STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4544
FOIL-AO-16932

Committee Members

Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Paul Francis
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

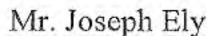
Executive Director

Robert J. Freeman

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

January 2, 2008

Mr. Joseph Ely



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

Dear Mr. Ely:

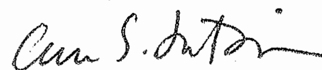
We are in receipt of your correspondence in which you request that we contact the Town Board of Rhinebeck and the Board of the Public Access Northern Dutchess Area (PANDA) to inform them of their obligations under both the Freedom of Information and Open Meetings Laws.

Applicable to all government agencies in New York, the Freedom of Information Law requires that records be made available to the public, subject to certain limitations, and pursuant to certain time limits. Similarly, the Open Meetings Law grants public access to meetings of all government bodies held to discuss public business. The law also requires that there be notice of all meetings and that minutes be prepared. It is our general view that town officials are aware of these statutory requirements.

While the Committee on Open Government is authorized to issue advisory opinions concerning application of these laws, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. At your request, and by copy of this letter, we inform the Town and PANDA Boards of our availability to provide training and educational presentations designed to enhance understanding of and compliance with the Freedom of Information and Open Meetings Laws. If members of either or both boards are interested in having a presentation in their community, we encourage them to contact us directly.

As you know, there are a number of valuable resources available on our website. It is our hope that the materials and opinions available online are educational and persuasive.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Hon. Barbara Cunningham
Bill Nieves

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16933

Committee Members

Tedra L. Cobb
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January 2, 2008

Mr. William Dalton
99-R-2170
Five Points Correctional Facility
Route 96, P.O. Box 119
Romulus, NY 14541

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

Dear Mr. Dalton:

I have received your letter concerning your efforts in obtaining a transcript of a judicial proceeding that you requested pursuant to the Freedom of Information Law.

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."

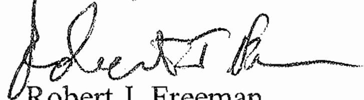
In turn, §86(1) defines "judiciary" to mean:

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts. However, insofar as court records exist, they are generally accessible to the public pursuant to other statutes (see 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16934

Committee Members

Tedra L. Cobb
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January 2, 2008

Mr. John Daniels
86-C-0867
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. Daniels:

I have received your letter in which you asked whether the Freedom of Information Law has "the power and effect to compel a court clerk to provide copies of lawfully requested records pertaining to [your] criminal conviction."

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

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

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

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

Based on the foregoing, the courts are outside the coverage of the Freedom of Information Law.

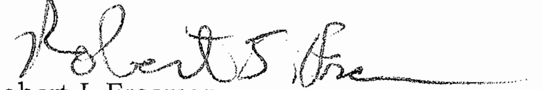
That is not to suggest that court records are not available to the public, for there are other provisions of law that may require the disclosure of court records. For instance, §255 of the Judiciary Law states generally that a clerk of a court must search for and make available records in his custody.

When the records of your interest are maintained by a court, it is suggested that your resubmit your request to the court clerk who maintains custody of the records, citing an appropriate provision of law as the basis for the request.

As you requested, enclosed is "Your Right to Know", which summarizes the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16935

Committee Members

Tedra L. Cobb
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January 2, 2008

E-MAIL

TO: Ken Warren

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. Warren:

Although I believe that the following has been communicated to you in the past, this is to reiterate 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."

RJF:tt

cc: Nellie Perez

FOIL-AO-16936

From: Freeman, Robert (DOS)
Sent: Wednesday, January 02, 2008 9:42 AM
To: jwarburton
Cc: town-clerk@hvc.rr.com
Subject: FOIL request - - Town of Newburgh

Dear Ms. Warburton:

I have received your letter concerning your efforts in gaining access to records of the Town of Newburgh. Please note that the Committee on Open Government has neither the authority nor the resources to conduct an investigation. However, if you could describe the kinds of records that you have requested, it is likely that I could offer guidance concerning your rights of access and the Town's obligation to disclose.

If I have correctly interpreted your remarks, the delay in responding to your request may be construed as a denial of the request. In brief, when an agency fails to respond to requests in accordance with the time limitations prescribed in §89(3)(a) of the Freedom of Information Law, such failure is deemed the equivalent of a written denial and may be appealed. An appeal, according to §89(4)(a), may be made to the Town Board or the person designated by the Town Board to determine appeals. It is suggested that you contact the Town Clerk and ask for the name of the person or body that determines appeals made under the Freedom of Information Law. The appeals person or body has ten business days from the receipt of an appeal to grant access to the records or to fully explain in writing the reasons for further denial.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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-16937

Committee Members

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David A. Paterson
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January 3, 2008

Mr. Stanley Brown
07-A-2734
Cape Vincent Correctional Facility
Route 12E, P.O. Box 739
Cape Vincent, NY 13618

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

Dear Mr. Brown:

I have received your letter in which you complained that an agency had failed to respond to your request for records in a timely manner.

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

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

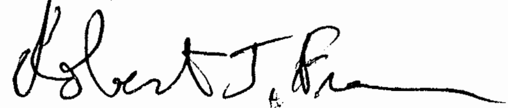
approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have 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

7011-AO-16938

From: Freeman, Robert (DOS)
Sent: Friday, January 04, 2008 12:00 PM
To: Laffronti
Subject: Suppression of public records

In general, there is no way for an individual to require that government records accessible to the public be "suppressed" or prevented from being disclosed. As you are likely aware, there are numerous sources of records identifying individuals that are public (i.e., county and other municipal offices). Further, it has been held that an individual's "preference" regarding disclosure is irrelevant, and that the law determines whether or the extent to which records must be disclosed.

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

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 - 16939

Committee Members

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January 7, 2008

E-MAIL

TO: Carol Ostrowski

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. Ostrowski:

I have received your most recent communication and appreciate the clarification. You asked whether "an agency [may] charge one person for a foil request, and not another..." and referred to a fee imposed by the Montgomery Otsego Schoharie Solid Waste Authority ("MOSA") that you characterized as "ridiculous."

In this regard, first, as a general matter, the Freedom of Information Law does not distinguish among those who seek records, and it was held more than thirty years ago that records accessible under that law must be made equally available to any person, "without regard to status or interest" [Burke v. Yudelson, 51 AD2d 673 (1976); see also, Farbman v. New York City, 62 NY2d 75 (1984)].

Second, unless a different fee is prescribed by statute (i.e., an act of Congress or the State Legislature), the Freedom of Information Law in §87(1)(b)(iii) authorizes an agency, such as MOSA, to charge a maximum of twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing other records, those that cannot be photocopied, such as tape recordings or records maintained electronically. Further, it has been held that when copies of records are requested pursuant to the Freedom of Information Law, an agency may charge the fee envisioned by that law, even when a request is made by an indigent person [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Third, since you mentioned HIPAA, the New York predecessor to that federal law, §18 of the Public Health Law, has long contained essentially the same requirements as HIPAA. In brief, §18 confers rights of access to medical records to the subjects of those records while prohibiting disclosure of the records without the consent of those persons. Although fees for copies of medical records may ordinarily be charged when a request is made pursuant to that statute, it also states that

records may not be withheld due to one's inability to pay. Therefore, although charges may ordinarily be imposed for copies of medical records, when those records are sought by indigent persons, the fee would be waived.

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

RJF:tt

cc: Montgomery Otsego Schoharie Solid Waste Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16940

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

January 7, 2008

E-MAIL

TO: Jennifer Warburton

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Warburton:

I have received your latest communication and your brief description of the matter. Based on that information, I offer the following comments.

First, I know of no requirement that a municipality must post information on its website relating to a position or that it has filled a position.

Second, agencies, such as the Town of Newburgh, can neither ignore requests for records made pursuant to the Freedom of Information Law, nor can they engage in continual delays. 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.

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. Items such as building permits, surveys and the like are in my opinion accessible in most instances, for none of the grounds for denying access would apply.

Lastly, eligible lists have long been available pursuant to §71.3 of the regulations promulgated by the State Civil Service Commission and the Department of Civil Service. To obtain or review an eligible list maintained by Orange County or the Town of Newburgh, a request to do so may be made to either agency.

I hope that I have been of assistance.

RJF:tt

cc: Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16941

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
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Dominick Tocci

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January 7, 2008

Ms. Sally Sonne

The staff of the Committee on 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. Sonne:

I have received your letter and hope that you will accept my apologies for the delay in response. You have questioned whether a denial of access to legal opinions prepared by attorneys for appointed boards in the Village of Tuxedo Park was consistent with law.

In this regard, as you are aware, the Freedom of Information Law pertains to all government records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with

§87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101(c) of the Civil Practice Law and Rules. In my view, there need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

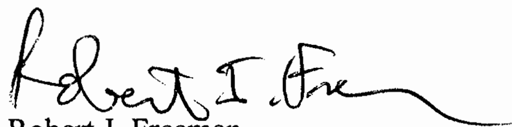
In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16942

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
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January 7, 2008

E-Mail

TO: Mr. Ronald Nowak

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. Nowak:

I have received your letter in which you sought guidance concerning requests for records made pursuant to the Freedom of Information Law to the town of Amherst 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 acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3, 2005 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a

> standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

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

I note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

I hope that I have been of assistance.

RJF:jm

cc: Hon. Susan K. Jaros, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16943

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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

January 7, 2008

Mr. Emmanuel Patterson
79-B-1572
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034

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

Dear Mr. Patterson:

I have received your letter, and as I understand your comments, you are interested in obtaining materials relating to or comprising your pre-sentence report.

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."

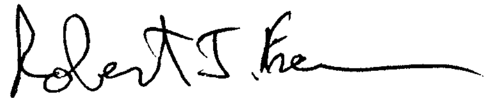
In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16944

Committee Members

Laura L. Anglin
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Lorraine A. Cortés-Vázquez
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January 7, 2008

Mr. Shawn Coleman
03-A-3153
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Coleman:

I have received your letter in which you requested a copy of a "certificate of conviction" from this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee does not have general custody or control of records, and we do not maintain the kind of record that you requested.

On the basis of your comments, it appears that the record sought would be maintained by the court in which the conviction occurred. If that is so, I point out that the Freedom of Information Law excludes the courts from its coverage. However, court records are generally accessible to the public pursuant to different provisions of law (see e.g., Judiciary Law, §255). If you believe that the record of your interest is maintained by a court, it is suggested that you seek the record from the clerk of the court, citing an applicable provision of law as the basis for the request.

If the record is maintained by an agency subject to the Freedom of Information Law, a request should be made to the "records access officer" at that agency. The records access officer has the duty of coordinating an agency's response to requests for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO-16945

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

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January 8, 2008

Ms. Janis Lauria
Accu-Counting Services, LLP
149-151 Westchester Ave.
Rye Brook, NY 10573

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

Dear Ms. Lauria:

I have received your letter in which you complained that your requests for records made pursuant to the Freedom of Information Law to the Village of Port Chester 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 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:

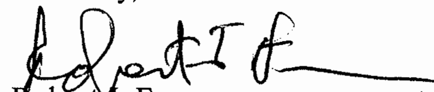
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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: Board of Trustees
Keith E. Rang, Clerk/Assistant Village Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-342
FOIL-AO-16946

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
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January 8, 2008

Mr. Peter Henner
Attorney & Counselor at Law
P.O. Box 326
Clarksville, NY 12041-0326

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

Dear Mr. Henner:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning the "[a]pplicability of the intra-agency exemption under § 87 (2) (g) of the Public Officers Law to request under Personal Privacy Protection Law." By way of background, your client requested records from her former employer, the Higher Education Services Corporation, pertaining, in brief, to a certain incident in which she was involved, concerning the decision to terminate her employment, and evaluations of her job performance. Although eight pages of material were disclosed, other aspects of the request were denied, initially on the basis of the provision cited above, as well as §95(6)(d) of the Personal Privacy Protection Law (hereafter "the PPPL"). The initial denial of access was affirmed following an appeal, and it was added that "these materials fall outside the scope of what is defined in the PPPL as a 'record' to which HESC must provide access." You noted in your letter that conversations with its staff indicate that HESC relied in part on the decision rendered in <u>Gorski v. Mullins</u>, Supreme Court, Albany County, July 1, 2003).

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law (hereafter "FOIL") defines the term "record" for purposes of statute broadly in §86(4) to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations,

> memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, the function, content or origin of documentary materials do not bear upon the applicability of FOIL; all such materials fall within the ambit of that statute.

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

In consideration of the nature of the records sought and the exception to FOIL to which you and HESC referred, the provision of primary significance under that statute is §87(2)(g), which enables an agency to withhold records that:

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

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

I point out that the Court of Appeals in Gould v. New York City [89 NY2d 267 (1996)] 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, opinions or constructive material, for example, they could be withheld under FOIL; insofar as they consist of statistical or factual information, or other information accessible under subparagraphs (ii), (iii) or (iv) of §87(2)(g), such as final agency determinations, I believe that they must be disclosed, unless a separate exception is applicable.

Most importantly, insofar as the PPPL applies, I believe that the result would be different. FOIL deals with rights of access conferred upon the public generally; the PPPL deals with rights of access conferred upon an individual, a "data subject", to records pertaining to him or her. A "data subject" is "any natural person about whom personal information has been collected by an agency" [§92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of the PPPL, 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)].

I am unaware of the extent to which the materials sought constitute "records" for the purposes of the PPPL. However, in consideration of the nature of the request, it would appear that most, if not all, of the materials would be subject to rights conferred by that statute.

Rights conferred upon individuals by the PPPL are separate from those granted under the FOIL. Under §95 of the PPPL, a data subject has the right to obtain from a state agency records pertaining to herself, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of that section or §96, which would deal with the privacy of others.

I am mindful of the decision rendered in Gorski and respectfully disagree with certain aspects of the holding. The court referred to interference with the deliberative process and the ability of persons in an advisory role to express their opinions freely. With due respect to the Court, I believe that a core purpose of the PPPL involves the ability of an individual who is the subject of records, a data subject, to gain access such records and potentially challenge their accuracy. For instance, if a co-worker sends memorandum to his or her supervisor suggesting that a fellow employee is drunk, the fellow employee in my view has a right to gain access to that record pursuant to §95(1) of the PPPL. It is important to have the right to do so, particularly if, for example, that employee was experiencing the effects of medication. In that circumstance, the subject of the record would have

the opportunity under §95(2) of the PPPL to correct the record, and if that request is refused, to include his or her explanation of the matter in the record itself. By so doing, he or she might not be penalized or stigmatized based on what might have been inaccurate conjecture regarding the employee's behavior or demeanor.

In sum, the PPPL does not contain an exception to rights of access comparable or analogous to §87(2)(g) of the FOIL. Consequently, I believe that your client should enjoy rights of access to records pertaining to herself that are subject to the PPPL in accordance with §95(1) of that statute, except to the extent that disclosure would constitute an unwarranted invasion of the personal privacy of persons other than herself, or which are outside the scope of rights conferred by that statute in accordance with §95(6)(d).

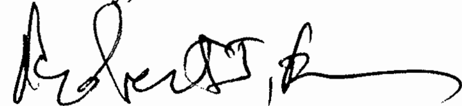
The provision cited in the preceding sentence indicates that rights of access of a data subject to not apply to:

> "attorney's work product or material prepared for litigation before judicial, quasi-judicial, or administrative tribunals, as described in subdivisions (c) and (d) of section three thousand one hundred one of the civil practice law and rules..."

As you are aware, subdivisions (c) and (d) of §3101 of the CPLR respectively exempt the work product of an attorney and material prepared for litigation from disclosure.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Corinne Biviano
Cheryl B. Fisher
Donna Fesel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 16947

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

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January 9, 2008

Mr. Anthony M. Cerreto
Village Attorney
Village of Port Chester
10 Pearl Street
Port Chester, NY 10573

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

Dear Mr. Cerreto:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to a person seeking records pursuant to the Freedom of Information Law who asked that identifying details within her request be withheld from the public. Nevertheless, a copy of the request was made available to a member of the Village Board of Trustees. You have sought an opinion concerning the propriety of disclosure of the request to the trustee and to the general public should a request for that record be made.

