclosed.

In an effort to enhance understanding of and compliance with the Freedom of Information Law, a copy of this advisory opinion will be forwarded to those at the New York City Police Department who were involved with the processing of your 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: James Russo
Jonathan David
Peter Brower

FOIL-AO-16878

From: Freeman, Robert (DOS)
Sent: Monday, November 26, 2007 2:09 PM
To: Maisano, James
Subject: RE: FOIL question

Dear Mr. Maisano:

FOIL pertains to all agency records, and §86(3) defines the term "agency" to include any entity of state or local government (except the State Legislature and the courts) and includes specific reference to "...any...public authority..." That being so, a public authority is treated in the same way and has the same obligations under FOIL as a municipal government agency.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1687

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November 26, 2007

Mr. Kevin Sheils
99-A-5444
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Sheils:

I have received your letter which is described as an appeal made under the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals. 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-16880

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 26, 2007

Mr. Morris B. Yuson
#260730
Monroe County Jail
130 South Plymouth Avenue
Rochester, NY 14614-2213

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Yuson:

I have received your letter in which you wrote that neither the City of Rochester Police Department nor the Attorney Grievance Committee had responded to your requests made under the Freedom of Information Law.

In this regard, first, in my opinion, the Grievance Committee is not subject to the Freedom of Information Law. 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.

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)].

Next, the Rochester City Police Department is an agency subject to the Freedom of Information Law. That Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of

> the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Rochester Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16881

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November 26, 2007

E-Mail

TO: Mr. David Radovanovic

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Radovanovic:

I have received your letters concerning denials of access to records by the Village of Saugerties pursuant to the Freedom of Information Law. The requests were denied on the ground that disclosure would reveal the identity of a victim of a sex offense.

In this regard, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), is applicable in this instance. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-b of the Civil Rights Law, which prohibits disclosure of records that would identify the victim of a sex offense.

Specifically, 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."

In consideration of the foregoing, in my opinion, §50-b would prohibit the Village from providing you with records that identify the victim of a sex offense.

I hope that I have been of assistance.

RJF:jm

cc: Records Access Officer, Village of Saugerties

FOIL-AO-16882

From: Freeman, Robert (DOS)
Sent: Wednesday, November 28, 2007 9:01 AM
To: 'albert.burkhart@doc.nyc.gov'
Subject:

Dear Mr. Burkhart:

I have received your correspondence. With respect to the first item, it is true that the Freedom of Information Law pertains to existing records and that the law indicates that an agency is not required to create a record in response to a request [see §89(3)(a)]. It is also noted that nothing in that statute requires that an agency correct the content of or amend a record, even if it is inaccurate.

With respect to the second, the Committee on Open Government does not render determinations concerning the propriety of agencies' responses to requests for records. However, it does prepare advisory opinions involving questions relating to any aspect of 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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FOIL-AO-16883

From: Freeman, Robert (DOS)
Sent: Thursday, November 29, 2007 9:16 AM
To: 'Burkhart, Albert' , NYC DOC
Subject: RE:

Mr. Burkhart:

If my recollection is accurate, you are referring to a person's use of the personal computer assigned to you in a government office. If that is so, the email communications that you initiate or receive involving the use of that computer are not your personal property; rather, they are the property of the government agency that employs you. With respect to the ability to correct or amend a record, the Freedom of Information Law is silent with respect to that issue. I can not refer to any particular provision in that statute specifying that it does not confer a right to correct a record. My suggestion is that you review the Freedom of Information Law in its entirety. Should you do so, you will find that nowhere is there a provision concerning the amendment or correction of records.

Please know that I am not suggesting that the unauthorized use of a computer is in any way appropriate. Nevertheless, I reiterate my opinion that the information communicated through the use of an agency's computer is not the property of the person who is assigned to use the computer; it is within the custody of the agency.

I hope that the foregoing serves to clarify your understanding.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-4527
FOIL-AO-16884

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November 29, 2007

Mr. Robert Nied
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nied:

I have received your correspondence pertaining to the Town of Richmondville and its implementation of the Open Meetings Law and a response to a request made under the Freedom of Information Law to Schoharie County. Please accept my apologies for the delay in response.

In your initial letter, you referred to gatherings between the Town Board and representatives of Reunion Power, a private company, to discuss the possibility of amending the Town's zoning law to accommodate Reunion's proposal to construct an industrial wind turbine facility on private land. Specifically, you wrote that a quorum of the Board met with representatives of Reunion on March 29 without having given notice and entered into executive to engage in "contractual discussions." However, the discussion consisted of negotiations between a private landowner and Reunion concerning the lease of the landowner's property; the Town would not be a party to any agreement, and the Town's participation appears to have involved only consideration given to the need to amend the zoning law. You referred to another meeting held wholly in private in June by a quorum of the Town Board and representatives of Reunion.

In this regard, first, 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" during which a quorum of a public body attended and functioned as a body constituted a "meeting" that fell within the coverage of the Open Meetings Law, even though the members were invited to attend by a non-member [see Goodman-Todman v. Kingston, 153 AD2d 103 (1990)].

In sum, assuming that a majority of the Town Board convened at the events to which you referred, I believe that those gatherings constituted "meetings" required to have been held in accordance with the Open Meetings Law. Section 104 of that statute requires that notice of the time and place of every meeting be given to the news media and to the public by means of posting.

Second, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the topics that may properly be discussed during an executive session. The only reference among the eight grounds to "contractual discussions" pertains to "collective negotiations pursuant to article fourteen of the civil service law." Article 14 deals with collective bargaining negotiations involving a public employer and a public employee union. Clearly the topic at issue did not relate to collective bargaining. In short, as you described the situation, there would have been no basis for conducting an executive session at either of the gatherings to which you referred.

The issue concerning the request made to Schoharie County pertained to the deletion of a portion of a communication sent by an employee of Reunion to a County employee. Here I point out as a general matter that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

In any instance in which a request is denied in whole or in part, the person seeking the record must be informed of the denial, and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force and effect of law, require that the reason for the denial be given in writing and that the person denied access be informed of the right to appeal to the head or governing body of the agency or a person designated to determine appeals. You indicated that there was no explanation for the deletion. If that is so, and if you were not informed of the right to appeal, the County, in my view, failed to comply with law.

Lastly, I have reviewed the document at issue, which indicates that a portion of one line was deleted. Based on the context and the remainder of the content of the document, it is doubtful in my opinion that there was a valid ground for the deletion.

In an effort to enhance understanding and compliance with open government laws, copies of this opinion will be sent to the Town Board and County officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richmondville Town Board
Records Access Officer, Schoharie County
Alicia Terry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 29, 2007

E-MAIL

TO: Karen L. Polmateer

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Polmateer:

I have received your letter in which you asked whether "individual time off slips for accrued time/vacation" are public records.

Based on a unanimous decision rendered by the state's highest court, the Court of Appeals, the records in question must be disclosed to comply with law. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", and the courts have provided substantial direction regarding the privacy of public employees. According to those decisions, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance

of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

One of the decisions referenced above, Capital Newspapers v. Burns, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer, and in granting access, the Court of Appeals found that the public has both economic and safety reasons for knowing when public employees perform their duties and whether they carry out those duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of leave used or accrued must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties.

In affirming the Appellate Division decision in Capital Newspapers, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, it is clear in my view that the records at issue must be disclosed under the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16886

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November 30, 2007

E-MAIL

TO: Gregory Melton

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. Melton:

I have received the correspondence sent to this office, as well as that directed to Ms. Wilbard of the Department of State.

You complained with respect to a series of delays in responding to your requests made under the Freedom of Information Law to a school district. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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.

If you could provide additional detail concerning the nature of the records sought, perhaps I could offer more specific guidance.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16867

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December 3, 2007

Mr. William J. Brennan
Counsel
NYS Division of Veterans' Affairs
5 Empire State Plaza - Suite 2836
Albany, NY 12223-1551

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brennan:

I have received your letter in which you sought an advisory opinion concerning a request made pursuant to the Freedom of Information Law by Rockland County.

The County requested either names and mailing addresses pertaining to veterans after separation found in Certificates of Release or Discharge from Active Duty forms (DD form 214) filed from 2001 through August, 2007 that include certain zip codes, or DD Form 214's covering the same period and including the same zip codes. You indicated that "to respond to Rockland County's request, the Agency [the Division of Veterans' Affairs] would have to manually search approximately 60,000 documents to select (by zip code) those documents that Rockland County is requesting." Even if the Division was able to respond after having retrieved the records, you wrote that much of the material appearing on DD Form 214's would be redacted to prevent unwarranted invasions of personal privacy.

The primary issue in my opinion involves the requirement imposed by §89(3)(a) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. In this regard, 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 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.