In this regard, first, assuming that the trustee sought the record at issue in relation to the performance of his/her official duties, I do not believe that disclosure in that circumstance could be equated to release of the record to the general public following a request made pursuant to the Freedom of Information Law. Absent a statutory prohibition concerning disclosure of the record, and there would be none in this instance, a disclosure to a government officer in the performance of that person's duties would, in my view, be appropriate and not inconsistent with law.

Second, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. From my perspective, with the exception of portions of certain kinds of requests, those kinds of 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.

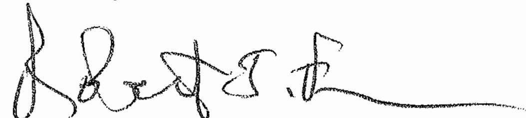
As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 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).

Third, it has been held that an individual's "preference" concerning the disclosure is largely irrelevant [see Johnson Newspaper Corp. v. Call, 115 AD2d 335 (1985)]. When records are accessible by law, personal preferences inconsistent with law are of no significance.

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 Village could withhold the record 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 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-16948

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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

January 9, 2008

Mr. Gerry Nally
South Street Seaport Tenants Association
875 Post Road
Scarsdale, NY 10583

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

Dear Mr. Nally:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response.

You referred to an advisory opinion rendered at your request in January, 2005, concerning the propriety of a denial of access to records by the New York City Economic Development Corporation ("EDC"), and indicated that EDC soon after issuance of the opinion disclosed some 500 pages of documentation. A new request was made to EDC, and you asked whether my opinion would change "if the circumstance has not changed."

Having reviewed the opinion rendered in 2005, the analysis included reference to two of the exceptions to rights of access appearing in §87(2) of the Freedom of Information Law. They were §87(2)(c) concerning the ability to deny access insofar as disclosure "would impair present or imminent contract awards..." and §87(2)(d), which authorizes an agency to withhold records or portions of records when disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Although the denial of your recent request also refers to §87(2)(c), it is also based on a provision not relied upon in 2005, §87(2)(g).

The 2005 opinion stressed that the state's highest court, the Court of Appeals, had rendered a decision critical of a "categorical" or "blanket" denial of access to records in Gould v. New York City Police Department, 89 NY2d 267 (1996)]. The Court in Gould focused on §87(2)(g) and found that certain kinds of information found within records falling within the scope of that exception must be disclosed, and in this regard, I offer the following comments.

First, my remarks with respect to the assertion of §87(2)(c) would be reiterated here, and there is no need to do so.

Second, although §87(2)(g) potentially serves as a basis for denying access, due to its structure, it often requires substantial disclosure. Specifically, that provision enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

To reiterate the direction offered by the Court of Appeals in Gould v. New York City Police Department [89 NY2d 267 (1996)]:

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

In that decision, 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).

I note 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).

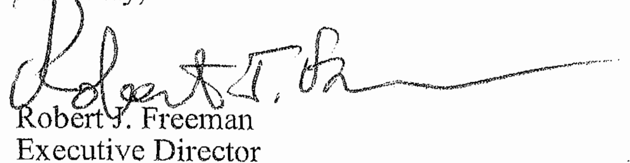
The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

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

In sum, insofar as the content of records falling within §87(2)(g) consists of statistical or factual information, or any of the other categories of information appearing in subparagraphs (ii), (iii) or (iv) of that provision, I believe that they must be disclosed, unless a separate exception can properly be asserted, i.e., §87(2)(c).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Judy Fensterman
David Shelley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16949

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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January 10, 2008

Mr. and Mrs. [redacted]
[redacted]

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

Dear Mr. And Mrs. [redacted]

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the New York State Police, specifically, for "all records associated with a complaint made against [redacted] by us" and "all copies of complaints she made on us". The State Police denied your request and then denied your appeal, stating that "the complaint that you filed is exempt from disclosure in that disclosure would constitute an unwarranted invasion of personal privacy of others concerned" and that your request for records pertaining to Ms. [redacted] complaint "was previously responded to and it will not be reconsidered." We believe that you are permitted to obtain a partial copy of the complaint you filed; however, we agree with the denial of access to information pertaining to others identified in the complaint you filed, and any complaint filed by Ms. [redacted] In this regard, we offer the following comments.

By way of background, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law. 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, here, 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. Section 89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same

provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

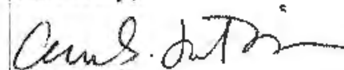
> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence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

In our opinion, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of 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. In sum, those portions of the records sought that would identify the person who made the complaint may be withheld. If the identity of the complainant is known, in our opinion, the complaint might properly be withheld in its entirety if indeed, due to its contents, disclosure would constitute an unwarranted invasion of personal privacy. In that situation, for obvious reasons, the deletion of a name or other identifying details would not serve to protect privacy. Accordingly, in this case, we believe that State Police could appropriately deny access to records of complaints filed by Ms. [redacted]

Further, while we believe that you are entitled to a copy of any complaint you may have filed with the State Police, in keeping with the above analysis, we believe the State Police has the discretionary authority to deny access to information indicated in the complaint that was not supplied by you if disclosure would result in an unwarranted invasion of personal privacy of any persons interviewed.

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-16950

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
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Robert J. Freeman

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January 11, 2008

Mr. Gregory Lee
07-A-4990
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. Lee:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records from two law enforcement agencies and a district attorney's office.

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

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

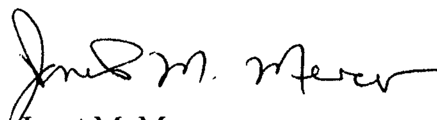
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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-16951

Committee Members

Laura L. Anglin
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Michelle K. Rea
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January 11, 2008

Mr. Virgil Brown
ICN: 49005
Erie County Correctional Facility
11581 Walden Avenue
Alden, NY 14004

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

Dear Mr. Brown:

I have received your letter in which you indicated that you have requested records from the Department of Correctional Services 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."

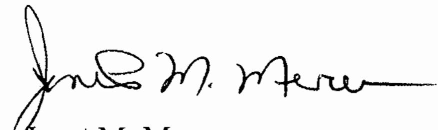
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

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

FOIL-AO-16952

From: Freeman, Robert (DOS)
Sent: Monday, January 14, 2008 11:51 AM
To: shaolinprince@hotmail.com

Dear Mr. Melton:

I have received your letter and regret to inform you that there is no federal or state agency that can offer direct assistance in compelling an agency to comply with the Freedom of Information Law. In some instances, shedding light on a matter or gaining publicity may encourage compliance. In addition, I note that the Freedom of Information Law authorizes (but does not guarantee) a court to award attorney's fees when a member of the public substantially prevails in a lawsuit and finds either that the agency had no reasonable basis for denying access to records or failed to abide by the time limits required in that statute concerning the time for responding to requests and appeals.

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

7016. AO-16953

From: Freeman, Robert (DOS)
Sent: Monday, January 14, 2008 12:09 PM
To: ewiatrjr@roadrunner.com
Cc: gyoung@town.new-hartford.ny.us

Dear Mr. Wiatr:

I have received your letter in which you asked that this office "coordinate...action(s) that are deemed necessary thus ensuring the immediate release" of a "CPA Audit and Management (Opinion) Letter" by the Town of New Hartford.

In this regard, please note that 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 compel an agency to grant access to records or otherwise comply with law. Nevertheless. I point out that subparagraph (iv) section 87(2)(g) of the Freedom of Information Law specifies that external audits are accessible to the public. Additionally, section 35(2)(a) of the General Municipal Law states that a management letter filed with a municipal clerk is available to the public as 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-16954

Committee Members

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Lorraine A. Cortés-Vázquez
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David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

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January 14, 2008

E-MAIL

TO: Sandy Petros

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Petros:

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

You have sought assistance in obtaining divorce records that are more than one hundred years old from the Seneca County Clerk. Additionally, you questioned the fee for a copy of a record charged by the Clerk.

In this regard, it is noted at the outset that the primary function of this office relates to the Freedom of Information Law, which does not apply to the courts or records maintained by the courts. The records of your interest are filed with a court officer, i.e., a court clerk or county clerk acting as the clerk of a court. That being so, the records are outside the coverage of the Freedom of Information Law. Nevertheless, as you suggested, although records indicating the details of matrimonial proceedings are generally confidential to all but the parties and their attorneys pursuant to §235 of the Domestic Relations Law, subdivision (5) of that statute specifies that the restrictions requiring confidentiality "shall cease to apply one hundred years after date of filing, and such records shall thereupon be public records available to public inspection." Since the records sought involve a divorce occurring in 1876, I believe that they must be made available based on subdivision (5).

With respect to fees for copies, when the Freedom of Information Law applies, it authorizes certain maximum fees, unless a different statute authorizes a different fee. Again, the Freedom of Information Law would not apply in this instance. It is my understanding that §8019(f)(1) of the Civil Practice Law and Rules authorizes a clerk to charge sixty-five cents for the preparation of a copy of a record, with a minimum fee of one dollar and thirty cents. Further, when documents are considered genealogical records, subdivision (3) of §4174 of the Public Health Law 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, states that:

> "For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of twenty dollars for each hour or fractional part of an hour of time for search, together with a fee of two dollars for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

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

RJF:tt

cc: Hon. Tina Lotz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16955

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
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January 14, 2008

Mr. Felix Machado
01-A-2869
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. Machado:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records from a district attorney's office.

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

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

It is noted that new language was added to that provision on May 3, 2005 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

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,

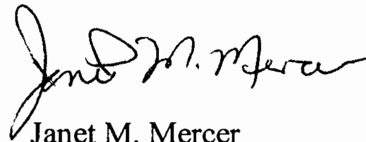
the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

There is not

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7011-A0-16956

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16959

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

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January 23, 2008

E-MAIL

TO: Larry A. Shafer, Sr.

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. Shafer:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to Binghamton University, specifically for bid tabulation sheets for intercollegiate athletic transportation submitted by the successful bidder. It is our understanding that such sheets were submitted in conjunction with bids opened on July 23, 2007, and that they were made part of a contract that is currently in effect. Your appeal following a denial of access to the tabulation sheets was denied in September of 2007 because the contract "has yet to be approved and is under review by the Office of the Attorney General and the Office of the State Comptroller." To date, the requested sheets have not been made available to you. We believe that such sheets should have been made available to you in a timely manner subsequent to the bid opening, and we offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to 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, as soon as a bid or any other documentation is created by or comes into the possession of an agency, it constitutes a "record" that falls within the coverage of the Freedom of Information Law. This is not to suggest that a bid must be disclosed immediately upon receipt by an agency, but rather that it is subject to rights of access 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 section 87(2)(a) through (j) of the law.

As indicated in the University's belated denial of your request, most relevant with respect to access to bids and related records is §87(2)(c). That provision permits an agency to withhold records or portions thereof that:

> "if disclosed would impair present or imminent contract awards or collective bargaining negotiations..."

In our view, the key word in §87(2)(c) is "impair", and the potential for harm or impairment as a result of disclosure is the determining factor regarding the propriety of a denial under that provision.

In the context of your letter, if, for example, an agency seeking bids receives a number of bids and related records, but the deadline for their submission has not been reached, premature disclosure of the records 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 other records has been reached, often the passage of that event results in the elimination of harm. As such, bids may be available, depending upon the attendant facts, even prior to an official bid opening or a determination to make an award. Further, it has been held that bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. In a decision dealing specifically with records sought in relation to the RFP process, it was held by the Appellate Division that "once the contract was awarded...the terms of [the] RFP response could no longer be competitively sensitive" [Cross-Sound Ferry v. Department of Transportation, 219 AD2d 346, 634 NYS2d 575,577 (1995)].

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

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

It is noted that new language was added to that provision on May 3, 2005 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

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

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

cc: Stacey Hengsterman
Barbara Scarlett

FOIL-AO-16958

From: Mercer, Janet (DOS)
Sent: Thursday, January 24, 2008 2:50 PM
To: Alexander Chimarev
Subject: RE: Failure to respond to FOIL request

Dear Mr. Chimarev:

I have received your correspondence in which you indicated that you have encountered difficulty in obtaining records from the Departmental Disciplinary Committee. That entity investigates complaints concerning the professional conduct of attorneys pursuant to the authority conferred by the Appellate Division.

In my view, the Departmental Disciplinary Committee is not subject to the Freedom of Information Law. In this regard, I offer the following comments.

First, that statute pertains to agency records, and §86(3) defines the term "agency" to include:

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

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

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

As such, the Freedom of Information Law excludes the courts from its coverage.

Second, with respect to the discipline of attorneys, §90(10) of the Judiciary Law states that:

"Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem

necessary. Without regard to the foregoing, in the event that
charges are sustained by the justices of the appellate division
having jurisdiction in any complaint, investigation or proceeding
relating to the conduct or discipline of any attorney, the records
and documents in relation thereto shall be deemed public records."

Therefore, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable. I note, too, that a different entity, one that also performs a function on behalf of the Appellate Division in relation to §90 of the Judiciary Law, was found to exercise a judicial function, is part of the judiciary and, therefore, is outside the coverage of the Freedom of Information Law [see Pasik v. State Board of Law Examiners, 102 AD2d 395 (1984)].

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
One Commerce Plaza
99 Washington Ave., Suite 650
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-16959

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

Albany, New York 12231
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January 24, 2008

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 indicated that you have encountered difficulty in receiving responses to your Freedom of Information Law request and appeal from 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:

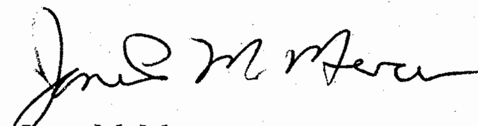
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16960

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
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Robert J. Freeman

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January 24, 2008

Mr. Donnie Dinkins
97-A-1113
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. Dinkins:

I have received your letter in which you indicated that you have encountered difficulty in receiving responses to your Freedom of Information Law request and appeal from 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:

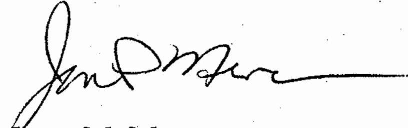
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16961

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
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David A. Paterson
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Dominick Tocci

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Robert J. Freeman

Albany, New York 12231
(518) 474-2518
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January 24, 2008

Mr. Richard Champion
97-B-1527
Oneida Correctional Facility
6100 School Road
Rome, NY 13440

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

Dear Mr. Champion:

I have received your letter concerning an unanswered request made to the Oneida County Clerk's Office for a copy of an indictment relating to your case in 1996.

In this regard, it does not appear that the Freedom of Information Law would have applied. That statute pertains to agency records, and §86(3) defines the term "agency" to mean:

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

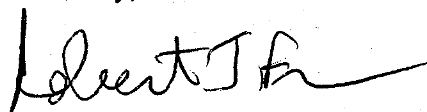
In turn, §86(1) defines "judiciary" to mean:

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts or records maintained for the courts. This is not to suggest that court records are not available. On the contrary, in most instances, they are accessible pursuant to different statutes (see e.g., Judiciary Law, §255). It is suggested that you renew your request, citing an applicable provision of law as the basis of 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-16962

Committee Members

Laura L. Anglin
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Lorraine A. Cortés-Vázquez
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Stewart F. Hancock III
David A. Paterson
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Robert J. Freeman

Albany, New York 12231
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January 24, 2008

Mr. Walter Grant
77-A-2462
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

Dear Mr. Grant:

I have received your letter in which you appealed a denial of access to records by an assistant district attorney in New York County.

Please note that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to comply with law. The provision dealing with the right to appeal a denial of access to records, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

I 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-16963

ommittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

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Robert J. Freeman

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January 25, 2008

Mr. Herbert Lewis
#441-07-02334
AMKC C-95
18-18 Hazan Street
East Elmhurst, NY 11370

Dear Mr. Lewis:

I have received your letter in which you requested from the Committee on Open Government and former Secretary of State Daniels a certain record relating to parole.

Please note that the provision of the State Constitution that you cited pertains to the filing of state agencies' regulations with the Department of State. The record that you seek is not maintained by the Department. Further, the Committee on Open Government is authorized to provide advice and opinions relating to the Freedom of Information Law; the Committee does not have custody or control of records generally.

It is suggested that you request the record at issue from the agency that is most likely to possess it. In this instance, it appears that the source of that record would be the Division of Parole. I point out, too, that each agency is required to designate one or more "records access officers." A records access officer has the duty of coordinating an agency's response to requests for records, and it is recommended that a request be made to the records access officer at the Division of Parole.

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-16964

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

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Robert J. Freeman

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

January 30, 2008

Mr. Stephen Boykin
04-A-1163
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

Dear Mr. Boykin:

I have received your letter in which you refer to your interest in obtaining a copy of a "certificate of conviction" from this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee does not have general custody or control of records, and we do not maintain the kind of record that you requested.

On the basis of your comments, it appears that the record sought would be maintained by the court in which the conviction occurred. If that is so, I point out that the Freedom of Information Law excludes the courts from its coverage. However, court records are generally accessible to the public pursuant to different provisions of law (see e.g., Judiciary Law, §255). If you believe that the record of your interest is maintained by a court, it is suggested that you seek the record from the clerk of the court, citing an applicable provision of law as the basis for the request.

If the record is maintained by an agency subject to the Freedom of Information Law, a request should be made to the "records access officer" at that agency. The records access officer has the duty of coordinating an agency's response to requests for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16965

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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

January 30, 2008

Mr. Timothy Grant
87-A-6099
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

Dear Mr. Grant:

I have received your letter in which you requested a copy of a "certificate of conviction" from this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee does not have general custody or control of records, and we do not maintain the kind of record that you requested.

On the basis of your comments, it appears that the record sought would be maintained by the court in which the conviction occurred. If that is so, I point out that the Freedom of Information Law excludes the courts from its coverage. However, court records are generally accessible to the public pursuant to different provisions of law (see e.g., Judiciary Law, §255). If you believe that the record of your interest is maintained by a court, it is suggested that you seek the record from the clerk of the court, citing an applicable provision of law as the basis for the request.

If the record is maintained by an agency subject to the Freedom of Information Law, a request should be made to the "records access officer" at that agency. The records access officer has the duty of coordinating an agency's response to requests for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16966

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

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

January 30, 2008

Mr. Kenneth J. Vogel
Roehrs Construction, Inc.
P.O. Box 406
Clintondale, NY 12515

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

Dear Mr. Vogel:

I have received your letter and hope that you will accept my apologies for the delay in response.

You expressed an "understanding that Bid Results summation numbers are listed on web site for each of the particular government agencies that solicit them, but only for a limited time." You also referred to certain bids being "itemized" and contended that "itemized results should be available to the public after the contract has been awarded."

In this regard, first, while it has become common practice for government agencies to post information on websites, there is nothing in the Freedom of Information Law requiring that they do so. Similarly, when information is posted, that law does not specify the duration of the posting.

Second, however, the Freedom of Information Law applies to all government records and confers rights of access as long 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.

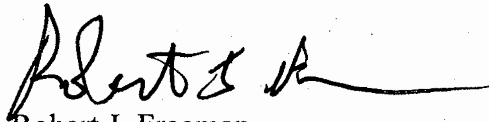
The provision of greatest significance relative to your remarks is §87(2)(c), which authorizes an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards..." When an agency solicits bids, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage *vis a vis* those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a

manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, when the deadline for submission of bids has been reached, all of the submitters are on an equal footing and an agency is generally obliged to accept the lowest appropriate bid. In that situation, the bids would, in my opinion, be available.

If records relating to bids have been prepared, such as "summation numbers", itemized results or other documentation, those records would, in my opinion, be accessible following the opening of the bids and an award. That they may not be posted or are removed from a website would not alter rights of access. So long as the exist, I believe that an agency would be required to disclose them in response to a request made pursuant to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16967

Committee Members

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

January 30, 2008

Mr. Edward G. Schneider III

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

Dear Mr. Schneider:

I have received your letter and the correspondence attached to it. You have raised questions concerning the implementation of the Freedom of Information Law by the Town of Evans. In this regard, I offer the following comments.

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

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

It is noted that new language was added to that provision in 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 legislation enacted in 2006 broadened the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law. Under those amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

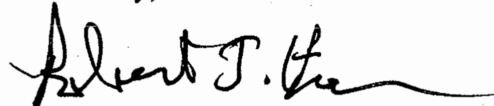
Second, the Town Clerk wrote that "[t]he opinion of the town Attorney states that you cannot FOIL a file [and] that you would need to request a specific document or documents in the file." If indeed that is the opinion of the Town Attorney, it is inconsistent with the language of the Freedom of Information Law and its judicial interpretation.

By way of background, when the Freedom of Information Law was enacted in 1974, it required that an applicant must seek "identifiable" records. Therefore, a person seeking records was required to identify records sought with particularity. Since 1978, however, §89(3) of the Freedom of Information Law has merely required that an applicant must "reasonably describe" the records sought. The Court of Appeals, the state's highest court, has held that when an agency has the ability to locate records with reasonable effort based on the terms of a request, the applicant has met the responsibility of reasonably describing the records, irrespective of the volume of the request. The

decision, Konigsberg v. Coughlin [68 NY2d 245 (1986)], involved a request by an inmate for records pertaining to him that could be located based on his name or identification number. The agency in receipt of the request located approximately 2,300 pages of material, and the court found that the request "reasonably described" the records. In my view, it is clear that your request met that standard.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Carol Meissner
J. Grant Zajas

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16968

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January 30, 2008

E-Mail

TO: Ms. Shereen 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 Ms. Bobrowsky:

I have received your correspondence and hope that you will accept my apologies for the delay in response.

You referred to requests made to the office of the Westchester County District Attorney that were misplaced or "ignored." In this regard, I offer the following comments.

First, I note that the regulations promulgated by the Committee on Open Government, which have the force and effect of law, require that each agency must designate one or more "records access officers" (21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records. In the future, it is suggested that any requests be made to the records access officer at the agency that maintains the records of your interest.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

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

I hope that I have been of assistance.

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4555
FOIL-AO-16969

Committee Members

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January 30, 2008

E-Mail

TO: Mr. William D. 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 information presented in your correspondence.

Dear Mr. White:

I have received your letter and hope that you will accept my apologies for the delay in response.

You indicated that you serve as a member of the Oswego City School District Board of Education and that the Board conducted an executive session to discuss you, stating that the matter was "personal." You added that the discussion apparently related to an email you sent to the Board President in which you referred to the Superintendent as "fatboy."

You asked whether "this [is] ex-session material" and whether you have "the right to release those emails to anyone [you] would choose..." In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as boards of education, must be conducted in public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for conducting an executive session.

Although an issue may be "personal" or involve a "personnel" matter, I point out that those terms do not appear in the Open Meetings Law. The only ground for entry into executive session that might have related to the matter that you described, §105(1)(f), authorizes 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..."

From my perspective, unless the Board discussed the possibility of your removal, §105(1)(f) would not have applied, and the matter should have been discussed in public.

You also referred to "emails between board members" that include comments such as yours and asked whether you have the right to disclose them. From my perspective, email kept, transmitted or received by a school district official in relation to the performance of his or her duties is subject to the Freedom of Information Law, even if the official uses his private email address and his own computer.

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

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

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

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

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

documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

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

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

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

The definition of the term "record" also makes clear that email communications between or among board members fall within the scope of the Freedom of Information Law. Based on its specific language, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. Whether information is stored on paper, on a computer tape, or in a computer, it constitutes a "record." In short, email is merely a means of transmitting information; it can be viewed on a screen and printed, and I believe that the email communications at issue must be treated in the same manner as traditional paper records for the purpose of their consideration under the Freedom of Information Law.

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

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

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

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

Lastly, the Freedom of Information Law is permissive. Although an agency may withhold records or portions of records, it is generally not required to do so. The only instances in my opinion in which records cannot be disclosed to the public would involve those in which a statute, an act of Congress or the State Legislature, forbids disclosure. For instance, the federal Family Educational Rights and Privacy Act ("FERPA") generally prohibits school officials from disclosing information that is personally identifiable to a student without the consent of a parent. In the situation that you described, I know of no law that would prohibit that disclosure of the kinds of email to which you referred.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16970

Committee Members

Laura L. Anglin
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January 30, 2008

Ms. Margie Rubin

The staff of the Committee on 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. Rubin:

I have received your letter and the correspondence attached to it. Please accept my apologies for the delay in response.

You referred to requests made to the New York City Department of Parks and Recreation for records pertaining to compliance with the American with Disabilities Act (ADA) in relation to the Washington Square Park development project. In response to the requests, you were told that no such records exist. I note that a letter addressed to the Commissioner of the Department by Congressman Nadler, Assemblymember Glick and Senator Duane referred to ADA regulations that require that Department to "have a transition plan which includes the necessary steps to make facilities accessible to the disabled", but that no such plan apparently exists relative to the project at issue.

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 is not required to create a record in response to a request in order to comply with that law. Therefore, if no records falling within the scope of your requests have been prepared, the Freedom of Information Law would not require that the Department create records on your behalf.

It appears, however, that a different law requires the preparation of certain records in order to comply with ADA regulations. Because that is so, if you have not done so already, and because they are federal regulations, it is suggested that you contact Congressman Nadler in an effort to encourage him to ensure compliance.

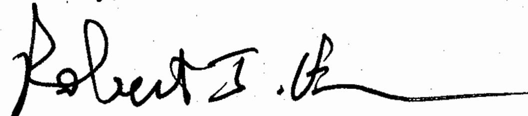
Lastly, once records have been prepared, they fall within the coverage of the Freedom of Information Law. That statute pertains to all agency records, and §86(4) defines the term "record" to include:

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

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

7011-AO-16970A

From: Freeman, Robert (DOS)
Sent: Wednesday, January 30, 2008 9:31 AM
To: 'thmtair
Subject: police report

Dear Mr. Henderson:
If I understand the situation to which you referred correctly, you are interested in obtaining a police report prepared by an officer of the NYC Police Department. If that is so, a request should be made, citing the Freedom of Information Law, to the "records access officer" at the agency that maintains the report, which would be the NYC Police Department. The records access officer has the duty of coordinating an agency's response to requests. The request may be addressed as follows: Records Access Officer, New York City Police Department, Room 110C, 1 Police Plaza, New York, NY 10038.

To see a sample Freedom of Information Law request, click on to "Publications" on our website and then to "Your Right to Know."

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-16971

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January 31, 2008

Ms. Deborah V. Gardner

The staff of the Committee on 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. Gardner:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to a request for an "Ethics Manual Memorandum" prepared by the Cicero Town Attorney that was denied on the ground that "it is specifically exempt from disclosure by state or federal statute, per New York State Civil Practice Law and Rules Section 4503."

It appears that the denial of the request was consistent with law, and in this regard, I offer the following comments.

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

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can

appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Freedom of Information 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. There need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

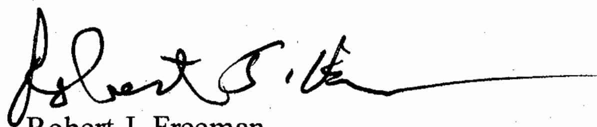
In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "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.

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. Tracy Cosilmon, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO- 16972

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

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Robert J. Freeman

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January 31, 2008

Ms. Moira Scircio

The staff of the Committee on 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. Scircio:

I have received your letter addressed to Camille Jobin-Davis, the Committee's Assistant Director, concerning a request made pursuant to the Freedom of Information Law indicating payments for health insurance that were paid by a particular Town of Cairo employee during a certain time period. The Town denied your request "since it would result in an unwarranted invasion of personal privacy and could subject the Town to a violation of HIPAA..." It has been alleged that the employee has not paid in full for health insurance coverage.

As you are aware, a primary function of the Committee on Open Government involves the preparation of advisory legal opinions. The opinions are not binding, but it is our hope that they are educational, persuasive, and that they encourage compliance with law. It has been held on several occasions, most recently by the Appellate Division in Brown v. Goord [45 AD3d 980 (2007)] that the Committee's opinions should be upheld if they are not arbitrary or unreasonable.

Because you attached an advisory opinion rendered in 1999 that deals in part with the issue that you raised, you are familiar with our views on the matter. In brief, the Freedom of Information Law requires that agencies disclose all records, except those records or portions of records that fall within the exceptions of rights of access appearing in §87(2)(a) through (j). The only exception that is pertinent in the context of your request is §87(2)(b), which authorizes an agency, such as a town, to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) contains a series of examples of unwarranted invasions of personal privacy.

With respect to the matter at issue, as you are aware, it has been advised by this office and held by the courts in a variety of contexts that public employees enjoy less privacy than others, for they are required to be more accountable than others. In general, records indicating payments to

public employees and their benefits must be disclosed, for those items relate to their status as public employees and, therefore, disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. The following excerpt from the advisory opinion that you enclosed represents our views relating to records involving health insurance coverage of public employees:

> "...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. However, in conjunction with the preceding commentary, I do not believe that the District [or Town in this instances] 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 am a public employee, and each pay stub attached to a paycheck that I receive includes a figure indicating both my bi-monthly and total contributions toward the payment of health insurance from the beginning of the calendar year to the date of the check.

In conjunction with the preceding analysis and commentary, if a general disclosure is made indicating employees' payments for health insurance by category, and if the employee has made proper contributions or payments, disclosure of the contributions or payments made year to date would likely enable the recipient of the information to ascertain the nature of health insurance chosen by the employee (i.e., by dividing the total year to date by the number of paychecks). For the reasons mentioned earlier, it is my view that disclosure in that instance would, arguably, result in an unwarranted invasion of personal privacy. However, if the year to date total is divided by the number of paychecks is inconsistent with the proper total for any category of health insurance coverage offered to employees, disclosure of the total would not indicate which plan or category of coverage was chosen by the employee. Because that is so, disclosure would not, in my opinion, constitute an unwarranted invasion of personal privacy.

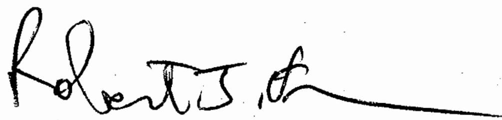
In short, although the foregoing may appear to be somewhat anomalous, in that entries indicating proper payment may be withheld, but those indicating incomplete or atypical payment must be disclosed, I believe that it is consistent with advice previously rendered concerning the protection of privacy, and concurrently, consistent with the intent of the Freedom of Information Law. To reiterate, the statement concerning the intent and utility of the Freedom of Information Law by the Court of Appeals, the state's highest court:

> "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)].

In an effort to share the foregoing with Town officials, copies of this opinion will be sent to them.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Tara Rumpf, Town Clerk

FOIL-AO-16973

From: Tefft, Teshanna (DOS)
Sent: Friday, February 01, 2008 12:34 PM
To: 'jcapolongo
Subject: Scanning of Records

Dear Ms. Capolongo:

In regard to your inquiry concerning the fee that may be charged for the scanning of records and what the obligations of an agency are, I have put the language from our website and a copy of an advisory opinion that has been issued on this subject in the body of this email. I hope this helps. Please do not hesitate to contact us if you have any further questions.

• 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.

FOIL-AO-16279

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

Dear Mr.:

With respect to scanning records in order to transmit them via email, it is our view that if the agency has the ability to do so and when doing so will not involve any effort additional to an alternative method of responding, it would be required to scan the records. For example, when copy machines are equipped with scanning technology that can create electronic copies of records as easily as paper copies, and the agency would not be required to perform any additional task in order to create an electronic record as opposed to a paper copy, we believe that the agency is required to do so. Further, it appears in that instance that transferring a paper record into electronic format would diminish the amount of work imposed upon the agency in consideration of the absence of any need to collect and account for money owed or paid for preparing paper copies, and the availability of the record in electronic format for future use.