From my perspective, since the Division cannot at present locate names and addresses of recent veterans by zip code without manually searching approximately 60,000 documents, the County's request would not reasonably describe the records, and the request could be rejected on that basis. I note that a copy of an advisory opinion rendered in 2004 was sent to representatives of the Rockland County Attorney's concerning a request for County records that stressed the same point, that "[w]hen an agency cannot locate the document with reasonable effort and an attempt to do so would involve the equivalent of a search for the needle in the haystack", the agency is not required to do so, even if it knows that the needle is somewhere in the haystack, for the request would not reasonably describe the record. A copy of that opinion, FOIL-AO 15048, is attached for your consideration.

Lastly, you indicated that the Division is in the process of converting military discharge materials to an electronic format, and that it has offered "to do a 'co-mailing' with the County when it has the capability to identify these returning veterans by zip code." This office has recommended many times over the years that similar action be taken in order that a class of persons can be reached, but without engaging in disclosures to a third parties that may result in unwarranted invasions of personal privacy or which involve records that are exempt from disclosure to the public by statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Michael P. O'Connor

FOIL-AO- 16088

From: Jobin-Davis, Camille (DOS)
Sent: Monday, December 03, 2007 3:52 PM
To: 'jyan@manhattanbp.org'
Subject: Freedom of Information Law - home addresses

Jimmy:

Although we don't have a written advisory opinion that is responsive to your exact question, I recommend that you redact home address and telephone information from the correspondence your agency received, based on an unwarranted invasion of personal privacy.

If I remember our conversation correctly, your agency is in receipt of correspondence from private individuals, submitted in response to the agency's invitation to comment. We discussed two different factual situations: one, when an agency proposes regulatory changes and is subject to a public comment period, in which case our advice is that release of a person's home address information would not be an invasion of personal privacy, and two, when an agency receives, unsolicited, a complaint from a private individual. In the latter situation, we recommend that disclosure of the individual's identifying information, including name, address and telephone number, would be an unwarranted invasion of personal privacy - see section 89(2)(b)(v) and the advisory opinion at the following link: http://www.dos.state.ny.us/coog/ftext/f15080.htm

Because the facts in your situation differ slightly, I offered to review our advisory opinions to see if we had written one relevant to your situation. I was unable to find one that fits your facts. In reading through our opinions, however, I have come to a different conclusion than I expressed in our telephone conversation. I believe it may be an unwarranted invasion of personal privacy for your agency to release home address and telephone information on correspondence that your agency solicited, however, I believe it would be appropriate to release individual names of persons making such comments. I believe this would be an appropriate middle ground, short of releasing all contact information, in keeping with the relatively public nature of the solicited comment environment.

I hope this is helpful to you. Please contact me if you have further questions.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16889

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 3, 2007

E-Mail

TO: Mr. Peter Meyer, Board Member, Hudson City School District

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Meyer:

I have received your letter in which you asked whether grievances submitted by members of bargaining units on behalf of members to the District on whose Board of Education you serve must be disclosed.

In this regard, I believe that the nature and content of grievances and records relating to them would determine 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 (j) of the Law. From my perspective, the ground for denial of most significance would be §87(2)(b). That provision enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

If, for example, a grievance relates to an issue involving a public employee in the nature of a health or medical problem, I believe that identifying details pertaining to the employee could justifiably be withheld. On the other hand, if the grievance does not focus on a particular employee but rather deals with a practice or policy of the District, for example, privacy would not be an issue, and the records in question would likely in my view be available in their entirety.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16890

41 State Street, Albany, New York 12231
(518) 474-2518
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December 4, 2007

Mr. Peter J. Walsh
[redacted]

The staff of the Committee on Open 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:

I have received your letter concerning rights of access to records of a condominium board and a property management company under the Freedom of Information Law. For the reason indicated below, it is unclear why the Attorney General's representative referred you this office.

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 includes entities of state and local government within its coverage. It does not apply to private entities, such as those to which you referred, and there is no general public right of access to the records of condominium boards or property management firms. It is suggested that, if possible, you review the rules and by-laws of the condominium board to ascertain whether residents may gain access to certain of its records.

I hope that the foregoing serves to clarify your understanding and regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16891

41 State Street, Albany, New York 12231
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December 4, 2007

Mr. Gerald Stevens
06-A-1009
Hale Creek Correctional Facility
P.O. Box 950
Johnstown, NY 12095-0950

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Stevens:

I have received your letter in which you referred to a delay by the Department of Correctional Services in responding 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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chad Powell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPL-AO-
FOIL-AO-16892

41 State Street, Albany, New York 12231
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December 4, 2007

Mr. Edward J. Aluck
NYS Public Employees Federation, AFL-CIO
1168-70 Troy Schenectady Road
P.O. Box 12414
Albany, NY 12212-12414

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Aluck:

I have received your letter and hope that you will accept my apologies for the delay in response. You have requested an advisory opinion concerning:

> "whether: (1) the Workers' Compensation Board ('WCB') may, pursuant to the *Personal Privacy Protection Law ('PPPL')*, maintain a resume submitted by a current employee for purposes of promotional consideration, after the position applied for has been filled by another candidate, and; (2) whether, pursuant the *PPPL* and the *Freedom of Information Law* ('FOIL'), a redacted copy of that resume may be released pursuant to a FOIL request."

The facts that precipitated your request for an opinion relate to an employee of the WCB who applied to fill a vacant position at that agency. The position was filled by a different person, but the WCB continues to maintain his current resume, as well as an older resume that he submitted prior to his appointment by the WCB more than ten years ago. In addition, in response to a FOIL request, the WCB provided a copy of his resume, following redactions, to a "disaffected Workers' Compensation claimant" and the claimant's son, apparently by mistake. When the subject of the resume asked that it be returned to him and removed from WCB's files, his request was refused.

From my perspective, the WCB likely did not act in a manner inconsistent with law. In this regard, I offer the following comments.

First, I believe that the resume constitutes a "record" as that term is defined in §86(4) of the FOIL and §92(9) of the PPPL. That being so, when it came into the possession of the WCB, I believe that the resume became the property of that agency. An agency cannot relinquish custody

of records, destroy or dispose of them, except in accordance with schedules promulgated pursuant to Article 57 of the Arts and Cultural Affairs Law. Those schedules indicate minimum records retention periods and, therefore, records cannot be disposed or returned, notwithstanding the desires of a the subjects of records, unless and until the agency is no longer required to retain the record.

Second, with respect to the ability of the WCB to "maintain" the resume, I believe that the provision that relates to that issue is §94(1)(a) of the PPPL, which states that:

> "Each agency that maintains a system of records shall:
>
> (a) except when a data subject provides an agency with unsolicited personal information, maintain in its records only such personal information which is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order, or to implement a program specifically authorized by law;"

In my view, a resume submitted by a candidate for employment, prior to, during or even following one's employment, is, perhaps in a variety of contexts, relevant and necessary to the purposes of an agency. It may be necessary to an agency for purposes of allocating staff based on employees' skills, licenses, certifications or degrees, in relation to qualification for promotion, or even in defense of a lawsuit. In short, in my opinion, there is no prohibition concerning an agency's authority to maintain one's resume for the period indicated in a retention schedule, or for a longer period, as it sees fit in accordance with the agency's functions.

Lastly, based on judicial precedent, significant portions of a public employee's resume or equivalent record are accessible to the public. 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. Most relevant is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an

unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

In conjunction with the foregoing, I note that it has been held by the Appellate Division that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

Additionally, in the lower court decision rendered in Kwasnik v. City of New York, (Supreme Court, New York County, September 26, 1997), the court cited and relied upon an opinion rendered by this office and held that those portions of applications or resumes, including information detailing one's prior public employment, must be disclosed. The Court quoted from the Committee's opinion, which stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

Quoting from the opinion, the court also concurred with the following:

> "Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

Items within an application for employment or a resume that may be withheld in my view would include social security numbers, marital status, home addresses, hobbies, and other details of one's life that are unrelated to the position for which he or she was hired.

In affirming the decision of the Supreme Court, the Appellate Division found that:

> "This result is supported by opinions of the Committee on Open Government, to which courts should defer (*see, Miracle Mile Assocs. v. Yudelson,* 68 AD2d 176, 181, *lv denied* 48 NY2d 706), favoring disclosure of public employees' resumes if only because public employment is, by dint of FOIL itself, a matter of public record (FOIL-AO-4010; FOIL-AO-7065; Public Officers Law §87[3][b]). The dates of attendance at academic institutions should also be subject to disclosure, at least where, as here, the employee did not meet the licensing requirement for employment when hired and therefore had to have worked a minimum number of years in the field in order to have qualified for the job. In such circumstances, the agency's need for the information would be great and the personal hardship of disclosure small (*see*, Public Officers Law §89[2][b][iv])" [262 AD2d 171, 691 NYS 2d 525, 526 (1999)].