In sum, it is our opinion that if the agency has the technology to scan a record without an effort additional to responding to a request in a different manner, and a request is made to supply the record via email, the agency must do so to comply with the Freedom of Information Law.

RJF:tt

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

FOIL-AO-16974

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

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February 4, 2008

Mr. Adrian Jackson
86-B-0941
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

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

Dear Mr. Jackson:

I have received your correspondence concerning a request that the Monroe County Sheriff's office "search [its] files...for the names of jailed prisoners who were interviewed by any of the below listed law enforcement officials....between October 9, 1984 and January 14, 1986."

In this regard, first, the Freedom of Information Law pertains to existing records. Since the records to which you referred would pertain to events that occurred more twenty years ago, it is likely in my opinion that many, if not all, would have been destroyed. If that is so, the Freedom of Information Law would not apply.

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

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

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability

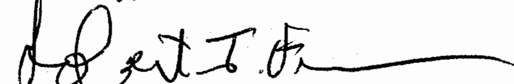
> under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Jennifer M. Sommers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7011-AO-16975

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

February 4, 2008

Mr. Willie C. Elliott
89-C-0148
Mohawk Correctional Facility
6100 School Road., P.O. Box 8451
Rome, NY 13442

Dear Mr. Elliott:

I have received your letter concerning a response by the Office of the Erie County District Attorney indicating that it does not maintain a certain record that you requested. In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 16976

Committee Members

Laura L. Anglin
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Lorraine A. Cortés-Vázquez
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February 4, 2008

Mr. Charles Knowles
89-A-7876
Eastern Correctional Facility
Box 338
Napanoch, NY 12458-0338

Dear Mr. Knowles:

I have received your letter in which you requested a variety of records from this office relating to your arrest in Kings County in 1987.

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 general custody or control of records, and we have no records that fall within the scope of your request.

When seeking records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency or agencies that you believe would have possession of the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

I note that many of records of your interest might properly have been destroyed, for the arrest occurred more than twenty years ago. Often a valuable source of records is the court in which a proceeding was conducted. 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).

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-16977

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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February 4, 2008

Mr. Gregory Lee
07-A-4990
Five Points Correctional Facility
State Route 96, P.O. Box 119
Romulus, NY 14541

Dear Mr. Lee:

I have received your letter concerning your requests made under the Freedom of Information Law. Having reviewed its content, I believe that one of the entities to which you referred is not subject to that statute.

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."

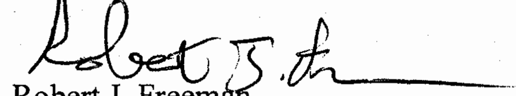
In turn, §86(1) defines the term "judiciary" to mean:

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

Based on the foregoing, while the office of a district attorney or county attorney, for example, would be an "agency" required to comply with the Freedom of Information Law, the courts fall beyond the coverage of that statute. I note, however, that records maintained by courts are generally available to the public under different laws (see 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16978

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
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February 4, 2008

Mr. Jaime Rodriguez
07-A-1979
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. Rodriquez:

I have received your letter concerning a request for disciplinary records pertaining to certain correction officers. From my perspective, records of that nature are beyond the scope of rights of access conferred by the Freedom of Information Law. In this regard, I offer the following comments.

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

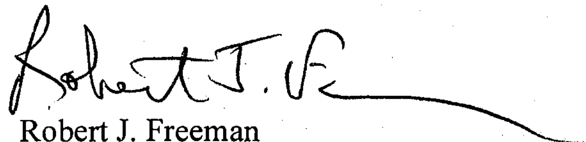
The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)].

Since the individuals who are the subjects of your inquiry are correction officers, I believe that the records of your interest would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7016-190-16979

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
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February 4, 2008

E-Mail

TO: Mr. Harold C. Siver, Jr.

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Siver:

I have received your inquiry in which you asked whether you may send an appeal or complaint to this office when a request made under the Freedom of Information Law is denied.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. Therefore, if there is a complaint or a need for guidance, you or any person may seek an opinion from this office. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records.

The provision concerning the right to appeal a denial, §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."

That provision also requires that the agency in receipt of an appeal send a copy of the appeal and its determination to the Committee on Open Government. There is no particular form that must be used to appeal a denial of access.

If you were not informed of the right to appeal a denial of a request, it is suggested that you phone the person or office that denied the request to ascertain the identity of the appeals person or body.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16980

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
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Executive Director

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February 4, 2008

Mr. Anthony Bennett
84-A-5208
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411

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

Dear Mr. Bennett:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from the New York City Police Department.

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

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

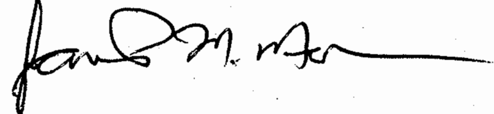
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7011-170-16981

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

One Commerce Plaza, 99 Washington Ave., Suite 650, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

February 4, 2008

Mr. Frederick Monroe
02-A-1334
Auburn Correctional Facility
135 State Street
Auburn, NY 13024

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

Dear Mr. Monroe:

I have received your letter in which you referred to difficulty in obtaining a complaint filed with the Office of the Attorney General.

In this regard, 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. Although I believe that the person in receipt of your should have responded directly or forwarded your request to the records access officer, it is suggested that you resubmit your request to Ms. Amy Karp, the records access officer at the Office of the Attorney General.

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 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."

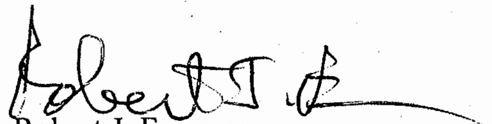
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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: Jeffrey Powell
Amy Karp

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16982

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

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February 5, 2008

Mr. John D. Justice
87-B-0385
Great Meadows Correctional Facility
Box 51
Comstock, NY 12821-0051

Dear Mr. Justice:

I have received your letter in which you asked "why the New York State Division of Parole released information to [this] office...without your consent." It appears that you appealed a denial of access to records and the Division forwarded materials to this office regarding your appeal.

In this regard, §89(4)(a) of the Freedom of Information Law states that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. **In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon"** (emphasis added).

As such, the Division is required by law to furnish the Committee on Open Government a copy of your appeal and their determination of that appeal.

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

Sincerely,

Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16983

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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

February 6, 2008

Mr. Hector Lopez
95-A-7409
Attica Correctional Facility
Exchange Street
Attica, NY 14011-0149

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

Dear Mr. Lopez:

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 to the Kings County Supreme Court and New York City Fire Department.

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."

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

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts. However, insofar as court records exist, they are generally accessible to the public pursuant to other statutes (see e.g., Judiciary Law, §255).

With respect to your request to the New York City Fire Department, 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 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:

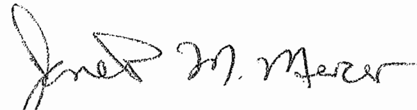
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16984

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

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February 6, 2008

Mr. Herbert Cary
07-A-2385
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. Cary:

I have received your letter in which you complained that you have encountered difficulty in obtaining records under the Freedom of Information Law from the Bronx Criminal Court.

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."

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

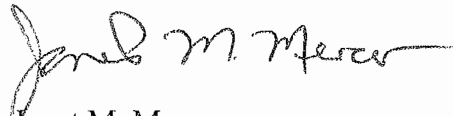
> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the Freedom of Information Law does not apply to the courts. However, insofar as court records exist, they are generally accessible to the public pursuant to other statutes (see 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



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 16985

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

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February 6, 2008

Mr. Donnell Genyard
07-A-5287
Downstate Correctional Facility
Box F
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 information presented in your correspondence.

Dear Mr. Genyard:

I have received your letter addressed to the Secretary of State and the Committee on Open Government. You indicated that you have encountered difficulty in obtaining records from the Queens County District Attorney's Office.

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

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

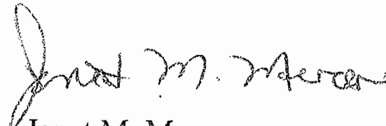
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

cc: Josette Simmons

OML-AO-4559
FOIL-AO-16986

From: Freeman, Robert (DOS)
Sent: Thursday, February 07, 2008 5:07 PM
To: Lauren Kingman, Town of Milan Planning Board
Subject: RE: FOIL and OML Inquiry re. CAC

Dear Ms. Kingman:

I believe that the records maintained or acquired by a conservation advisory council ("CAC") are clearly subject to rights of access conferred by the Freedom of Information Law. In short, that statute pertains to all government agency records, and §86(4) defines the term "record" to mean any information in any physical form whatsoever that is kept, held, filed, produced or reproduced by, with or for an agency. Since documentary materials in possession of a CAC are kept "for" a municipality, which is an "agency", all such materials constitute agency records that all within the scope of the FOIL.,

Although a CAC may be advisory in nature, based on §239-x of the General Municipal Law, it has certain statutory obligations i.e., "to keep an inventory and map...", to "file an annual report", to "describe areas of natural resources", etc. Because it must carry out certain functions pursuant to statute, it has consistently been advised that a CAC constitutes a "public body" required to comply with the Open Meetings Law.

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

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave., Suite 650
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-16987

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

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

February 8, 2008

Mr. Thomas Woodland
96-A-4941
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

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

Dear Mr. Woodland:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records from your facility.

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

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

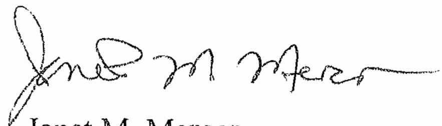
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

FOIL-AO-16988

From: Freeman, Robert (DOS)
Sent: Friday, February 08, 2008 12:26 PM
To: tom
Subject: IDA comments during public comment period

Hi - -

I know of no advisory opinions that deal directly with the issue. However, if comments are offered by an agency during a public comment period, my opinion is that there is no expectation of privacy or secrecy and that the comments should be disclosed. The closest decision that comes to mind, which dealt with a completely different subject matter, involved interviews by the NYC Fire Department of its employees who were involved in the 9/11 disaster. Although the records of the interviews were clearly intra-agency material, the Court of Appeals found, based on the facts, that "the interviews were intended as an 'historical record'—which implies that the interviews would be disclosed to the public" [New York Times v. City of New York, 4NY3d 477, 489 (2005)]. In analogous fashion, I believe that when it is known that opinions or positions are being offered during a public comment period, those records are intended to be public and accessible to the public on request.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
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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-16989

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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February 8, 2008

Mr. James A. Gordon
99-A-1028
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

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

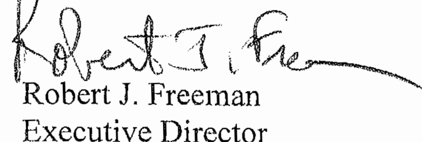
Dear Mr. Gordon:

I have received your letter in which you asked whether, under the Freedom of Information Law, it is "possible for fragments of a shell (bullet), to be weighed and a determination can be rendered as to what caliber of weapon said fragments came from."

In this regard, the Freedom of Information Law pertains to the ability to gain access to records. It has been held that items of evidence, such as clothing or tools, are not records and that, therefore, the Freedom of Information Law does not apply [<u>Allen v. Strojnowski</u>, 129AD2d 700; motion for leave to appeal denied, 70 NY2d 871 (1989)]. Based on the language of the law and the judicial decision cited above, I do not believe that the Freedom of Information Law can be used to gain access to shell fragments or require that they be weighed.

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-16990

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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

February 11, 2008

Mr. Steve Balcom

Ms. Carol Thompson
The Valley News
67 South Second Street
Fulton, NY 13069

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

Dear Mr. Balcom and Ms. Thompson:

We are in receipt of your requests for an advisory opinion concerning application of the Freedom of Information Law to a request made to the Oswego County Legislature for "disclosure of the legislators who are currently enrolled in the county health plan" or "a list of all active legislators who are receiving health benefits and legislators who are using the $1,000 annual perk". Your requests were denied on the ground that it was private, personal health information exempt from release pursuant to the Health Insurance Portability and Accountability Act (HIPAA). We believe that records reflecting the information that you requested must be disclosed, and in this regard, we offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if no list exists, the County would not be obliged to prepare a list on your behalf. In the future, unless it is certain that a list exists, it is suggested that a request should refer to records containing the information of interest rather than a list.

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.

Relevant to the matter is §87(2)(a) which pertains to records that "are specifically exempted from disclosure by state or federal statute." The term "statute", according to judicial decisions, is an enactment of Congress or the State Legislature. In this case, the County alleges that the Health Insurance Portability and Accountability Act, a federal statute which is widely known as HIPAA, prohibits disclosure of the requested information. In our view, the restrictions on disclosure do not apply to records or portions of records that indicate only a public employee's enrollment or participation in a health insurance plan.

The "Privacy Rule" imposed by HIPAA applies only to "covered entities", which are defined to include a health plan, a health care clearinghouse, and a health care provider that transmits any health information in electronic forms (see 45 CFR §§160, 162 and 164, particularly §160.103). Only "protected health information", which is defined as information relating to an individual's physical or mental health, provision of health care, or payment of health care, falls within the scope of the regulations.

In the federal regulations dealing with "health plans", 45 CFR 160.103 states in relevant part that:

> "Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual and:
>
> (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual..."

However, the same section of the regulations states that "Protected health information excludes individually identifiable health information in...(iii) Employment records held by a covered entity in its role as employer." Based on the foregoing, the fact that a public employee participates in a public employer sponsored health insurance plant does not constitute protected health information that is confidential under HIPAA.

It is noted that information indicating only participation in a health insurance plan differs from other records that include greater detail or personal information relating to actual events involving requests for or the provision of medical or mental health services or treatment. For instance, the federal regulations in 45 CFR §164.054 relate to "plan administration functions" and state in subdivision (a) that:

> "Summary health information means information, that may be individually identifiable health information, and:

> "1) That summarizes the claims history, claims expenses, or type of claims experienced by individuals for whom a plan sponsor has provided health benefits under a group health plan..."

The foregoing would signify that claims based on the provision of medical or mental health services have been made by an individual, and any such records would, therefore, be protected under HIPAA. To be distinguished is information that merely indicates that an individual participates in a health benefits plan, which alone indicates nothing about claims for or the provision of medical or mental health services. Records solely indicating participation in a plan in our view clearly are excluded from the scope of "protected health information" for they are merely "employment records held be a covered entity in its role as employer."

Also relevant, as raised by the County in response to Ms. Thompson's appeal, is §87(2)(b) which enables agencies to withhold records to the extent that disclosure would constitute an unwarranted invasion of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 109 AD 2d 292 (1985) aff'd 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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

> "...the Legislature has established a scale to be used by a governmental body subject to the 'Freedom of Information Law' and to be utilized as well by the Court in reviewing the granting or denial of access to records of each governmental body. At one extreme lies records which are 'relevant or essential to the ordinary work of the agency or municipality' and in such event, regardless of their personal

> nature or contents, must be disclosed in toto. At the other extremity are those records which are not 'relevant or essential' - which contain personal matters wherein the right of the public to know must be delicately balanced against the right of the individual to privacy and confidentiality.
>
> "The facts before this Court clearly are weighted in favor of individual rights. Membership or non-membership of a municipal employee in the CSEA is hardly necessary or essential to the ordinary work of a municipality. 'Public employees have the right to form, join and participate in, or to refrain from forming, joining or participating in any employee organization of their choosing.' Membership in the CSEA has no relevance to an employee's on-the-job performance or to the functioning of his or her employer."

Consequently, it was held that portions of records indicating membership in a union could be withheld as an unwarranted invasion of personal privacy. Based on the Wool decision, it might be contended, as the County has set forth, that whether a public employee is covered by a health insurance plan or received $1,000 in lieu of enrollment has no relevance to the performance of that person's official duties, and that, therefore, such information may be withheld.

We point out that records indicating the salaries of public employees must be disclosed. Specifically, §87(3)(b) of the Freedom of Information Law states 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..." 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 our view would be relevant to the performance of one's official duties. It is also noted that those portions of W-2 forms indicating public employees' names and gross wages have been found to be available to the public (Day v. Town Board of Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

In sum, in our opinion, a record of payment to a public official or employee would generally be accessible to the public and not an unwarranted invasion of personal privacy. In this instance, it is our view that the names of those who have received payments in conjunction with the plan should be made available.

A third provision of §87(2) which the County relies on to deny access is §87(2)(g), which, we believe, only supports our position that the law requires disclosure. Section 87(2)(g) permits an agency to withhold records that:

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

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

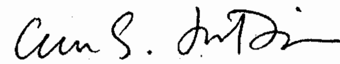
We point out that the Court of Appeals, the State's highest court, recently focused on what constitutes "factual data", stating that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, 463 N.Y.S.2d 122, mod on other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182. 417 N.Y.S.2d 142)" [Gould v. New York City Police Department, 89 NY2d 267, 276, 277 (1996)].

Based on the foregoing, insofar as records include reference to the information in question, we believe that they consist of "factual data" that must be disclosed under §87(2)(g)(i) of 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:jm

cc: Theodore Jerrett
Christa L. Carrington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16991

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February 12, 2008

Mr. Eniezer Rios
02-A-4826
Wallkill Correctional Facility
Route 208, Box G
Wallkill, NY 12589

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

Dear Mr. Rios:

I have received your letter concerning a failure of an attorney who represented to you to respond to a request made under the Freedom of Information Law.

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

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

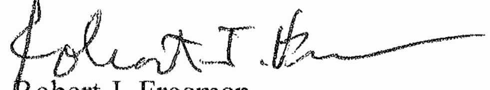
Based on the foregoing, as a general matter, the Freedom of Information Law applies to entities of state and local government, such as police departments or the offices of district attorneys; it does not apply to private entities or persons. That being so, I do not believe that the Freedom of Information Law would apply in the situation that you described.

Although the courts are excluded from the coverage of the Freedom of Information Law, I note that court records are accessible to the public in most instances under other provisions of law (see e.g., Judiciary Law, §255).

In short, while the attorney might not be required to give effect to the Freedom of Information Law, requests for records may be made pursuant to that statute to a police department or office of a district attorney, or to a court under a different provision of 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-16992

Committee Members

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February 12, 2008

Mr. Jerry R. Carter
2E-L-16
840 Shaker Road
Colonie, NY 12211

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

Dear Mr. Carter:

I have received your letter and the materials attached to it. The correspondence indicates that a request was made under the Freedom of Information Law to a Supreme Court clerk.

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

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

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

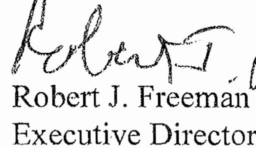
> "...the courts of the state, including any municipal or district court, whether or not of record."

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

Lastly, as you may be aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. An area in which the distinction between agency records and court records may be significant involves fees. Under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute". In the case of fees that may be assessed by county clerks, §§8018 through 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, the fees may exceed those permitted by the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-1699

From: Freeman, Robert (DOS)
Sent: Wednesday, February 13, 2008 11:06 AM
To: Rose Colombo

Dear Ms. Colombo:

I have received your letter in which you sought guidance concerning your ability to obtain a transcript of a judicial proceeding that occurred in 1989. In this regard, the statute within the advisory jurisdiction of this office is the Freedom of Information Law, which specifically excludes the courts from its coverage. I note, however, that court records are in most instances accessible to the public pursuant to other provisions of law (see e.g., Judiciary Law, §255). That being so, a request for court records should be made to the clerk of the court, citing an applicable provision of law as the basis for the request. Since the event to which you occurred nearly twenty years ago, it is possible that the transcript of your interest might not have been prepared, or that any such transcript no longer exists.

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

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
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Albany, NY 12231
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(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

FOIL-AO- 16944

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, February 14, 2008 1:22 PM
To: Lauren Bertolini
Subject: Freedom of Information Law - records of peace officers

Lauren:

As promised.

The following is a link to an advisory opinion we wrote about Cornell University Peace Officers: http://www.dos.state.ny.us/coog/ftext/f14396.htm

Although Cornell University has the additional authority to create law, I believe the same legal analysis would apply to Syracuse University based on the similarity between Education Law section 5709 pertaining to Cornell University peace officers and Criminal Procedure Law section 2.10(77) pertaining to Syracuse University peace officers.

I have attached a copy of Criminal Procedure Law section 2.10(77). This is the provision, enacted in 2006, that authorizes the City to appoint peace officers to Syracuse University.

I recommend that you make you request in writing to the Department of Public Service, attaching a copy of both of these documents, and that you also make an identical request to the Syracuse Police Department, Records Access Officer. If there is any arrangement whereby the University must file these records with the City, the City is required to provide copies also. Here is a link to our webpage that describes the time limits for responding: http://www.dos.state.ny.us/coog/explaination05.htm

Portions of the records that you request may require redaction. If this is the case, the legal reason for the redaction must be provided. Please call if you have further questions.

Hope it helps.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
(518) 474-2518

L

FOIL-AO-16995

From: Freeman, Robert (DOS)
Sent: Thursday, February 14, 2008 4:55 PM
To: tammy.zullo@dcjs.state.ny.us

Dear Ms. Zullo:

I have received your inquiry in which you referred to federal and state grants given to school districts and asked "if you should submit [your] FOIL request to the Dept of Education or the OSC."

In short, a request made under the FOIL should be directed to the "records access officer" at the agency or agencies that you believe would maintain the records of your interest. An agency's records access officer has the duty of coordinating an agency's response to requests for records.

I am unaware of whether either the State Education Department or the Office of the State Comptroller would maintain records pertaining to both state and federal grants to school districts. If, however, a school district is the recipient of grants from either a federal or state agency, it would maintain records relating to the grant. That being so, it suggested that the most likely source of the materials of your interest would be the school district in receipt of grant monies.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
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7071-AO-16996

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February 15, 2008

Mr. Danny Montes
94-B-0382
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

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

Dear Mr. Montes:

I have received your letter requesting assistance in obtaining copies of the minutes of your "co-defendant's guilty plea in open court from the Monroe County Clerk's Office."

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

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

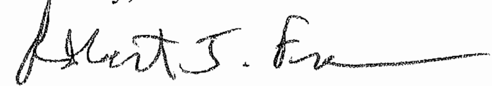
In turn, §86(1) defines the term "judiciary" to mean:

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

Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

7071-AO-16997

From: Freeman, Robert (DOS)
Sent: Friday, February 15, 2008 10:27 AM
To: Ms. Austin
Subject: FOIL requests

Dear Ms. Austin:

I have received your inquiry in which you asked whether minutes of meetings of a board of fire commissioners must be made available to a person who resides outside of the fire district.

In this regard, the Freedom of Information Law does not distinguish among applicants for records, and it was held more than thirty years ago that when records are accessible under that law, they must be made equally available to "any person", regardless of "status or interest." Therefore, anyone may request and obtain the records in question, irrespective of their residence.

I hope that I have been of assistance.

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

FOIL-AO-16998

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February 15, 2008

Mr. Armando Guzman, Sr.
#241-07-10700
15-15 Hazen Street
G.M.D.C. C-73 Facility
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. Guzman:

I have received your letter concerning your ability to obtain "hospital medical records with respect as to a deceased party..."

In this regard, first, the statute within the jurisdiction of this office, the Freedom of Information Law, deals with records of state and local government agencies; it does not include private hospitals within its coverage.

Second and more importantly, access medical records is governed by other provisions of law. Section 18 of the Public Health Law deals specifically with access to patient records. In brief, that statute prohibits disclosure of medical records to all but "qualified persons." Subdivision (1)(g) of §18 defines the phrase "qualified person" to mean:

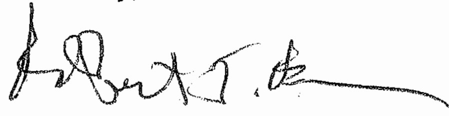
> "any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law, or a parent of an infant, a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record pursuant to paragraph (c) of subdivision two of this section, or an attorney representing or acting on behalf of the subject or the subjects estate."

If you are not a "qualified person", I believe that the medical records of your interest would be exempt from disclosure. To obtain additional information regarding access to patient information, it is suggested that you contact Mr. Peter Farr, NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

A federal statute widely known as HIPAA provides essentially the same rights and restrictions as its New York counterpart.

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-16999

Committee Members

Laura L. Anglin
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February 15, 2008

Mr. William Hinson
99-A-1626
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 12733

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

Dear Mr. Hinson:

I have received your letter in which you referred to unanswered requests made to a branch of the State University and to a community college. The requests involve whether certain individuals attended those institutions during certain years.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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, the governing statute concerning access to records identifiable to students is the federal Family Educational Rights and Privacy Act ("FERPA"), 20 USC §1232g. In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over, an "eligible student", similarly waives his or her right to confidentiality.

However, an exception to the rule of confidentiality in FERPA involves "directory information", which is defined in the regulations of the Department of Education to include:

> "....information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended."

Prior to disclosing directory information, educational agencies must provide notice to parents of students or eligible students in order that they may essentially prohibit any or all of the items from being disclosed. Therefore, if an educational agency or institution has adopted a policy on directory

information, those items designated as directory information would be available to any person. If, however, an educational agency or institution has not adopted a policy on directory information, it would in my view be prohibited from disclosing records identifiable to students without the written consent of the parents of the minor students, or the eligible students, as the case may be.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-17000

From: Jobin-Davis, Camille (DOS)
Sent: Friday, February 15, 2008 4:16 PM
To: Richard T. Tucker
Subject: RE: Open Meetings Law - Boards of Assessment Review

Ric:

I think you're on the right track. Records or portions that are generated during the deliberative, quasi-judicial portion of the meeting would be protected from disclosure. But the record of the action taken, the minutes of the decision, would not.

I hope that answers your question. I'm here until 5:30 or so, today, if you want to call.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
(518) 474-2518

FOIL-AO- 17001

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, February 19, 2008 10:25 AM
To: Mr. Richard Herrick
Subject: Freedom of Information Law - email request, form, and time limits

Richard:

As promised:

Requesting records via email: In 2006, the Legislature amended the Freedom of Information Law 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."

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.

Form required by agency:

We do not believe that an agency can require that a request be made on a prescribed form. Section 89(3) of the Freedom of Information Law, as well as the regulations promulgated by the Committee (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Neither the law nor the regulations refers to, requires or authorizes the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, we do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in our opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is our opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

Time limits for responding:

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

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

I hope these are helpful. Please call me if you have further questions.

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

OML-AO-4565
FOIL-AO-17002

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February 20, 2008

Mr. Roy A. Mallette

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

Dear Mr. Mallette:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response. Having reviewed the materials, I offer the following comments.

First, in a request to the records access officer of the Town of Cicero, you sought information by raising a series of questions, i.e., What is the total Police Budget for the year 2007", "What portion has been spent to date", "Who made the decision on who gets a cell phone", etc. In this regard, it is emphasized that the Freedom of Information Law does not require that government officers or employees supply information in response to questions. They may choose to do so and often do, but they are not required to do so to comply with the Freedom of Information Law. That statute pertains to existing records, and §89(3)(a) 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 record indicating a department's expenditures to date, there would be no obligation to prepare a new record containing that information. In the future, rather than seeking information by raising questions, it is suggested that you request existing records, i.e., records identifying individuals to whom the Town has issued cell phones.

Second, one request involved the "backgrounds" of two Town employees. 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. Most relevant is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are

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

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

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

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

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

> "Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles

> and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

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

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

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

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

Lastly, you questioned the propriety of an executive session held by the Town Board concerning "a possibility of some acquisition of some land by the Town..." Here I direct you to the Open Meetings Law. That law, analogous to the Freedom of Information Law, is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1). Consequently, a public body, such as a town board, cannot enter into an executive session to discuss the subject of its choice. From my perspective, the grounds for entry into executive session are based on the need to avoid some sort of harm that would arise by means of public discussion, and that is so with respect to the only ground for entry into executive session that appears to be relevant in relation to the matter.

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

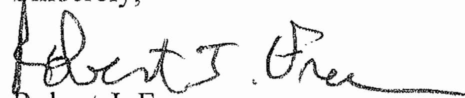
> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

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

A key question, in my view, involves the extent to which information relating to possible real property transactions has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or in some way damage the interests of taxpayers. It has been advised that when a municipality is seeking to purchase a parcel and the public is unaware of the location or locations under consideration, it is possible if not likely that premature disclosure or publicity would indeed substantially affect the value of the property. In that kind of situation, publicity might result in speculation or offers from others, thereby precluding the municipality from reaching an optimal price on behalf of the taxpayers. However, when details concerning a potential real property transaction, such as the location and potential uses of the property, are known to the public, publicity would have a lesser effect or impact on the value of the parcel. Again, the more that is known to the public, the less likely it is that publicity would affect the value of a parcel.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Tracy Cosilmon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17003

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February 20, 2008

Mr. John Landers

The staff of the Committee 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. Landers:

I have received your letter and hope that you will accept my apologies for the delay in response.

You have questioned the propriety of a denial of access to records by the New York City Department of Transportation. Specifically, you sought a list of "all red light traffic camera locations" in New York City, and the request was denied pursuant to §87(2)(e)(iii) of the Freedom of Information Law, on the ground that disclosure could identify a confidential source. You wrote, however, that the locations of red light traffic locations are generally available via various websites made known when individuals receive summonses.

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. 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 [89 NY2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Department contended that certain records could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited 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.).

Second, the provision cited by the Department, §87(2)(e)(iii), authorizes an agency to withhold records compiled for law enforcement purposes when disclosure would identify a confidential source. In my view, a confidential source typically is a person, such as an informant. More pertinent, in my opinion is §87(2)(e)(iv), which permits an agency to withhold records compiled for law enforcement purposes when disclosure would reveal other than routine criminal investigative techniques and procedures. The Court of Appeals focused on that provision in Fink v. Lefkowitz, 63 AD2d 610 (1978); modified in 47 NY2d 567 (1979) and found, in brief, that it is intended to enable agencies to withhold records to the extent that disclosure would enable potential lawbreakers to evade effective law enforcement. The Court also found, however, that an agency could not justify a denial of access when disclosure would encourage compliance with or better understanding of the law.

In this instance, disclosure of the location of the cameras would likely deter speeding or running red lights, thereby enhancing public safety and compliance with law. If that is so, I do not believe that the Department could satisfactorily demonstrate that disclosure would result in the frames described in §87(2)(iii) or (iv) of the Freedom of Information Law.

Lastly, through one of the websites to which you referred, I was able to obtain a list of the locations in New York City where red light cameras are located. Assuming that information of that nature can be obtained via the internet and/or that the locations of red light cameras are indicated on summonses sent to alleged violators, I do not believe that the Department can justify its denial of your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Appeals Officer
Penny Jackson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-344
FOIL-AO-17004

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February 20, 2008

E-Mail

TO: Mr. John Thomas

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Thomas:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to a situation in which the NYS Teachers' Retirement System (the "TRS") "had an audit done on a teacher." The audit, according to your letter, included "accusations without factual data" that could lead a person reading it "to believe that this teacher may have committed a crime." You wrote that the school district that employs the teacher "FOILed" and received the record from the TRS and that the teacher contends that the TRS "had no right to release" it. You have asked whether that is so.

In this regard, I offer the following comments.

First, while it is possible that the district might have requested the record at issue pursuant to the Freedom of Information Law, often an agency, such as a school district, will request records, not as a member of the public under the Freedom of Information Law, but rather as a governmental entity seeking the information in the performance of its duties.

Second, in my view, two statutes, the Freedom of Information Law and the Personal Privacy Protection Law, are pertinent to an analysis of the matter. The Freedom of Information Law pertains to records of agencies of both state and local government; the Personal Privacy Protection Law pertains only to records of a state agency, such as the TRS.

The Personal Privacy Protection Law pertains to personal information maintained by or for state agencies, and for purposes of that law, "record" is defined in §92(9) to mean:

> "...any item, collection or grouping of personal information about a subject which is maintained and is retrievable by use of the name or other identifier of the data subject irrespective of the physical form or technology used to maintain such personal information."