In sum, again, I believe that the details within a resume or an employment application that are irrelevant to the performance of one's duties may generally be withheld. However, based on judicial decisions, those portions of such a record or its equivalent detailing one's prior public employment and other items that are matters of public record, general educational background, licenses and certifications, and items that indicate that an individual has met the requisite criteria to serve in the position, must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: James Mulligan
Patrick J. Cremo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16893

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 4, 2007

E-MAIL

TO: William Warnecke

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Warnecke:

I have received your letter and hope that you will accept my apologies for the delay in response.

The matter relates to your request for a variety of records of the Onteora Central School District and you were informed that photocopies of the records would be made available based on payment of twenty-five cents per page at a total cost of $109.50, or that the records would be available for your inspection at no charge. You indicated that you are unable to pay the fee for photocopying, and that it is likely that you "would be unable to understand what's in those 438 pages." That being so, you expressed the belief that the District's response is "unreasonable and unfair."

In short, I disagree and offer the following comments.

First, having reviewed your request, I note that the Freedom of Information Law pertains to existing records. There is nothing in that law that requires that government agencies, such as school districts, provide answers to questions or provide explanations of the content of their records. Therefore, unless it expressed in a record, the District would not be required to explain "The reason for (why they worked) the overtime that was required in the Custodial Department in the 2005/2006 School year." It could choose to do so, but would not be required to do so to comply with law.

Second, when records are required to be disclosed under the Freedom of Information Law, the records are available for inspection and copying [see §87(2)], and when a person seeking copies asks that records be photocopied, §87(1)(b)(iii) states that an agency may charge up to twenty-five cents per photocopy. Consequently, if you requested photocopies, the fee indicated by the District

would be consistent with law. Alternatively, records may be inspected at no charge. When a person chooses to do so, he or she may take notes or manually copy the records.

Lastly, the Freedom of Information Law was recently amended, and §89(3)(b) states that, provided that an agency "has reasonable means to do so," it must, "to the extent practicable", make records available by means of email. Therefore, if the District has the ability to do so with reasonable effort, it is required to make records available via email. When records are made available in that manner and no copies are made, there can be no fee.

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-16894

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 5, 2007

E-Mail

TO: Mr. Kenneth Bartholomew

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. Bartholomew:

I have received your letter in which you questioned an agency's ability to charge a fee for copies of records that have been redacted before you may photograph the redacted copies.

In my view, the assessment of the fee is consistent with law. When a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect or photograph 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 or photograph 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 redactions or deletions from a copy of the record.

For example, I do not believe that you would have the right to inspect W-2 forms, for they include information that you have no right to see. Based upon the direction provided by the Freedom of Information Law and the courts, insofar as W-2 forms pertaining to public employees indicate gross wages, they must be disclosed. However, pursuant to §87 (2)(b) of the Freedom of Information Law concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

In short, when portions of records may be withheld, an agency may seek payment of the requisite fee for photocopies, which would be made available after the redactions or deletions of

certain details (see Van Ness v. Center for Animal Care and Control and the New York City Department of Health, Supreme Court, New York County, January 28, 1999).

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16895

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 5, 2007

Ms. Jennifer Forte
[redacted]

The staff of the Committee on 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. Forte:

I have received your letter and hope that you will accept my apologies for the delay in response. You referred to difficulty in obtaining records relating to the investigation of a nurse and a veterinarian by the State Education Department and delays by the Department in dealing with your requests.

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.

Most pertinent in my view is §87(2)(a), the initial ground for denial of access, which concerns records that "are specifically exempted from disclosure by state or federal statute." One such statute is §6510 of the Education Law, entitled "Proceedings in cases of professional misconduct." As you may be aware, nurses and veterinarians are considered as professionals and licensed by the State Education Department. Subdivision (8) of §6510 states that:

> "The files of the department relating to the investigation of possible instances of professional misconduct, or the unlawful practice of any profession licensed by the board of regents, or the unlawful use of a professional title or the moral fitness of an applicant for a professional license or permit, shall be confidential and not subject to disclosure at the request of any person, except upon the order of a court in a pending action or proceeding. The provisions of this subdivision shall not apply to documents introduced in evidence at a hearing held pursuant to this chapter and shall not prevent the department from sharing information concerning investigations with

> other duly authorized public agencies responsible for professional regulation or criminal prosecution."

In consideration of the foregoing, it appears that the records of your interest are exempted from disclosure.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

FOIL-AO-16896

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, December 05, 2007 4:04 PM
To: 'steven_blow@dps.state.ny.us'
Subject: Freedom of Information Law - appeal constructive denial

Steve:

In response to your question about how long an applicant would have to appeal a constructive denial of access, please note that there is no case law regarding this issue and the statute does not address it. Upon reflection, I believe that as long as an agency continues to indicate that it is continuing to search for requested records, the applicant has the ability to appeal. FOIL requires that the agency provide a date specific by which it will respond in full. If it does not, if it only indicates that it is continuing to search for records, the agency has, in my opinion, left the door open for an appeal to its constructive denial. I have discussed the question with the executive director here. We agree that as long as an agency does not provide a date specific by which it will respond in full, as required by statute, the applicant continues to have the ability to appeal a constructive denial of access.

I hope this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 6, 2007

Mr. Frank Pagan
06-R-0403
N-42B
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

Dear Mr. Pagan:

I have received your letter in which you appealed a denial of access to police reports relating to your arrest.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. This office is not empowered to determine appeals, and it does not have custody or control over records generally. In short, the Committee does not maintain the records of your interest, and it cannot order disclosure.

When seeking records, a request should be made to the "records access officer" at the agency that you believe maintains the records. The records access officer has the duty of coordinating an agency's response to requests for records. The provision dealing with appeals of denials of access, §89(4)(a), states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. "

I hope that 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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December 6, 2007

Mr. Toindra Ramdeo
97-A-3482
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582

Dear Mr. Ramdeo:

I have received your letter in which you asked "how much money New York State receives from the Federal Government each year to keep one person in prison..."

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 possess records generally, and we do not have records or information that relate to your question.

I point out that the Freedom of Information Law pertains to existing records and states that agencies are not required to create new records in order to respond to a request. If no record exists indicating the amount of money received from the federal government to house one person in prison, there would be no obligation to create a record containing that information on your behalf. On the other hand, if an agency does have a record containing the information sought, I believe that it would be accessible to the public. When seeking such a record, a request should be made to the "records access officer" at the agency that you believe would maintain the record. The records access officer has the duty of coordinating an agency's response to requests for records.

Since the likely source of a record containing the information of your interest would be the Department of Correctional Services, it is suggested that you submit a request for records to the Department's records access officer at its central office in Albany.

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-16899

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December 10, 2007

Mr. Damon Holmes
95-A-1809
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. Holmes:

I have received your letter in which you asked whether "the five (5) days to respond, acknowledge or deny a FOIL request is a statutory requirement, which once violated by non-compliance by a state agency is good enough to then file an Article 78...."

While the Freedom of Information Law requires that an agency respond to a request in some manner within five business days, a failure by an agency to do so does not give the person denied access the ability to initiate an Article 78 proceeding. Rather, that person must appeal and have his or her appeal denied before commencing a judicial proceeding.

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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in

> writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 12, 2007

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:

I have received your letter and hope you will accept my apologies for the delay in response.

You have sought an advisory opinion concerning a request made to the Department of Correctional Services for various records, including contracts between the Department and medical providers, as well as the dates of locations, employment, salary, assignments and duty status pertaining to a named doctor employed by the Department and any complaints and records involving disciplinary proceedings pertaining to him. In response to your initial request, you were informed that no such records were maintained by the Department's central office, and it was suggested that your request be made to a certain Department facility. You did so, and the request for contracts was denied on the ground that the records "do not exist here at Mohawk Correctional Facility." With respect to records concerning the employee, you were informed that:

> "The agency Roster and Employee History were denied in part because complete disclosure of the requested records would constitute an unwarranted invasion of personal privacy [POL 87-2(b)]. These documents provide full employment information for Dr. Zaki. We do not have any disciplinary proceedings or complaints on file regarding Dr. Zaki."

It is your contention that "[s]omeone has to have a copy of the contract between the provider and the prison." Further, you wrote that the denial that any complaints were made concerning the doctor "is a lie because [you] personally filed one."

In this regard, I offer the following comments.

First, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of

Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." It is suggested that you request the certification described above from records access officers at both the central office and the facility to which you referred.

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, if contracts falling within the scope of the request do exist, I believe that they must be disclosed. In short, none of the exceptions to rights of access could, in my opinion, be asserted to withhold those records.

Third, in my opinion, many of the items that you requested pertaining to the doctor must be disclosed. Perhaps of greatest significance is the provision to which the agency alluded, §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those persons are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Insofar as a request involves a final agency determination, I believe that such a determination must be disclosed, again, unless a different ground for denial could be asserted.

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

On the other hand, charges that were not sustained or that were withdrawn or complaints that were not substantiated could, in my view, also be withheld for the same reason. Further, internal communications between or among Department employees reflective of opinions or recommendations could, as suggested earlier, be withheld under §87(2)(g). However, for reasons previously discussed, any determination reflective of a finding of misconduct regarding the doctor should, in my opinion, be disclosed.

Additionally, the basic information that you requested concerning the doctor, such as dates and locations of employment with the Department, salary, assignments and the like must be disclosed, for disclosure of those items would, in my view, constitute a permissible rather than an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chad Powell
Judy L. Palmer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 12, 2007

Sarah Hall, Editor
Liverpool Review
Eagle Newspapers
5910 Firestone Drive
Syracuse, NY 13206

The staff of the Committee on 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 you wrote that you "have had several former members of [y]our local school board approach [you] and state they have information, but they cannot divulge it as it was discussed in executive session." You expressed an understanding, however, that "once an individual is no longer a member of the board, they are no longer bound by confidentiality in terms of executive session and are free to discuss it if they so choose."

You have asked that I confirm that to be so. In brief, in my opinion, the only instances in which members of a public body, such as a board of education, 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." Further, when an individual no longer serves as a board member, as you have suggested, with one exception, I believe that he/she is free to discuss any topic.

I note that the Commissioner of Education has rendered a decision indicating that board members may be removed from office if they divulge information acquired during an executive session. Notwithstanding my disagreement with that decision, I do not believe that it would apply to a former board member.

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. Not referenced, 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.

I am not suggesting that board members, present or former should intentionally disclose information that could clearly be damaging to an individual or the operation of a governmental entity. However, based on the proceeding analysis, I reiterate my belief that the Commissioner's conclusion is inconsistent with both state and federal judicial decisions.

Lastly, if a person no longer serves as a member of a board of education, I do not believe that he or she could be penalized by the Commissioner of Education or a board of education. Further, I believe that, with one exception, a former board member is free to disclose information as he/she sees fit. The exception, in my opinion, would involve information identifiable to a student acquired in his/her capacity as a member of the board when that information is required to be kept confidential by federal law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 12, 2007

Mr. Eduardo Crosse
07-A-5018, B-1-10-TOP
9300 Lakeview Shock Incarceration Corr. Fac.
P.O. Box T
Brocton, NY 14716-0679

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Grosse:

I have received your letter in which you asked for guidance concerning a request made under the Freedom of Information Law to a legal aid organization appointed to represent you that has not been answered.

In this regard, the Freedom of Information Law, pertains to records maintained by agencies. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Therefore, in general, the Freedom of Information Law is applicable to entities of state and local government.

It is my understanding the there are a variety of entities within New York that use the name "Legal Aid Society". Some are a part of the federal Legal Services Corporation, some may be private not-for profit corporations, and some may be parts of units of local government. While legal aid societies which are agencies of local government may be subject to the Freedom of Information Law, most are not "agencies" as that term is defined in the Freedom of Information Law and, as such, are not subject to that statute.

I am not familiar with the specific status of the legal aid group in question. However, if it is a corporate entity separate and distinct from government, in my opinion, it is not an "agency"

subject to the Freedom of Information Law. In that situation, the records in which you are interested would be outside the scope of public rights of access.

On the other hand, if it is part of the government, I believe that it would constitute an "agency" required to comply with the Freedom of Information Law. When an entity is subject to that statute, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

In view of the foregoing, it is suggested that you discuss the matter with an attorney. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 12, 2007

E-MAIL

TO: Richard Perry

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Perry:

I have received your letter and hope that you will accept my apologies for the delay in response. You referred to unsuccessful efforts in obtaining information pertaining to "durable medical goods suppliers" that are licensed by New York City.

In this regard, I offer the following comments.

First, in an effort to deal with your complaint, an attempt was made to ascertain which agency licenses durable medical goods suppliers, but I was unsuccessful and am unaware of any licensing requirement imposed either by the state or New York City.

Second, there is no law of which I am aware that requires that agency employees supply information via the telephone or respond to questions. However, they must respond to requests for records pursuant to the Freedom of Information Law and may require that any such requests be made in writing.

Third, as you may be aware, the regulations promulgated by the Committee on Open Government (21 NYCRR §1401.2) require that each agency designate one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests for records, and requests should generally be made to that person.

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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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 12, 2007

Mr. Joseph M. Walsh
Walsh & Walsh, LLP
42 Long Alley
Saratoga Springs, NY 12866-2116

The staff of the Committee on Open 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 correspondence and attached materials. Thank you for forwarding the decision by the Saratoga County Supreme Court, Boghosian v. Heritage Springs Sewer Works, Inc., (December 19, 2006) and expressing your concerns with respect to the advisory opinion issued to Mr. Vincent Valenza on May 10, 2006. In response to the decision, we have withdrawn the advisory opinion from our website and await a decision by the Appellate Division.

Briefly, we note that the court in Boghosian does not provide any analysis of the law concerning application of the term "agency" to a for-profit sewer service provider such as your client, Heritage Springs Sewer Works, Inc., citing Ervin v. Southern Tier Economic Development, Inc., 26 AD3d 633, 809 NYS2d 268 (3rd Dept, 2006). In Ervin, the Appellate Division distinguished the not-for-profit corporation based on membership on its board, which included six private individuals and three *ex officio* members, none of whom exercised any financial control over the corporation, and the municipality's lack of control and oversight over the management of the corporation. In our opinion there is one difference between the responsibilities of the Heritage Board and the Southern Tier Economic Development Board, and that is the municipality's required participation in the rate setting.

With respect to the advisory opinions concerning this issue that you referenced in your memorandum of law, we note that each request for an advisory opinion is considered on a case by case, fact specific basis. Since the decision in Boghosian has been appealed, we do not believe that this issue can be considered to have been finally determined. And, as previously expressed, it continues to be our opinion that some of Heritage's records may fall within the scope of the Freedom of Information Law regardless of whether it is determined to be an agency subject to FOIL.

Again, thank you for your attention to these matters.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

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December 13, 2007

Ms. Shirley J. Motyl
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Motyl:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Galway Volunteer Fire Department. There is little to offer, however, in addition to the advisory opinions previously rendered at your request with respect to the issue that you raised.

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.

As previously advised, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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 he 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.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: George Hargrave, Town Supervisor
Tim Horrigan, Town Attorney
Douglas DeRidder, Chief
Barbara Plummer, Records Access Officer, County of Saratoga

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 13, 2007

E-Mail

TO: Mr. Thomas Callahan

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open 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 and hope that you will accept my apologies for the delay in response.

You requested records from the Newfane Central School District pertaining to a law firm that represents the District, including "payment information" and records indicating attendance by the firm's attorney at meetings involving the District. In response, records were made available, but only after having been heavily redacted. Based on a review of copies of the records made available to you, any meaningful descriptions of services rendered were deleted.

From my perspective, many of the redactions appear to have been improperly made. In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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)].

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.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with such an attorney-client relationship may be considered privileged under §4503 of the CPLR. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does

> not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.)...
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters being communicated and, consequently, was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)"

In short, in Knapp, even though portions of the records containing the time billed and the amount paid for the time, it was determined that other aspects of billing statements indicating "the general nature of legal services performed", as well as certain others, did not fall within the attorney client privilege and were available.

In the other decision dealing with the issue under the Freedom of Information Law, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], the matter involved a request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). While monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.).

Although the County argued that the "description material" is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the CPLR, the court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determines the extent to which the privilege applies. Further, the court distinguished between

actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications...
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

In my view, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, I would agree that references identifiable to students may properly be deleted. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

In the context of your request and the deletions made by the District, I believe that names of students, private citizens and witnesses, for example, could be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Similarly, insofar as the records include information in the nature of a description of legal advice, legal strategy or similar information reflective of communications falling within the scope of the attorney-client privilege, I believe that deletions would have been proper. However, I do not believe that the name of a current or former officer or employee of the District in relation to a discussion involving the performance of that person's duties could be withheld in every instance.

In sum, for reasons offered earlier, I believe that a description of legal advice or litigation strategy may be withheld. Nevertheless, I believe that an entry that indicates discussion occurred or that advice was rendered, without in indication of the nature of that advice, would not be privileged and must be disclosed to comply with the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education
Gary Pogorzelski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 14, 2007

Mr. Travis Hayes
03-A-5953
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hayes:

I have received your letter in which you referred to requests for records made to the City of Newburgh that have not been answered.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: City Manager

STATE OF NEW YORK
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December 14, 2007

Mr. Don Murphy
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Murphy:

Your letter sent to the State Education Department 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.