A "data subject", according to §92(3) of the Personal Privacy Protection Law, is a "natural person about whom personal information has been collected by an agency."

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

A series of judicial decisions rendered under the Freedom of Information Law represent a general finding that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have determined that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy.

Several of the decisions cited above indicate that a determination reflective of a finding or admission of misconduct must be disclosed. However, it has also been found that unsubstantiated charges or allegations may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see Herald Company v. School District of the City of Syracuse, 430 NYS2d 460 (1980)].

As the foregoing relates to the TRS, I believe that disclosure of unproven allegations would constitute an unwarranted invasion of personal privacy and, therefore, must be withheld from a

member of the public seeking the records under the Freedom of Information Law. However, in my view, the TRS would likely have the authority to disclose the record in question to a school district pursuant to §96(1)(d) of the Personal Privacy Protection Law. That provision authorizes a state agency to disclose personally identifiable information:

> "...to officers or employees of another governmental unit if each category of information sought to be disclosed is necessary for the receiving governmental unit to operate a program specifically authorized by statute and if the use for which the information is requested is not relevant to the purpose for which it was collected..."

Therefore, while the TRS would not have been required to disclose the record to the school district, it appears that it had the authority to do so.

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 - 17005

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February 20, 2008

Ms. Sharleen Reshard

The staff of the Committee on 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. Reshard:

I have received your letter, as well as the materials attached to it. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning a denial of a request for applications for commercial landscapers filed with the Village of Hempstead. An application includes the name of the applicant, his/her business address and business telephone number, license number, information regarding trucks, a dumping site, a dumping permit number, a pesticide applicator's license number and a liability insurance policy number. The Village denied access on the ground that disclosure would result in an unwarranted invasion of personal privacy.

I disagree with the denial of your request and offer the following comments.

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

One of the exceptions authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy" [§§87(2)(b), 89(2)(b)]. However, based on the language of the Freedom of Information Law, as well as other statutes and their judicial construction, I believe that the provisions dealing with the protection of personal privacy are intended to deal with natural persons, rather than entities, such as corporations, or individuals in relation to their business or professional capacities. The Personal Privacy Protection Law, which is applicable to state agencies, when read in conjunction with the Freedom of Information Law makes clear that the protection of privacy as envisioned by those statutes is intended to pertain to *personal* information about natural persons [see Public Officers Law, §§92(3), 92(7), 96(1) and 89(2-a). In

a decision rendered by the Court of Appeals, the state's highest court, that focused upon the privacy provisions, the Court referred to the authority to withhold "certain personal information about private citizens" [see Federation of New York State Rifle and Pistol Clubs, Inc., 73 NY2d 92 (1989)]. In another decision rendered by the Court of Appeals and a discussion of "the essence of the exemption" concerning privacy, the Court referred to information "that would ordinarily and reasonably regarded as intimate, private information" [Hanig v. State Dept. of Motor Vehicles, 79 NY 2d 106, 112 (1992)]. In view of the direction given by the state's highest court, again, I believe that the authority to withhold the information based upon considerations of privacy is restricted to those situations in which records contain *personal* information about natural persons, as opposed to information identifiable to those in their business or professional capacities.

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

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

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

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

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

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

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

In short, in my opinion and as indicated in the decisions cited above, the exception concerning privacy does not apply to a record identifying entities or individuals in relation to their business or professional capacities. That being so, I do not believe that there is a basis for withholding the records sought.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Wayne J. Hall
Lt. Michael Kearney
Tanya L. Ford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17006

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February 20, 2008

Ms. Patricia Carey

The staff of the Committee on 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. Carey:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response.

You wrote that three requests were made to the City of Little Falls in which you sought information "about income and expenditures for two Grants the City...got from H.U.D." Although you received some of the information concerning one of the grants, you indicated that the majority of the material sought was withheld. You added that you received no response to a request relating to a second grant.

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.

I note that legislation enacted in broadened 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.

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.

While I am unfamiliar with the contents of the records that you requested, I note that there is a decision that focused on personal information contained in records concerning a HUD program, specifically, the "section 8" housing program. Tri-State Publishing, Co. v. City of Port Jervis (Supreme Court, Orange County, March 4, 1992) includes excerpts from an advisory opinion that I prepared in 1991, and I believe that the court essentially agreed with the thrust of that opinion. Because tenants in section 8 housing must meet an income qualification, it has been consistently advised that insofar as disclosure of records would identify tenants, they may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Conversely, following the deletion of identifying details pertaining to tenants, the remainder of the records, i.e., those portions indicating identities of landlords, contractors and the amounts that are paid, must be disclosed.

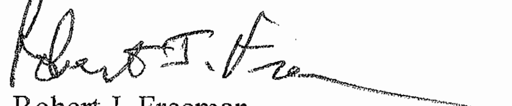
There was concern with respect to what the court characterized as a "hybrid situation" in which "a landlord owns one or more multiple dwellings where less than all units in each building are Section 8 units." The court determined that in that kind of situation, "it may reasonably be said that a subsidized tenant's identity would not be readily ascertainable." Based upon that finding, the court determined that the names of landlords and the addresses of multiple dwellings, as well as related information must be disclosed.

In my opinion, the identity of a landlord, for example, must be disclosed, for payments are made by governmental entities to the landlord. Similarly, insofar as the records sought reflect the City's financial transactions, I do not believe that there would be a basis for denying access. On the other hand, however, insofar as the records sought pertain to persons who participate based on an income qualification, I believe that the Freedom of Information Law and the holding in Tri-State

Publishing authorize the City to withhold personally identifying details on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Theodore Wind

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4567
FOIL-AO-17007

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February 20, 2008

Ms. Carol M. Solari-Ruscoe

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

Dear Ms. Solari-Ruscoe:

I have received your correspondence and hope that you will accept my apologies for the delay in response. The issues that you raised relate to the Clinton-Essex-Warren-Washington Health Insurance Consortium ("the Consortium").

Before focusing on the specific issues that you raised, I note that the Consortium is, in my opinion, an "agency" as that term is defined in §86(3) of the Freedom of Information Law, and that its governing body is a "public body" subject to the Open Meetings Law.

Section 102(2) of the Open Meetings Law defines the phrase "public body" to include:

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

As I understand the matter, the Board of Directors of the Consortium carries out its duties in accordance with the authority conferred by Articles 5-G of the General Municipal Law and 47 of the Insurance Law. With respect to the former, §119-o(1) of the General Municipal states in relevant part that:

> "In addition to any other general or special powers vested in municipal corporations and districts for the performance of their respective functions, powers or duties on an individual, cooperative,

> joint or contract basis, municipal corporations and districts shall have the power to enter into, amend, cancel and terminate agreements for the performance among themselves or one for the other of their respective functions, powers and duties on a cooperative or contract basis or for the provision of a joint service..."

In Article 47 of the Insurance Law, §4701(a) states that:

> "Cooperative health risk-sharing agreements allow public entities to: share, in whole or part, the costs of self-funding employee health benefit plans; provide municipal corporations, school districts and other public employers with an alternative approach to stabilize health claim costs; lower per unit administration costs; and enhance negotiating power with health providers by spreading such costs among a larger pool of risks."

Further, subdivision (e) and (f) of §4702 respectively provide as follows:

> "(e) 'Municipal cooperative health benefit plan' or 'plan' means any plan established or maintained by two or more municipal corporations pursuant to a municipal cooperation agreement for the purpose of providing medical, surgical or hospital services to employees or retirees of such municipal corporations and to the dependents of such employees or retirees.
>
> (f) 'Municipal corporation' means within the state of New York, a city with a population of less than one million or a county outside the city of New York, town, village, board of cooperative educational services, school district, a public library, as defined in section two hundred fifty-three of the education law, or district, as defined in section one hundred nineteen-n of the general municipal law."

Based on the foregoing, the participants in the consortium have been given the legal authority to create a cooperative health benefit plan in furtherance of their official governmental functions, powers and duties. If that is so, the Board of Directors conducts public business and performs a governmental function for a group of public corporations, i.e., school districts. In short, given the characteristics of the Consortium, again, I believe that it is a "public body" required to comply with the Open Meetings Law.

Lastly, the foregoing is not to suggest that the meetings of the Board of Directors must be conducted in public in their entirety. As you may be aware, every meeting of a public body is required to be preceded by notice given in accordance with §104 of the Open Meetings Law, and every meeting must be convened as an open meeting. Nevertheless, in view of the functions of the Board of Directors, it is likely that some aspects of its business could be conducted during validly convened executive sessions. For example, there may be instances in which it considers collective

bargaining negotiations or the financial or medical history of a particular person. In those kinds of circumstances, executive sessions could likely be held pursuant to §105(1)(e) or (f) of the Open Meetings Law.

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

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

Since a municipal corporation is a kind of public corporation (see General Construction Law, §66), the Consortium is, in my view, an agency required to comply with the Freedom of Information Law.

One element of your correspondence deals with the "subject matter list." As a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception that rule relates to the subject matter list. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. It is suggested that you ask to review the retention schedule applicable to the College. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

I note that in one aspect of a request made pursuant to the Freedom of Information Law, you asked for an "explanation of how the proposed activity is consistent with specific grant selection criteria." Again, the Freedom of Information Law pertains to existing records, and if no "explanation" exists, an agency would not be required to create a record containing the information sought.

Next, as you are aware, a grant application submitted by one agency, such as the Consortium, to another agency would constitute intra-agency material falling within the coverage of §87(2)(g) of the Freedom of Information Law. That provision authorizes an agency to withhold records that:

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

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

You referred in one letter to the unanimous approval of a resolution by the governing body of the Consortium and indicated that the approval was made without any public discussion. Due to the absence of discussion, you asked for a "ruling as to whether the vote taken on this resolution is valid..." Your inference, I believe, is that there must have been a private discussion prior to the approval of the resolution.

In this regard, first, the authority of this office involves providing advice and opinions; it is not empowered to issue a "ruling" that is binding or which has the force of law.

Second, the unanimous approval without discussion does not necessarily suggest that a meeting was held in contravention of the Open Meetings Law. There are numerous instances in which written materials distributed to members of public bodies in advance of their meetings enable them to take action with little or no discussion. Further, action taken by a public body remains valid unless and until a court renders a determination to the contrary.

Lastly, §106 of the Open Meetings Law pertains to minutes of meetings and provides what might be characterized as minimum requirements concerning the contents of minutes. Subdivision (1) concerning minutes of open meetings 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."

In short, so long as minutes consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members, the minutes would be adequate to comply with law. They may be more detailed, but there is no requirement that they be expansive.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Teri Calabrese-Gray
Tammy Johnson
Susan Watson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17008

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February 21, 2008

Mr. Tom Schossau

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

Dear Dr. Schossau:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information and Personal Privacy Protection Laws to requests made to the State Department. Specifically, you are concerned about the relationship between the New York State Board for Medicine, known as the Office of the Professions, and the National Board of Medical Examiners, for purposes of licensing medical doctors in New York State. Please note that we know little about the administration or grading medical licensing exams, or about the relationship between the two entities. And, in direct response to your question, we are not aware of any law or regulations that require or authorize regulated professions to verify licensing examinations.

However, in an attempt to offer guidance, we offer the following comments.

First, should the Office of the Professions (Office) maintain records documenting its relationship with the National Board, we believe that you have a right of access to those records. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Second, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if no contract exists, or there is no written agreement or understanding with respect to a particular function, the Office would not be obliged to prepare a new record on your behalf. If the information given at the hearing is correct, that the Office does not have any authority over grading or any contractual agreement pertaining to the verification of examination scores, nor does it have a record documenting a lack of authority.

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 in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure.

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

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

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

Finally, with respect to your questions about the Personal Privacy Protection Law, please note that the enforcement provisions are set forth in §97, including circumstances under which reasonable attorney's fees may be awarded.

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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FOIL AO 17009

VIA EMAIL

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, February 21, 2008 10:28 AM
To: Ms. Janice Bailey
Subject: Freedom of Information Law

Janice:

As promised, the following is the provision of the NYC Administrative Code that we discussed:

§ 11-2115 Returns to be secret. a. Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the commissioner of finance, register or tax appeals tribunal or any officer or employee of the department of finance, register or tax appeals tribunal to divulge or make known in any manner any information contained in or relating to any return provided for by this chapter. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the commissioner of finance in an action or proceeding under the provisions of this chapter, or on behalf of any party to an action or proceeding under the provisions of this chapter when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a grantor or grantee of a deed or to any subsequent owner of the real property conveyed by such deed or to the duly authorized representative of any of them of a certified copy of any return filed in connection with the tax on such deed; nor to prohibit the delivery of such a certified copy of such return or of any information contained in or relating thereto to the United States of

America or any department thereof, the state of New York or any department thereof, the city of New York or any department thereof provided the same is required for official business; nor to prohibit the inspection for official business of such returns by the register, the corporation counsel or other legal representatives of the city or by the district attorney of any county within the city; nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns or items thereof.

b. (1) Any officer or employee of the city who willfully violates the provisions of subdivision a of this section shall be dismissed from office and be incapable of holding any public office in this city for a period of five years thereafter.

(2) Cross-reference: For criminal penalties, see chapter forty of this title.

c. This section shall be deemed a state statute for purposes of paragraph (a) of subdivision two of section eighty-seven of the public officers law.

d. Notwithstanding anything in subdivision a of this section to the contrary, if a taxpayer has petitioned the tax appeals tribunal for administrative review as provided in section one hundred seventy of the charter, the commissioner of finance shall be authorized to present to the tribunal any report or return of such taxpayer, or any information contained therein or relating thereto, which may be material or relevant to the proceeding before the tribunal. The tax appeals tribunal shall be authorized to publish a copy or a summary of any decision rendered pursuant to section one hundred seventy-one of the charter.

e. This section shall not apply to any information contained in or relating to a return filed on or after the first day of January, two thousand three with respect to a transaction or transfer occurring on or after that date; provided, however, that this section shall continue to apply to any social security account number contained in any report or return pursuant to this chapter.

Please note subsection (e). In my opinion, this provision removes the confidentiality provisions for documents filed on or after January 2003, except for the release of social security numbers. Accordingly, it is my opinion that a copy of the record you have requested, the contract of sale, filed with the RP-5217, should be provided to you.

I hope it helps.

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-17010

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February 21, 2008

E-Mail

TO: Mr. John Stephenson

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

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

Dear Mr. Stephenson:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the W.F. Bruen Rescue Squad of East Greenbush. In an effort to clarify the issues, I contacted the Chair of the Board of Directors of the Rescue Squad and learned that you were provided with financial information pertaining to the Ambulance District, but not the Rescue Squad. It is the Chair's understanding that the Rescue Squad is incorporated as a not-for-profit corporation and that the ambulance taxing district was formed years ago in order to receive taxpayer funds from residents of the Town of East Greenbush. Although the Chair recommended that I discuss the legal basis for non-disclosure with the attorney for the Squad, I was unable to reach him.

From our perspective, the key issue is whether the Rescue Squad and the Ambulance District are subject to the Freedom of Information Law. That statute 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.

In Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], however, 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 respect to your specific situation, the Appellate Division has held that a volunteer ambulance corporation is subject to the Freedom of Information Law. In so holding, the decision states that:

> "The Court of Appeals has rejected any distinction between a volunteer organization on which a local government relies for the performance of an essential public service and an organic arm of government (*see, Matter of Westchester Rockland Newspapers v. Kimball,* 50 N.Y.2d 575, 579, 430 N.Y.S.2d 574, 408 N.E.2d 904).
>
> "The appellant performs a governmental function, and it performs that function solely for the Mastic Ambulance District, a municipal entity and a municipal subdivision of the Town of Brookhaven (hereinafter the Town). The appellant submits a budget to and receives all of its funding from the Town, and the allocation of its funds is scrutinized by the Town. Thus, the appellant clearly falls within the definition of an agency and is subject to the requirements of FOIL" [Ryan v. Mastic Ambulance Company, 212 AD 2d 716, 622 NYS 2d 795, 796 (1995)].