In your letter, you referred to the inability to obtain bills, particularly those involving payments to law firms, that were directed to or paid by the Rochester City School District. You asked how you might "force the release of the information" and whether "professional misconduct charges [may] be brought by a member of the community..."

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.

In most instances, bills and records of payment by a government agency, such as a school district, must be disclosed, for none of the grounds for denial of access would be applicable.

With specific respect to bills, invoices and related records involving payments to attorneys, most pertinent in my view is the first ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared or imparted pursuant to an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with such an attorney-client relationship may be considered privileged under §4503 of the CPLR. Further, since the

enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.)...
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters being communicated and, consequently, was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)"

In short, in Knapp, even though portions of the records containing the time billed and the amount paid for the time, it was determined that other aspects of billing statements indicating "the general nature of legal services performed", as well as certain others, did not fall within the attorney client privilege and were available.

In the other decision dealing with the issue under the Freedom of Information Law, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], the matter involved a request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). While monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.).

Although the County argued that the "description material" is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the CPLR, the court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determines the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications...
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

In my view, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, I agree that references identifiable to students may properly be deleted. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

In the context of your request and the deletions made by the District, I believe that names of students, private citizens and witnesses, for example, could be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Similarly, insofar as the records include information in the nature of a description of legal advice, legal strategy or similar information reflective of communications falling within the scope of the attorney-client privilege, I believe that deletions would be proper. However, in my opinion, as indicated earlier, the general description of services rendered, and in most circumstances, the names of District officials, must be disclosed.

As you may be aware, when a request made under the Freedom of Information Law is initially denied, the person denied access must be informed of the right to appeal the denial pursuant to §89(4)(a). That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

If an appeal is denied, the person denied access may challenge the denial by initiating a judicial proceeding under Article 78 of the Civil Practice Law and Rules. When such a proceeding is brought under the Freedom of Information Law, the agency denying access has the burden of demonstrating that its denial was consistent with law.

Lastly, I cannot answer your question concerning charges of professional misconduct. In short, that issue is beyond the jurisdiction or expertise of this office. However, since the focus of your letter relates to the expenditure of public moneys, it is suggested that you might contact the Office of State Comptroller.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Rochester City School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 14, 2007

Mr. Ahib Paul
03-A-5192
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Paul:

I have received your letter in which you referred to responses to your requests in which representatives of the Office of the Bronx County District Attorney indicated that the records sought could not 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." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 14, 2007

Mr. Ben Venable
Legal Investigator
Watts Law Firm, LLP
555 N. Carancahua Ste. 1400
Corpus Christi, TX 78478

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Venable:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response. You have sought guidance concerning a request for records of the City of Buffalo Fire Department relating to a fatal house fire. The request was denied in its entirety on the basis of §87(2), paragraphs (e)(i) and (iii) and (g) of the Freedom of Information Law.

In this regard, As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 [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 blanket denial of access to records is inconsistent with the requirements of the Freedom of Information Law, for it was stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, I believe that they must be reviewed by the Department for the purpose of identifying those portions that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

With respect to the exceptions cited in response to your request, §87(2)(e)(i) permits an agency to withhold records "compiled for law enforcement purposes" insofar as disclosure would "interfere with law enforcement investigations or judicial proceedings." Therefore, subparagraph (i) may justifiably be asserted only to the extent that disclosure would result in the harm expressed in that provision, i.e. to the extent that disclosure would "interfere" with a law enforcement investigation or judicial proceeding. Subparagraph (iii) of §87(2)(e) refers to the ability to deny access when disclosure would identify an informant.

From my perspective, although it is possible that some aspects of the records at issue may properly be withheld under §87(2)(e)(i) or (iii), it is doubtful that the records could be withheld in

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation" (id., 276-277)."

I would conjecture that at least some elements of the record, in accordance with the direction offered by the Court of Appeals, would consist of factual information that must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Alisa A. Lukasiewicz
Cavette A. Chambers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 17, 2007

Mr. Keith Lettley
97-A-5657
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lettley:

I am in receipt of your letter in which you describe a lack of response from your correctional facility to a request made under the Freedom of Information Law.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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 17, 2007

Mr. Michael Miranda
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Miranda:

I have received your letters in which you wrote that it was reported to the Chancellor of the New York City Department of Education that "a Principal repeatedly struck a 7 year old student" and also that "a Principal repeatedly struck a 7 year old mentally challenged student." You alleged that in both instances, the Chancellor "ignored repeated requests to reveal the outcome of the investigation'."

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records and provides in §89(3)(a) in relevant part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no record indicating the "outcome" of an investigation or inquiry, the Department would not be required to prepare a new record containing the information sought on your behalf.

Second, 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 (j) of the Law.

I note that there is nothing in the Freedom of Information Law that deals specifically with personnel records or files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980).

On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Three of the grounds for denial are relevant to an analysis of the matter.

Section §87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g), which exempts from disclosure records or portions of records maintained by an educational agency that contain personally identifiable information pertaining to a student, unless a parent consents to disclosure. Therefore, insofar as the disclosure of the records would make a student's identity "easily traceable" (see 34 CFR §99.3), the Department must in my opinion deny access absent parental consent to disclose.

Also 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". 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 those persons, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In consideration of the foregoing, if there is a final determination indicating a finding or admission of misconduct, I believe that it would be accessible. On the other hand, if there has been no such determination or admission, I believe that allegations, complaints or unsubstantiated charges could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see Herald Company v. City of Syracuse, 430 NYS2d 460 (1980)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chancellor Joel I. Klein

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 17, 2007

Mr. Emilio L. Colaiacovo
Associate Counsel
Erie County Water Authority
350 Ellicott Square
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.

Dear Mr. Colaiacovo:

I have received your letter and hope that you will accept my apologies for the delay in response. You have asked that I confirm an oral opinion offered by Ms. Camille Jobin-Davis, the Committee's Assistant Director, during a telephone conversation with you.

By way of background, you wrote that you submitted a request pursuant to the Freedom of Information Law to the Department of Correctional Services concerning a former employee of the Erie County Water Authority relating to his employment with the Department, and that records were disclosed to you by the Department. You later received a request made under the Freedom of Information Law for records pertaining to that employee. You asked whether the Authority must "provide documents regarding the employee that [you] have in [your] possession that [you] maintain internally as well as the documents that [you] FOILed from the NYS Department of Corrections" [sic]. Ms. Jobin-Davis indicated that the Authority must provide access to both, and I agree.

In this regard, perhaps most significant is the definition of the term "record." Section 86(4) of the Freedom of Information Law defines "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared, the function to which it relates, or its origin are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

Based upon the foregoing, when documents come into the possession of the Authority, even though they may have been made available by a different agency, for the purpose of the Freedom of Information Law, I believe that they constitute "records" of the Authority subject to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 18, 2007

Ms. Ann 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:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to various requests for records made to the Town of Pitcairn, and application of the Open Meetings Law to certain actions of the Town Board. In response to your questions regarding ethics issues and conflicts of interest, we point out that the Committee on Open Government is authorized to provide guidance concerning the Freedom of Information and Open Meetings Laws. We are not empowered to provide opinions concerning ethics laws. In response to your questions regarding access to records and meetings, we offer the following.

First, it is our understanding that the Town contracted with Hancock & Estabrook ("law firm") for legal services, and to retain Thew Associates ("surveyor") to survey Vrooman Road. We note that the Town denied access to itemized bills relating to the law firm and surveyor and failed to provide a copy of the "confidentiality agreement" you requested, despite repeated reference to this agreement in public meetings (see Minutes November, 2006; May 14, 2007), which will be addressed later in this correspondence. Instead, the Town provided a copy of an unsigned retainer agreement for "legal services on an as needed basis for Town matters at your discretion" and denied access to the remainder of the records based on the attorney-client privilege.

It appears that the records you have requested are Town records that fall within the framework of the Freedom of Information Law and should have been provided to you in whole or in part.

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 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)].

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, we 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, 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 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 deletions would have been proper. More importantly, we do not believe that the Town has the authority to deny access to billing statements for legal services in their entirety.

Further, the records you requested indicating amounts paid to a surveyor would not fall under the attorney-client privilege, and it is likely that they should be disclosed in their entirety based on the above analysis. While these records may not be in the physical custody of the Town, based on the nature of the relationship between the Town and the lawfirm, it appears that they are Town records that fall within the framework of the Freedom of Information Law. As indicated above, that statute pertains to agency records, such as those of a county department, and §86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever

> including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

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. 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 Hancock & Estabrook are "kept, held, filed, produced or reproduced...*for* an agency", such as the Town, i.e., for the purpose of providing services that would otherwise be carried out by that entity, we believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform Hancock & Estabrook 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, for example, those pertaining to the surveyor, 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 did in this instance. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation described in the correspondence, insofar as Hancock & Estabrook maintains records for the Town, to comply with the Freedom of Information Law and the implementing regulations, the records access officer

must either direct Hancock & Estabrook to disclose the records in a manner consistent with law, or acquire the records from them in order that she can review the records for the purpose of determining rights of access.

With respect to the "confidentiality agreement" and any records that have been withheld based on such alleged agreement, we note that a request for or promise of confidentiality is irrelevant in determining the extent to which Town 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".

Clearly, it is the content of the records that is relevant in determining the extent to which they are available or deniable under the Freedom of Information Law.

We turn now to the Open Meetings Law issues identified in your correspondence. There were multiple occasions over the past two years when the Town Board entered into executive session to discuss legal matters pertaining to Vrooman Road, or to discuss the Vrooman Road survey (August 2006, October 2006, February 2007).

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 our 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 the preceding paragraph, i.e., that they are intended to enable public bodies to avoid some sort of identifiable harm. Specifically, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session, for it has been 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, we 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, it is not clear from the minutes whether all of the discussions would fall under this exception.

We 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].

The emphasis in the passage quoted above on the word "*the*" indicates that when the discussion relates to litigation that has been initiated, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of Pitcairn." If the Town Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the Town and its residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Ann S. Jobin-Davis

Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Hon. Rebecca J. Moore
Town Board

FOIL-AO-16915

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, December 19, 2007 10:58 AM
To: [redacted]
Subject: RE: Open Meetings Law - confidentiality

Patti, I have three ideas for you:

1. Take a look at the explanation regarding time limits within which the district is required to respond to your request, in writing, with reference to the provision of FOIL on which they rely to deny access, at the following link: http://www.dos.state.ny.us/coog/explaination05.htm

2. It sounds like the reports you described are intra-agency reports containing factual tabulations or data. If that is the case, the following explanation will help explain why they are required to release those records to you, at least in part:

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

While one of the grounds for denial is pertinent, due to its structure, I believe that it would require disclosure in this instance. Relevant is §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:
i. statistical or factual tabulations or data;
ii. instructions to staff that affect the public;
iii. final agency policy or determinations; or
iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. As a member of the board, you are entitled, at the very least, to the same amount of information that every member of the public is entitled.

3. If they are reports that have been submitted to the State Education Department, you could also make a request for them from Nellie Perez, Records Access Officer, , RM 122, 89 Washington Avenue, Albany NY 12234 (518)474-1201

I'm off to a meeting, but I hope this helps.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
41 State Street
Albany NY 12231
(518) 474-2518
(518) 474-1927 fax
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4538
FOIL-AO-16916

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 19, 2007

E-MAIL

TO: Kyle Hassler

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hassler:

I have received your letter and hope that you will accept my apologies for the delay in response. You described a series of difficulties and issues concerning the operation of the Town of Piercefield.

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions concerning the Freedom of Information and Open Meetings Laws. Although you did not refer directly to those statutes, some of your remarks relate to them, and I offer the following comments.

First, since there appear to have been changes in policy, I note that a public body, such as a town board, may take action only during a meeting held in accordance with the Open Meetings Law. A "meeting" is any gathering of a majority of the membership of a public body for the purpose of conducting public, irrespective of whether there is an intent to take action or vote.

Second, minutes of meetings need not be detailed or expansive. Section 106 of the Open Meetings Law pertains to minutes, and states in subdivision (1) 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 must at a minimum consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. Therefore, if, for example, a policy is changed or adopted by the Town Board, any such action must be memorialized in minutes of the

meeting during which the event occurred. If there is a desire to have a more detailed record of an open meeting, judicial precedent indicates that any person may tape record or video record such a meeting, so long as the use of the recording device is neither disruptive nor obtrusive [Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Csorny v. Shorham -Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003).

Third, another source of information is the Freedom of Information Law, which pertains to all government agency records and defines the term "record" broadly 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."

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 (j) of the Law.

With specific respect to a town, I note that §29 of the Town Law 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."

Lastly, there are thousands of advisory opinions potentially useful to you that are available on our website that deal with particular aspects of or issues arising in relation to the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16917

Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 19, 2007

Mr. Jason Hofelich
01-A-5996
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

Dear Mr. Hofelich:

I have received your letter, which purports to be an appeal concerning a request made pursuant to the Freedom of Information Law. You alleged that a correction officer "lied about its existence..."

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. The provision concerning the right to appeal, §89(4)(a), states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

For your information, the person designated to determine appeals at the Department of Correctional Services is Anthony J. Annucci, Counsel to the Department.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16918

Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 19, 2007

Ms. Marjorie 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 facts presented in your correspondence.

Dear Ms. Miller:

As you are aware, I have received your letter and the materials relating to it. I hope that you will accept my apologies for the delay in response. You have asked that the materials be reviewed and that an advisory opinion be prepared concerning the "refusal" of the Fairview Public Library [hereafter "the Library"] to permit you to examine its minutes and "upon occasion, attend their board meetings."

In this regard, by way of background, a document granting the Library a provisional charter in 1974 indicates that the successors of the Library's original board of trustees, upon the expiration of their terms, "shall be appointed by the town board of the town of Middletown", and a form completed by and transmitted to staff of the State Education Department in 1977 characterizes the Library as a "public town" library. Similarly, a 1983 memorandum addressed to the former State Librarian by a member of staff at the Education Department specifies that the Library "was established by action of the town board of the Town of Middletown, Delaware County, in 1974", and a chart apparently prepared by the Four County Library System identifying libraries as association, public or school district libraries indicates that the Library is a "public" library.

In consideration of the means by which it was created and the authority of the Middletown Town Board to designate all of the members of its board of trustees, it is clear in my opinion that the Library's records fall within the scope of the Freedom of Information Law, and that meetings of its Board of Trustees must be conducted in accordance with the Open Meetings Law.

The Freedom of Information Law is applicable to agency records, and the term "agency" is defined in §86(3) to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

A town unquestionably constitutes an "agency" required to comply with the Freedom of Information Law. Perhaps equally significant is §86(4), which 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."

Because the Library is a creation of the Town of Middletown, and because the Town Board is authorized to select the members of the Library's Board of Trustees, I believe that the Library is essentially an extension of the Town and is part of the government of the Town. Further, based on the definition of "record", information "in any physical form whatsoever" in possession of the Library are, in my view, Town records, irrespective of their physical location. Even when records are in the possession of an entity that may not be governmental, but which maintains them, pursuant to the terms of a contract or otherwise, for an agency, they have been found to be "agency records" that fall within the coverage of the Freedom of Information Law [see Encore College Bookstores v.Auxiliary Service Corporation of the State University, 87 NY2d 410 (1995)].

In short, because the Library was created by the Town and the Town Board designates the entirety of the membership of the Library Board of Trustees, the records maintained by the Library are, in my opinion, clearly agency records subject to rights of access conferred by the Freedom of Information Law. In brief, that statute is based on a presumption of access. Stated differently, all agency records are available for inspection and copying, except to the extent that one or more of the exceptions to rights of access appearing in §87(2) may properly be asserted. Minutes of meetings of the governing bodies of governmental entities are among the most public and routinely disclosed and, therefore, I believe that you, and any other person, have the right to inspect and copy those records.

With respect to your ability to attend meetings of the Library's Board of Trustees, as you may be aware, the boards of trustees of a variety of entities characterized as "public libraries" are required to give effect to the Open Meetings Law. Some are governmental entities; others are not-for-profit corporations that typically have a relationship with government but which are not governmental entities. The boards of trustees of both the governmental and non-governmental public libraries are required to comply with the Open Meetings Law pursuant to §260-a of the Education Law, which states that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law. Provided, however, and notwithstanding the provisions of subdivision one of section ninety-nine of the public officers law,

> public notice of the time and place of a meeting scheduled at least two weeks prior thereto shall be given to the public and news media at least one week prior to such meeting."

Since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including public libraries that are not-for-profit corporations, must be conducted in accordance with that statute.

But for the enactment of §260-a, the boards of trustees of non-governmental or not-for-profit corporations that head public libraries would not fall within the scope of the Open Meetings Law. However, a board of trustees of a public library that is a governmental entity would fall within the coverage of the Open Meetings Law, even if §260-a of the Education Law had not been enacted, for it would constitute a "public body" subject to that statute.

Section 102(2) of the Open Meetings Law defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, the Open Meetings Law clearly applies to the governing bodies of governmental entities. For the reasons described in the commentary concerning the application of the Freedom of Information Law to the Library, i.e., that it is a creation of government whose governing body is appointed by the Middletown Town Board, I believe that its Board of Trustees is a "public body" subject to the Open Meetings Law. Even if that could be demonstrated not to be so, it would nonetheless be required to comply with the Open Meetings Law through the operation of §260-a of the Education Law. In either case, any member of the public, pursuant to §103(a) of the Open Meetings Law has the right to attending meetings of the Board of Trustees.