Based on these determinations, it is our opinion that a volunteer ambulance entity, performing the same governmental function for the town in its legal capacity as rescue squad and ambulance district, would constitute an "agency" subject to the Freedom of Information Law. Anecdotal evidence suggests that most, if not all ambulance districts, rescue squads, fire companies and fire departments participate in some sort of revenue raising endeavors to supplement income received from municipal taxes. Therefore, in our opinion, it is likely that despite any perceived distinction between a rescue squad and a taxing district based on legal status or fund-raising, both are subject to the Freedom of Information Law.

Assuming that the Rescue Squad falls within the coverage of the Freedom of Information Law, we note that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if no report exists, the Rescue Squad would not be obliged to prepare a report on your behalf. In the future, unless it is certain that a report exists, it is suggested that you request records containing the information of your interest rather than a report.

More importantly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. In our opinion, none of these provisions would justify 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. In sum, in our opinion, information pertaining to the finances of the Rescue Squad and the Ambulance District would be required to made available.

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

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

It is noted that new language was added to that provision in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

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

if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

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

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:jm

cc: Bradley Rose, Chair of Board of Rescue Squad
James Girvin, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17011

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February 22, 2008

Mr. Paul Cipriani
06-A-0678
Washington Correctional Facility
72 Lock 11 Lane, P.O. Box 180
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. Cipriani:

I have received your letter and the material attached to it.

You have asked that this office "take any required steps to enforce" the Freedom of Information Law in relation to your request for records identifying the correction officer that worked at the Schenectady County jail at a certain time on a particular date "as the officer in charge of the inmates..."

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 enforce the law or otherwise compel an agency to grant or deny access to records. However, in an effort to provide guidance, I offer the following comments.

First, 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. Therefore, if the information sought was not prepared or no longer exists, the Freedom of Information Law would not apply.

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

Pertinent is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Numerous judicial decisions concerning that provision as it related to records pertaining to public employees indicate,

in brief, that those records that are relevant to the performance of a public employee's duties are accessible, for disclosure in those instances would result in a permissive, not an unwarranted invasion of personal privacy.

Most significant in my opinion is in a decision affirmed by the State's highest court dealing with attendance records maintained by an agency (not the State Legislature), specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found that the records are accessible. In that case, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..."[Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Based on that decision, insofar as an agency's attendance records or time sheets exist and indicate the dates and times of attendance or absence of a public employee, disclosure 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. That being so, I believe that an agency's attendance records must be disclosed under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Schenectady County Jail

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17012

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February 22, 2008

Mr. Andrew Stankevich
Friends Helping Friends
P.O. Box 39618
Rochester, NY 14604

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

Dear Mr. Stankevich:

I have received your letter in which you raised several issues in relation to your effort in gaining access to records from the City of Rochester. Based on a review of your remarks, I offer the following comments.

First, the Freedom of Information Law pertains to all records of an agency, such as a city, and defines the term "record" in §86(4) to include:

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

Based on the foregoing, when information exists in some physical form and is maintained by or for the City, I believe that it constitutes a City 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.

Third, written communications between or among City officials, whether they are made on paper or by means of email, would constitute intra-agency material falling within the scope of

§87(2)(g) of the Freedom of Information Law. That provision authorizes an agency to withhold records that:

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

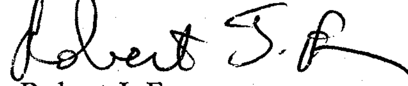
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations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

With respect to the attorney-client privilege, first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101(c) of the Civil Practice Law and Rules. In my view, there need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

Lastly, you referred to your right to appeal a denial of a request beyond the period of thirty days expressed in the Freedom of Information Law as the time within which a denial may be appealed. In this regard, it has been held that a challenge to a denial of a second request for records that had initially been denied in response to a preceding request and appeal must be dismissed on the ground that initiation of the suit was time barred [Garcia v. Division of State Police, 302 AD2d 755 (2003)]. Insofar as your requests involve records that had previously been denied both initially and following an appeal, it is my view that the City is not required to respond, unless there is a change in circumstances that would alter the authority of the City to deny access.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas S. Richards
Gary Walker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17013

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February 22, 2008

Mr. Alexander Nicolaides

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

Dear Mr. Nicolaides:

I have received your letter and apologize for the delay in response.

It is noted at the outset that the Committee on Open Government dos not have general custody or control of government records. Rather, each government agency in New York has the duty to respond to requests for records in its possession.

You wrote that you are interested in obtaining "official school records" concerning your late father, who attended a school in Bronx, "at least since the year 1913." In this regard, the agency that would maintain the records of your interest, if any such records continue to exist, would be the New York City Department of Education. I point out that every agency must 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 the records access officer is Ms. Christine Kicinski, Department of Education, 52 Chambers Street, New York, New York 10007.

A federal law, the Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) generally forbids the disclosure of records pertaining to a student, unless a student above the age of eighteen consents to disclosure. There is no prohibition, however, if it can be demonstrated that the former student is deceased. Therefore, if you request records pertaining to your father, it is suggested that you indicate your relationship to him and provide proof that he is deceased.

I hope that I have been of assistance and again apologize for the delay in responding to you.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17014

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February 22, 2008

Mr. John Fitzgerald

The staff of the Committee on Open 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 and the materials relating to it.

You have sought a "ruling" concerning a denial of access by the Valhalla Union Free School District to "letters of complaint" concerning a particular individual, apparently an employee of the District. The reason for the denial involved a contention that disclosure would result in an "unwarranted invasion of personal privacy." You wrote that you are "not familiar with the concept and [are] certain that you do not need a warrant of any kind."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide opinions concerning the Freedom of Information Law. It is not empowered to issue a "ruling" that is binding.

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

Third, one of the exceptions to rights of access, §87(2)(b), authorizes an agency, such as a school district, to deny access to records insofar as disclosure would result in "an unwarranted invasion of personal privacy." The term "unwarranted" has nothing to do with a warrant or an obligation to obtain a warrant. Rather, I believe that it is intended to mean "unreasonable", and that agency's may withhold records or portions of records when disclosure would result in an "unreasonable" invasion of personal privacy.

In the context of your inquiry, it has been advised that any portion of a complaint that identifies a person who made the complaint may be withheld to protect that person's privacy. When

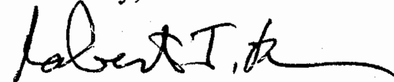
a government agency receives a complaint, the identity of the complaint is largely irrelevant; what is relevant is whether the complaint has merit. Further, people are less likely to submit complaints if their identities are disclosed, and if that were to be so, agencies might not received information needed to carry out their duties effectively.

I note that while the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the judicial decisions cited above indicate that a final determination indicating a finding of misconduct by a public employee must be disclosed. However, when a complaint, an allegation or a charge cannot be proven and does not result in a finding or admission of misconduct, it has been held that disclosure of records relating to the complaint, the allegation or the charge may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Rosa Abbondola

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4570
FOIL-AO-17015

Committee Members

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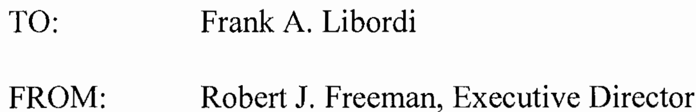
February 22, 2008

E-M,AIL

TO: Frank A. Libordi

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. Libordi:

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

You raised the following questions: "If a reporter is a secret member of a committee appointed by the Board of Education, are his notes considered minutes, and can they be requested under FOIA...?"

In this regard, first, I do not believe that an appointment of an individual to a committee by a board of education can be "secret." Any action taken by a board of education must occur during a meeting held open to the public in accordance with the Open Meetings Law. Further, minutes of meetings must consist of a record or summary of any action taken by the board. Any such minutes must be prepared and accessible to the public within two weeks of a meeting (see Open Meetings Law, §106).

Second, assuming that a person takes notes in his or her capacity as an appointee of a board of education, while I do not believe that the notes could be characterized as minutes, I believe that they would constitute "records" that fall within the coverage of the Freedom of Information Law.

That statute pertains to all records of an agency, such as a school district or board of education, and §86(4) defines the term "record" expansively to include:

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

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

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

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

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

In short, when records are prepared by an individual for an agency, I believe that they are subject to rights of access.

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

Without knowledge of the contents of records, I cannot offer specific guidance concerning public rights of access. However, in the context of the functions of a board of education, several exceptions to rights of access may be relevant. 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 Privacy Act (20 USC §1232g), which generally prohibits the disclosure of records identifiable to students, unless a parent consents to disclosure. Section 87(2)(b) deals with information identifiable to any person and authorizes an agency to withhold records the disclosure of which would constitute an unwarranted invasion of personal privacy. Also relevant may be §87(2)(g), which permits an agency to withhold records that:

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

ii. instructions to staff that affect the public;

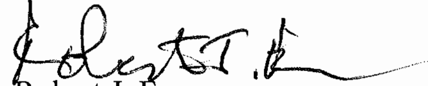
iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view 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 - 17016

Committee Members

Laura L. Anglin
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February 26, 2008

Mr. Anthony J. Dolan

The staff of the Committee 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. Dolan:

I have received your letter concerning an unsuccessful request made to the Peconic Bay Medical Center pursuant to the Freedom of Information Law for its "Use of Restraint and Seclusion Policy."

In this regard, I offer the following comments and suggestions.

First, 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 or other governmental 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 Medical Center's letterhead indicates that it is affiliated with Stony Brook University Hospital and the Stony Brook University School of Medicine. I contacted the Medical Center to ask whether it is an extension of those entities and the University, or a separate not-for-profit corporation. I was told that it is part of the University. If that is so, I believe that it is an entity within an "agency" and that, therefore, its records are subject to rights of access conferred by the Freedom of Information Law.

Second, each agency is required pursuant to regulations promulgated by this office to designate one or more "records access officers" (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 directed to that person. Each institution within the State University has designated a records access

officer, and it is suggested that you contact the office of President of the University at Stony Brook or the University's office of public affairs to ascertain the identity of the records access officer.

Third, 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. Consequently, if no written policy exists, there would be no obligation on the part of the University or the Medical Center to prepare such a record on your behalf.

Next, 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.

Most pertinent in the context of your request is §87(2)(g), which authorizes an agency to withhold records that:

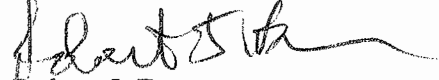
> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. From my perspective, if the policy of your interest exists, it would be accessible under §87(2)(g)(iii).

Lastly, §89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. I am unaware of whether a record characterized as "Use of Restraint and Seclusion Police" exists. Rather than requesting a specific record by that name, it is suggested that you request any policy pertaining to the use of restraints and/or seclusion.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
cc: Jay Zuckerman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17017

Committee Members

Laura L. Anglin
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February 26, 2008

Mr. Roger D. Joslyn

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

Dear Mr. Joslyn:

I have received your letter concerning rights of access to military discharge records, certificates of honorable discharge, that have been filed voluntarily by veterans in offices of county clerks.

In this regard, although those records had generally been available to the public on request, §250 of the Military Law was amended in 2005 and restricts access. That statute now provides in relevant part that:

> "No filed certificate or any information contained therein, shall be disclosed to any person except the veteran or parent, spouse, dependent or child of the veteran, representative of the estate of the deceased veteran or a public official, acting within the scope of his or her employment, unless such disclosure is authorized in writing by the veteran. The provisions of this section also apply to the counties within the city of New York."

Based on the change in the law, access to the records in question is limited to the circumstances described in the language quoted above.

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 17018

VIA EMAIL
From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, February 26, 2008 3:58 PM
To: Bill Dunne
Subject: RE: Another Question

Yes, FOIL applies both to the City of Troy and the IDA. You can address your appeal to the FOIL Appeals Officer, without knowing the name. I recommend sending it to the same address where you reached the Records Access Officer. When no appeals officer has been appointed, the appeals officer is the chief executive, or governing body. So, for example, in the City, if no one has been appointed, the appeals officer would be either the Mayor or the City Council.

I'm scheduled to fly to glamorous Buffalo tomorrow - we'll see if I get there!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
(518) 474-2518

State of New York
Department of State
Committee on Open Government

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Albany, New York 12231
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FOIL AO 17019

VIA EMAIL
FROM: Jobin-Davis, Camille@dos.state.ny.us writes:
SENT: February 26, 2008
TO: Bill Dunne

Bill:

Take a look at the information at the following link:
http://www.dos.state.ny.us/coog/explaination05.htm

When no response is received, an applicant is deemed to have been "constructively denied" access, and is then permitted to appeal to the FOIL appeals officer.

I hope this is helpful too!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
(518) 474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17020

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February 26, 2008

E-Mail

TO: Mr. Rodney Duff

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Duff:

I have received your letter concerning your efforts in gaining access to records pertaining to a particular individual from the Family Court and ACS.

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which pertains to agency records. Section 86(3) of the Freedom of Information Law defines the term "agency" to include:

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

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

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

As such, the Freedom of Information Law does not apply to the courts or court records.

I point out that§166 of the Family Court Act entitled "Privacy of records" states that:

> "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

If "ACS" is an entity of state or local government, it would be subject to the Freedom of Information Law. However, I point out that that law includes provisions concerning the protection of personal privacy, and that an agency is not required to disclose records concerning one's medical or mental health condition [see §89(2)(b)].

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17021

Committee Members

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February 26, 2008

E-Mail

TO: Ms. Taleisha Krieger

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. Krieger:

I have received your letter in which you indicated that you have not yet been granted or denied access to records requested from the Village of Seneca Falls Police Department in October. You added that you were told that if you did not obtain the records within two days of being informed that they would be available to you, the records would be destroyed.

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

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

It is noted that new language was added to that provision in 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."

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 legislation enacted in broadened 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.

Second, based on §89(8) of the Freedom of Information Law and §240.65 of the Penal Law entitled "Unlawful prevention of public access to records", the Department cannot destroy or dispose of records when a request is pending.

Lastly, it has been held that an agency may charge its established fee, which generally cannot exceed twenty-five cents per photocopy, even when a person seeking records is indigent [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

RJF:jm

cc: Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17022

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
David A. Paterson
Michelle K. Rea
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Executive Director

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February 26, 2008

Mr. Mark Mitchell
94-B-2931
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

Dear Mr. Mitchell:

I have received your letter in which you appealed a constructive denial of access to records to this office. You indicated that you were informed by the Erie County District Attorney's Office that your request was being reviewed, but that no date was given when you would receive a response from that office.

In this regard, it is noted that the Committee on Open Government is authorized to provide advice and opinions concerning access to government information, primarily under the state's Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. However, in this regard, I offer the following comments.

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

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

It is noted that new language was added to that provision in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the

> acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

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

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

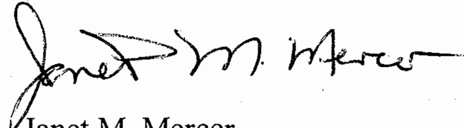
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to the Erie County District Attorney's Office.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Frank J. Clark
Matthew B. Powers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17023

Committee Members

Laura L. Anglin
Tedra L. Cobb
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David A. Paterson
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Dominick Tocci

Executive Director

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February 27, 2008

Mr. Jason Dent
67640-053
U.S.P. Big Sandy
P.O. Box 2068
Inez, KY 41224

Dear Mr. Dent:

I have received your letter in which you appealed "the denial of [this] office to intervene regarding your request for release" of records that you requested from the New York City Department of Correction.

In this regard, it is emphasized that the functions of the Committee on Open Government largely involve providing advice and opinions pertaining to the Freedom of Information Law. The Committee cannot "intervene" in a judicial or other proceeding, it does not have custody or control of records generally, and it is not empowered to determine appeals or compel an agency to grant or deny access to records. In short, this office does not possess the records of your interest, and it does not have the authority to direct the Department of Correction or any other agency to disclose its records.