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, a copy of this opinion will be sent to the Board of Trustees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

FOIL-AO-16919

From: Freeman, Robert (DOS)
Sent: Thursday, December 20, 2007 5:13 PM
To: metadatachick

Dear Ms. DelGuidice:

I have received your inquiry and note that the federal Freedom of Information Act pertains only to records of federal agencies. However, each state has enacted its own law dealing with access to records. In New York, the Freedom of Information Law is applicable to all state and local government agencies, including villages. Therefore, records of a village building department are subject to rights of access conferred by the Freedom of Information Law.

Each agency is required to designate one or persons as "records access officer". The records access officer has the duty of coordinating the agency's response to requests for records, and requests should generally be made to that person. In most villages, the clerk is the records access officer.

To obtain additional information, it is suggested that you peruse our website (identified below), which includes the full text of the Freedom of Information Law, a guide to its provisions, "Your Right to Know", and thousands of legal opinions prepared by this office since the law became effective in 1974. Since you are the "metadatachick", I point out that our website can be reached by googling "Committee on Open Government", "coog", "freedom of information law" or "open meetings law."

If you have additional questions, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State
41 State Street
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16920

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 21, 2007

E-MAIL

TO: Alexander Chimarev

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Chimarev:

I have received your correspondence addressed to Ms. Mercer of this office in which you asked that we "compel" the Departmental Disciplinary Committee of the Appellate Division, First Judicial Department, to respond to your request made under the Freedom of Information Law.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee is not empowered to compel an entity to grant or deny access to records.

Second, I do not believe that the Disciplinary Committee is subject to the Freedom of Information Law. In this regard, I offer the following comments.

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.

Third, 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 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-16921

Albany, New York 12231
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December 21, 2007

E-MAIL

TO: Ronald Lineman

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lineman:

I have received your letter in which you referred to litigation involving the Village of Forestville and asked whether you are "entitled to know exactly what was paid to the lawyer, surveyor, and engineer in this case."

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.

In most instances, bills and records of payment by a government agency, such as villages, must be disclosed, for none of the grounds for denial of access would be applicable.

With specific respect to bills, invoices and related records involving payments to attorneys, most pertinent in my view is the first ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared or imparted pursuant to an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with such an attorney-client relationship may be considered privileged under §4503 of the CPLR. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of

Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.)...
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters being communicated and, consequently, was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)"

In short, in Knapp, even though portions of the records containing the time billed and the amount paid for the time, it was determined that other aspects of billing statements indicating "the general nature of legal services performed", as well as certain others, did not fall within the attorney client privilege and were available.

In the other decision dealing with the issue under the Freedom of Information Law, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], the matter involved a request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). While monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.).

Although the County argued that the "description material" is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the CPLR, the court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determines the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications...
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

In my view, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, I agree that references identifiable to students may properly be deleted. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

In sum, in the context of your inquiry, 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 be proper.

However, in my opinion, as indicated earlier, the general description of services rendered must be disclosed.

I hope that I have been of assistance.

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16922

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December 21, 2007

Mr. Alan G. Schulman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schulman:

I have received your letters and copies of a variety of correspondence relating to your requests made pursuant to the Freedom of Information Law to the Town of North Castle and the Hartsdale Fire District. It is clear that some of the records sought have been made available to you and/or your attorney; it is unclear, however, which records might have been withheld. Nevertheless, based on a review of the materials, I offer the following comments.

Since you asked that this office "instruct" or "compel" an agency to disclose records or otherwise comply with law, it is noted that the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. Neither the Committee nor its staff is empowered to compel an agency to grant or deny access to records or enforce the law.

I point out, too, that the title of the law may be somewhat misleading, for it is not a vehicle that requires that government agencies provide information *per se* or that it must supply answers to questions. Rather, the Freedom of Information Law pertains to existing records, and §89(3)(a) states in relevant part that an agency is not required to create a record in response to a request for information. If there is no record, for example, indicating "where" records might have been reviewed, an agency is not required to prepare a record containing that information on your behalf. Similarly, since you requested an "inventory", if no such record exists, an agency would not be required to create an inventory.

One of the issues may involve a different aspect of §89(3)(a), the portion indicating that an applicant must "reasonably describe" the records sought. The Court of Appeals, the state's highest court, has held by the 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, 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 or Fire District, to the extent that records sought can be located with reasonable effort, I believe that a request meets the requirement 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 perhaps thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, a request would not in my opinion meet the standard of reasonably describing the records.

With respect to your ability to photograph records, §87(2) of the Freedom of Information Law states that records are available for inspection and copying. There is nothing in that statute that references the ability to photograph records or, contrarily, imposes a prohibition from so doing. From my perspective, the issue involves whether a denial of a request to photograph records is reasonable. In a case involving the use of personal photocopier, and it was held that municipality could prohibit the use of one's photocopier if its presence or use, due to the size of the device or the municipal office, is disruptive [see Murtha v. Leonard, 60 NYS 2d 101 (1994), 210 AD 2d 411]. Due to the disruption caused in that instance, the prohibition was found to be reasonable. However, if the use of a copier or camera, for example, is not disruptive, I do not believe that a prohibition concerning the use of such a device would be reasonable or consistent with law.

In my opinion, the use of one's own camera would not ordinarily be disruptive, and if that is so in the situation that you described, the prohibition by the agency in my view would have been unreasonable. Further, I note that the use of cameras to copy government records has become common and, in some instances, mutually beneficial and recommended. For instance, when an agency does not have a photocopier that can accommodate oversized records, such as maps, the use of a digital camera has served the interests of both the agency and the public.

Next, I am unaware of whether of whether the Fire District's Board of Commissioners has regular business hours. If it does so, it is required to accept records and permit inspection of records during those hours. By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

Section 1401.2 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 and the foregoing is a decision rendered by the Appellate Division, Second Department. Among the issues was the validity of a limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

In your latest letter to this office you indicated that you asked that the District "provide a listing of documents withheld and redacted..." In this regard, 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 in whole or in part or include a description of the reason for a denial of access in each instance. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the

agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index.

Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond

twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Commissioner Fred Overing
Sharon A. Spagnoli
Hon. Ann Leber

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 21, 2007

E-MAIL

TO: John Y. Kim

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kim:

I have received your correspondence in which you indicated that the records access officer at the Division of Human Rights "claims that he cannot locate two boxes that contain [a certain] cased file....which was available in March, 2007." You have asked whether you "need to contact the Governor's Office to locate it."

In my view, since it would not have possession or copies of the file in question, I do not believe that it would be worthwhile to contact the Governor's office. 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." A request for such a certification might encourage staff at the Division to engage in a substantial search for the file.

I hope that I have been of assistance.

RJF:tt

cc: Richard Brill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 26, 2007

Mr. Timothy Chittenden
President
Rye Police Association
P.O. Box 246
Rye, NY 10550

The staff of the Committee 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. Chittenden:

I have received your letter of September 18, as well as the materials attached to it and hope that you will accept my apologies for the delay in response. You have sought an opinion concerning the redaction of phone numbers associated with calls made on or received through use of City of Rye Police Department cell phones. The request was initially denied, and since receiving your letter, the City has sent a copy of your appeal and its determination thereon sustaining the denial of access to the phone numbers.

In this regard, it has been advised in previous opinions that telephone bills involving the use of an agency's phones, whether they be land line or cellular, are generally accessible to the public. In short, when a public officer or employee uses a phone, that person does so in the performance of his or her official duties. That being so, I do not believe that there are considerations involving the privacy of those persons that would justify a denial of access. However, it has been advised that, in unusual or other than routine circumstances, phone numbers, or perhaps the last four digits of phone numbers, appearing a bill or invoice may be redacted as appropriate.

For instance, if a school district official is regularly on the phone with parents of students, due to provisions of federal law involving student privacy, it has been advised that any identifying details that would make a student's identity easily traceable, such as a telephone number, must be withheld to comply with federal law. If a health care worker is in routine contact with persons associated with a particular disease or health condition, again, it has been advised that identifying details, such as telephone numbers, may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" in accordance with §87(2)(b) of the Freedom of Information Law.

I do not agree with the City's reliance on the provisions of §87(2)(e), which pertains to the ability in certain situations to withhold records that are "compiled for law enforcement purposes." Phone bills or invoices sent to the City by Nextel, could not, in my view, be characterized as records "compiled for law enforcement purposes." However, the other two exceptions cited by City are, in my opinion, valid. They involve the provision cited above concerning unwarranted invasions of personal privacy and §87(2)(f), which authorizes an agency to deny access when disclosure "could endanger the life or safety of any person."

With respect to the redaction of all phone numbers, in situations in which many calls are made or received, there may be no way of knowing either who called or to whom a call was made without extraordinary effort. For example, I make and/or receive hundreds of calls each month. If I reviewed a bill or invoice, I would not know the identity of most of those called by reviewing a phone number. While bills or invoices associated with the use of my phone are, in my opinion, accessible to the public in their entirety due to the nature of my duties, in the context of law enforcement functions, I believe that portions of bills or invoices may properly be redacted in accordance with paragraphs (b) and or (f) of §87(2) of the Freedom of Information Law, unless it can reasonably be known that disclosure of certain telephone numbers could not justifiably be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Susan Morrison
Scott D. Pickup

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 26, 2007

Ms. Linda Pew
[redacted]

The staff of the Committee on 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. Pew:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

You referred to requests for records submitted to the Town of Brookhaven that were rejected because they were, in the words of the Assistant Town Attorney, "unreasonably described." You were informed that you "need to be more specific as to what documents you are seeking."

In this regard, you expressed familiarity with and in fact attached an opinion rendered by this office focusing on the requirement that a request must reasonably describe the records sought in accordance with §89(3) of the Freedom of the Information Law. That being so, it appears that it is understood that "specificity" is not necessarily the issue in meeting that standard. Rather, based on a decision rendered by the state's highest court, the issue involves an agency's ability to locate requested records with reasonable effort, and that in many instances the ability to do so is dependent upon the nature of an agency's filing, record-keeping or retrieval systems [Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. In the context of your requests, insofar as Town staff have the ability to locate the records of your interest with reasonable effort, I believe that they are required to do so to comply with law, for in those instances, your requests would have reasonably described the records.

It is also noted that an agency is required by regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force of law, to attempt to assist those seeking records to reasonably describe the records. Specifically, §1401.2(b)(2) requires that an agency's 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 the records."

In consideration of the foregoing, I believe that the Town's response indicating that your request was not sufficiently specific is inadequate. In my view, based on the provision quoted above, the records access officer must ensure that Town staff provide information concerning the means by which the records of your interest are maintained or retrieved in order to enable you, if necessary, to "reasonably describe" the records as required by law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Pam Betheil
Thomas Ventura

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT PPPL-AO - 341
FOIL-AO - 16926

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December 26, 2007

[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear [redacted]

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

You wrote that you are employed by the Office of Children and Family Services and that an investigation was initiated in September of 2006 concerning "false allegations of a disgruntled executive director whose Day Care Center [you] licensed." Although the investigation "has been open for a full year", you wrote that no action has been taken against you, and you have been "denied access to the findings of this investigation."

In this regard, I believe that the primary source of your rights of access to the records in question is the Personal Privacy Protection Law. In general, that statute requires that state agencies disclose records about data subjects to those persons. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

Under §95 of the Personal Privacy Protection Law, a data subject, a person such as yourself in the context of the situation that you described, has the right to obtain from a state agency records pertaining to him or her, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of that section or §96, which would deal with the privacy of others.

Of potential relevance to the matter is subdivision (6)(d) of §95, which states that rights of access by a data subject to not extend to:

> "attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivision (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena, search warrant or other court ordered disclosure."

The references to the work product of an attorney and material prepared for litigation are based on subdivisions (c) and (d) §3101 of the Civil Practice Law and Rules.

While I am unaware of the specific nature of the records sought, §3101 pertains to disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. It is also noted that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

As suggested earlier, as a "data subject", I believe that you generally enjoy rights of access to records about yourself. However, insofar as the records pertain to or identify others, there may be privacy considerations applicable to them. To the extent that the records identify others, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions, §96(1)(c), involves a case in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Consequently, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law; alternatively, if disclosure of a record would not constitute an unwarranted invasion of personal privacy and if the record is available under the Freedom of Information Law, it may be disclosed under §96(1)(c).

It appears that the identity of the complainant is known to you, for you referred to that person in your letter. Nevertheless, depending upon the contents of those portions of the records identifiable to that person, disclosure might constitute an unwarranted invasion of his/her privacy. To that extent, I believe that the agency would have the ability to make appropriate redactions.

In sum, I believe that the records sought must be disclosed to you pursuant to the Personal Privacy Protection Law, subject to the qualifications discussed in the preceding commentary pertaining to the possibility that §95(6)(d) might enable the agency to withhold some elements of

the documentation, as well as the ability to redact information identifiable to the complainant or others the disclosure of which would constitute an unwarranted invasion of privacy.

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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December 26, 2007

Mr. Thomas H. Joseph, Jr.
President
Residents of East Farmingdale
Civic Association
P.O. Box 281
Farmingdale, NY 11735

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Joseph:

I have received your letter and the materials attached to it and hope that you will accept my apologies for the delay in response. You have contended that a request directed to the Town of Babylon "under the Freedom of Information Act 5 U.S.C. § 552" was not "fulfilled completely and correctly" by the town. Based on a review of the materials, I offer the following comments.

First, the provision to which you referred is the federal Freedom of Information Act, which pertains only federal agencies. The provision dealing with access to records of state and local government agencies in New York is this state's Freedom of Information Law. I point out, too, that while the federal Act includes reference to a waiver of fees, the New York law contains no such provisions. Under §87(1)(b)(iii), an agency, such as a town, may charge up twenty-five cents per photocopy up to nine by fourteen inches or the actual cost of reproducing other records, such as tape recordings or records maintained electronically. Inspection of records available under the New York law is free.

Second, 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 an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. 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, insofar as an agency does not maintain records containing the information sought, it would not be obliged to

prepare new records that contain that information. In the future, rather than seeking to elicit information by raising a series of questions or seeking "amounts", "totals", or a "listing", it is suggested that you request existing records.

For instance, if there is no "listing of all the services....the Town of Babylon provided to East Farmingdale and the costs of those services in 2005," the Town would not be required to create a listing on your behalf. Similarly, unless a "more detailed explanation of each line item listed on the Statement of Taxes" exists, the Town would not be obliged prepare such an explanation to comply with law.

Third, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. In my view, any existing records reflecting the information that you have requested should be accessible, for none of the grounds for denial of access would apply.

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 acknowledgment 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, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Enclosed for your review is "Your Right to Know", which summarizes the Freedom of Information and Open Meetings Law and includes a sample letter of 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

Enc.

cc: Chelley Gordon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16928

Albany, New York 12231
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December 26, 2007

Mr. Matthew Goforth
07-B-2008
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. Goforth:

I have received your letter in which you requested an opinion concerning access to pre-sentence investigation records under the Freedom of Information Law.

In this regard, I believe that the ability to gain access to those records 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

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December 26, 2007

E-Mail

TO: Ms. Celia Fishman

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Fishman:

I have received your letter and the materials relating to it. Once again, the issue involves the status of the Chappaqua Volunteer Ambulance Corps under the Freedom of Information Law.

The undated minutes of a meeting of the North Castle Town Board indicate that the Board approved the establishment of an ambulance district within the Town. As indicated in previous communications, the only judicial decision of which I am aware that deals with a volunteer ambulance company and its duty to comply with the Freedom of Information Law involved an entity that had an integral relationship with a town. Specifically, in Ryan v. Mastic Volunteer Ambulance Company, which was decided by the Appellate Division, Second Department, which includes Westchester County, the Court found that the Company, which is referenced as "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 (hereafter the Town). The appellant submits a budget to and receives all of its funding from the Town, and the allocation of 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" [212 AD2d 716, 622 NYS2d 795, 796 (1995)].

If the relationship between the Chappaqua Volunteer Ambulance Corps, the Town of North Castle and the ambulance district is analogous to that of the Mastic Volunteer Fire Company, the Town of Brookhaven and the Mastic Ambulance District, I believe that the Ambulance Corps would,

based on judicial precedent, constitute an agency subject to the Freedom of Information Law. If the relationship is different, perhaps a different conclusion would be reached.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16930

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December 26, 2007

Mr. Carl Patterson, Jr.
[redacted]

Dear Mr. Patterson:

I have received your letter and hope that you will accept my apologies for the delay in response.

My only comment involving the propriety of your request relates to the distinction between the federal Freedom of Information Act ("FOIA") and the New York Freedom of Information Law ("FOIL"). Although the FOIA includes provisions concerning fee waivers, FOIL contains no such provisions. Further, due to the absence of any such provisions, it has been held that an agency subject to FOIL may charge its established fee for copying records, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518(1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-1693

From: Freeman, Robert (DOS)
Sent: Monday, December 31, 2007 11:15 AM
To: 'Peter Meyer'
Subject: RE: FOIL question

It is recommended that requests for records be directed to the records access officer, but there is no statutory requirement to do so. If a request is not sent to the records access officer, I believe that the recipient of the request must either respond directly in a manner consistent with law, or forward the request to the records access officer.

Robert J. Freeman
Executive Director
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