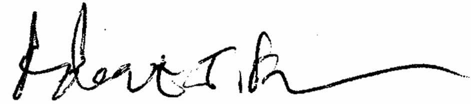
As I did in a response to you of July 31, 2007, copies of this response will be sent to officials at the Department of Correction.

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

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

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: Stephen Morello
Judith LaPook

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17024

Committee Members

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Tedra L. Cobb
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February 27, 2008

Mr. Anthony Lewis
00-B-0639
Livingston Correctional Facility
Box 1991
Sonyea, NY 14556

Dear Mr. Lewis:

Your letter addressed to the Department of State concerning your difficulty in obtaining records from the Steuben County District Attorney's office in a timely manner has been forwarded to the Committee on Open Government for a response. The Committee is authorized to provide advice and opinions concerning access to government information, primarily under the state's Freedom of Information Law.

In this regard, I offer the following comments.

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

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

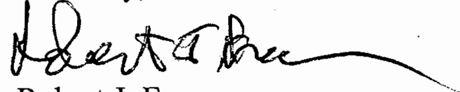
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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 officials at Steuben County.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Chris Kane, Clerk, Steuben County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4574
FOIL-AO-17025

Committee Members

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March 3, 2008

James T. Evans, M.D., FACS
President, Medical-Dental Staff
Erie County Medical Center Corporation
462 Grider Street
Buffalo, NY 14215

The staff of the Committee 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 Dr. Evans:

As you are aware, I have received your letter in which you referred to an opinion rendered on October 3 of last year in which it was advised that the Board of Directors of Western New York Health System ("WNYHS") constitutes a "public body" required to comply with the Open Meetings Law. The basis of the opinion involved the fact that every member of the Board had been designated by the Commissioner of Health, and that the Board was charged with the responsibility to "bring about a single unified joint governance" as the result of a merger of the Erie County Medical Center and Kaleida Health. You wrote that you serve as a member of the Board and asked that I reaffirm that meetings of the Board are subject to the Open Meetings Law.

When the October 3 opinion was prepared the entity at issue had not been incorporated. However, you wrote that WNYHS was incorporated as a not-for-profit corporation on October 25. You added that:

> "All of the existing board members were appointed by the N.Y. Commissioner of Health, Richard F. Daines, M.D. Seven of those appointees serve in official capacity to represent public institutions at his direction (Erie County Medical Center Corporation and the State University of New York at Buffalo are the public institutions involved). Although there are representatives of public institutions and the receipt of public money for purposes of public good is contemplated, counsel for WNYHS has verbally advised the Board that in his opinion the Open Meetings Law does not apply because WNYHS is a not-for-profit organization."

I respectfully disagree with that conclusion.

Once again, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based upon the language quoted above, a public body, in brief, is an entity consisting of two or more members that conducts public business and performs a governmental function for one or more governmental entities.

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

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

In consideration of the foregoing, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York.

Although not-for-profit corporations typically are not governmental entities and, therefore, fall beyond the scope of the Freedom of Information and Open Meetings Laws, the courts have found that the incorporation status of those entities is, alone, not determinative of their status under the statutes in question. Rather, they have considered the extent to which there is governmental control over those corporations in determining whether they fall within the coverage of those statutes.

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

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are

> delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

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

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

More recently, in a case involving a not-for-profit corporation, the "CRDC", the court found that:'

> "The CRDC denies the City has a controlling interest in the corporation. Presently the Board has eleven members, all of whom

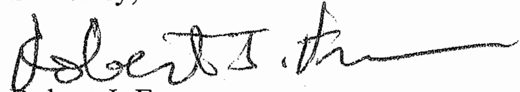
> were appointed by the City (see Resolution #99-083). The Board is empowered to fill any vacancies of six members not reserved for City appointment. Of those reserved to the City, two are paid City employees and the other three include the City mayor and council members. Formerly the Canandaigua City Manager was president of the CRDC. Additionally, the number of members may be reduced to nine by a board vote (see Amended Certificate of Incorporation Article V(a)). Thus the CRDC's claim that the City lacks control is at best questionable...

I note that the Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing [292 AD2d 825 (2002)].

In short, the Commissioner of Health has complete control over the membership of the Board of Directors of WNYHS. That being so, and in consideration of the judicial decisions cited earlier, I believe that the Board of Directors of WNYHS remains a "public body" required to comply with the Open Meetings Law, despite its status as a not-for-profit corporation.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas Conway, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17026

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March 4, 2008

E-MAIL

TO: John P. Brock

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Brock:

I have received your inquiry in which you asked whether there is any "NY law or regulations that permit or prevent school administration from withholding student academic reports or transcripts (K-12) due to (overdue library books or) fines."

In this regard, the primary consideration involves a federal statute, the Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). In brief, that statute applies to any educational agency or institution that participates in any federal funding or loan program and confers rights of access to education records pertaining to a student upon a parent of a student under the age of eighteen, and the students themselves upon reaching that age. Because those rights are accorded by means of federal law, I do not believe that an educational institution may withhold records from a student's parent or older student on the ground that there may be overdue books and/or fines owed. Further, in Dramadri v. New York Inst. of Technology, the court reached the same conclusion (Supreme Court, New York County, NYLJ, January 26, 1988).

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO -17027

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March 3, 2008

Mr. Brian M. Kelty

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

Dear Mr. Kelty:

I have received your letter and a variety of material relating to it. You have requested an advisory opinion concerning the responsibility of the Island Trees Union Free School District to scan records requested under the Freedom of Information Law so that those records can be emailed to you.

By way of background, you requested a variety of records "in email form" concerning the purchase of goods and services by the District. As it pertains to email, the request relates to §89(3)(b) of the Freedom of Information Law, which states 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..." You were informed by the district that the volume of the material was more than 600 pages. In order to transmit them via email, the records would have to be scanned first, and then emailed. Through another request, you obtained records indicating that the District possesses a machine that serves as both a photocopier and a scanner.

In this regard, I know of no judicial decision that deals with an agency's obligation to scan records in order to transmit them to an applicant who requests that they be made available via email. Further, although you acquired records indicating that the District has at least one machine that serves as both a photocopier and a scanner, I am unfamiliar with the capabilities of any such machine or machines. Both you and the Assistant Superintendent who responded to the request cited an opinion prepared by this office concerning the process of scanning and subsequently emailing records in which it was advised that "if the agency has the ability to do so and when doing so will not involve any effort additional to an alternative method of responding, it would be required to scan the records."

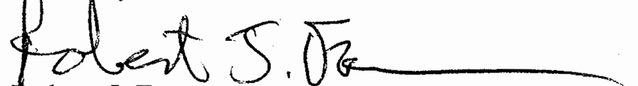
In consideration of that opinion, which is based on reasonableness and the intent of the Freedom of Information Law, it is your contention that the District must scan the records and then email them to you in order to comply with the Freedom of Information Law. The Assistant

Superintendent wrote, however that "Since the district does not have the technology to scan and e-mail your requested documents, totaling more than 600 pages, without exerting substantially greater effort than responding to your request in a different manner e.g. photocopying the documents, the District is not obligated to comply with your request." The District Superintendent offered the same conclusion, using essentially the same language, in an ensuing letter.

Without additional information concerning the capacity of the District's machine, I cannot offer specific guidance. If indeed the process of scanning and then emailing the documents involves "substantially greater effort" than photocopying the documents, I would agree that the District is not obliged to do so. However, the District's responses are conclusory; there is no explanation of how or why scanning and emailing would involve greater effort than photocopying. It is my understanding that the processes involving photocopying and scanning are exactly the same on many machines. Moreover, once a document is scanned and saved, it would not have to be photocopied in response to other requests or when needed by District staff. Rather, it would be stored electronically and available for viewing on a computer screen, emailing, or perhaps being printed if necessary or desired. From my perspective, unless it can be explained how or why scanning and emailing would involve "substantially greater effort" than photocopying, the District's response is inconsistent with the thrust and intent of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: James Parla
Salvatore Carambia

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17028

Committee Members

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March 4, 2008

Mr. John Ramos
04-A-3060
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051

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

Dear Mr. Ramos:

I have received your letter in which you indicated that you are having difficulty in obtaining a response to your request for records from the New York City Department of Correction.

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."

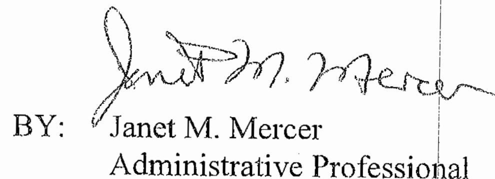
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17029

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March 5, 2008

Mr. Mark Mitchell
94-B-2931
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

Dear Mr. Mitchell:

I have received your letter in which you appealed a denial of access to records by the Office of the Erie County District Attorney.

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

The provision concerning the right to appeal, §89(4)(a), states in relevant part that:

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

State of New York
Department of State
Committee on Open Government

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FOIL AO 17030

VIA EMAIL
From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, March 05, 2008 5:25 PM
To: Helen T. Rose, Herkimer County Legislator
Subject: RE: FOIL REQUEST

Dear Helen:

My apologies for taking so long to return your email. It's been hectic here, but I finally have been able to read the attached emails, and I offer you the following comments.

The Freedom of Information Law is based on a presumption of access. In short, all records of an agency are available except to the extent that an agency can deny access to a record or a portion thereof based on a provision of law. When an agency denies access to a record or records, the agency must articulate the legal basis for non-disclosure. In this case, the response indicated that there are records that are exempt from the law, yet no provision of law was cited as the basis for denial.

Regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the FOIL. Section 1401.2(b)(3) states that an agency's records access officer is responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor." In my opinion, therefore, you now have the right to appeal the agency's response. Because the agency failed to articulate the basis for nondisclosure, the law permits you the authority to appeal, which would require the agency to respond to your request in full within 10 business days (see http://www.dos.state.ny.us/coog/explaination05.htm).

It may be that the agency attempts to deny access to your request based on section 87(2)(g) of the Freedom of Information Law. This is the provision that requires an agency to provide, upon request, inter and intra-agency records to the extent that they contain (1) statistical or factual tabulations or data (2) instructions to staff that affect the public (3) final agency policy or determinations, or (4) external audits. The Court of Appeals has ruled that reports submitted by professional consultants are inter-agency records (see http://www.dos.state.ny.us/coog/ftext/13646.htm). "Statistical or factual tabulations or data" has been interpreted by the Court of Appeals to mean factual or objective information (see http://www.dos.state.ny.us/coog/ftext/f10047.htm starting with the paragraph "Pertinent in my view...").

In direct response to your question, no, the agency is not required to list the name of the record or records that they are refusing to disclose; however, again, it is required to indicate the basis for non disclosure, and, on appeal, is required to "fully explain in writing... the reasons for further denial." FOIL section 89(4)(a). The Court of Appeals has interpreted this provision to require the agency to do more that reiterate the statutory language (see http://www.dos.state.ny.us/coog/ftext/F15614.htm specifically,

the paragraph beginning "First...").

I hope this is helpful to you. I will be available on Thursday after 2 PM if you'd like to call. I wish you a fun and restful vacation!!

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17031

Committee Members

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March 6, 2008

Ms. Marianne Stewart

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

Dear Ms. Stewart:

I have received your letter and apologize for the delay in response.

With respect to the first issue that you raised, when a request is made and an agency grants access to some of the items sought but denies access to others, it is required to inform the applicant of the denial in writing and that he/she has the right to appeal the denial to the head or governing body of the agency or a person or body designated to determine appeals. If an agency does not maintain records that have been requested, again, the applicant should be so informed. 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." When you consider it worthwhile to do so, you could seek such a certification.

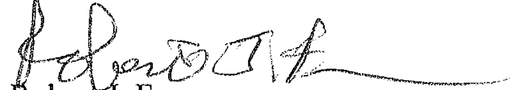
Next, the Freedom of Information Law pertains to existing records maintained by or for an agency. Therefore, if an agency does not maintain certain records that have been requested, it would not be required to create new records or obtain records on behalf of an applicant.

Lastly, if a record pertaining to a public employee includes an indication that he/she has been convicted of a felony, I believe that an item of that nature should be disclosed. By way of background, as you may be aware, government and private entities are in most instances are precluded from asking an applicant for employment whether he or she has been *arrested*. Under section 160.50 of the Criminal Procedure, if a person is charged with a crime and the charge is later dismissed in favor of the accused, records relating to the event are sealed. In my view, the sealing requirement in that situation is intended to ensure that a charge that did not result in a conviction does not result in detriment or hardship to a person who did not admit his or her guilt or against whom the government could not prove guilt. In contrast, when a person is convicted, the conviction occurs during a public proceeding, and the record of one's conviction is accessible from a court (see

e.g., Judiciary Law, section 255). That being so, I do not believe that disclosure of information indicating one's conviction would, if disclosed, constitute an unwarranted invasion of personal privacy [see FOIL, §87(2)(b)]. I note, too, that the state's highest court, the Court of Appeals, in Johnson Newspaper Corp. v. Stainkamp [94 AD2d 825, 61 NY2d 958 (1984)] held that records of arrest maintained by an agency were accessible, except in those instances in which they were sealed pursuant to section 160.50 of the Criminal Procedure Law. That being so, I believe that a portion of an employment record pertaining to a public employee indicating that the employee has been convicted of a felony must be disclosed.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17032

Committee Members

Laura L. Anglin
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March 6, 2008

Mr. Edward Hull

Dear Mr. Hull:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response. Having read the documentation, I am not sure of the kind of response that you want or anticipate.

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

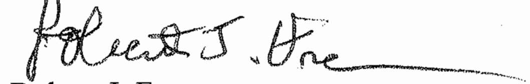
Additionally, while I am not suggesting that it is applicable in the situation that you described, §240.65 of the Penal Law, states that:

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

Article 6 of the Public Officers Law is the Freedom of Information Law, and §89(8) of that statute contains essentially the same language as §240.65. From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Gallatin Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17033

Committee Members

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March 6, 2008

Mr. Richard Himes

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

Dear Mr. Himes:

I have received your letter in which you criticized the *Journal News* concerning its publication on its website of the names of the pistol license holders in Westchester and Rockland Counties.

I note that the *Journal News* is not the first or the only entity to have requested and obtained the kinds of records to which to you referred. Further, the agencies in possession of those records are, in my view, as well as that of the state's highest court, required to disclose them to the public. 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, §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."

Therefore, when records are available as of right under some other provision of law or by means of judicial interpretation, they remain available, notwithstanding the provisions of the Freedom of Information Law. In the context of your remarks, a statute other than the Freedom of Information Law clearly requires that the addresses of licensees must be disclosed. Specifically, subdivision (5) of §400.00 of the Penal Law, entitled "Filing of Approved Applications", is most pertinent. Until November 1 of 1994, §400.00(5) stated in part that: "The application for any license, if granted, shall be a public record." As amended, it provides that: "The name and address of any person to

whom an application for any license has been granted shall be a public record." Because the statute quoted above requires the disclosure of the names and addresses of licensees, nothing in the Freedom of Information Law may be cited to withhold that information.

I point out that the contention that you offered that certain exceptions to rights of access, notably paragraph (f) of §87(2) of the Freedom of Information Law, was raised by the New York City Police Department years ago and was rejected by the Court of Appeals. That provision authorizes an agency to withhold records insofar as disclosure "could endanger the life or safety of any person." In the dissent in Kwitny v. McGuire [53 NY2d 968 (1981)], it was suggested that §87(2)(f) might properly be asserted to enable agencies to withhold certain aspects of approved pistol license applications. In fact, the dissent referred to an advisory opinion that I prepared in which the potential danger to gun license holders was recognized but in which it was advised that the information must nonetheless be disclosed, absent "amendatory legislation" (id. at 970). The majority, however, construed the statute as I did, stating that the information in question is available, and "[w]hether as a matter of sound policy, disclosure of the contents of applications should be restricted is a matter of consideration or resolution by the Legislature (id. at 969).

As indicated above, the State Legislature did indeed amend §400.00(5). However, it did not in any way limit the disclosure of the names and addresses of the holders of gun licenses.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Henry Freeman
CynDee Royle
Tony Davenport
Jorge Fitz-Gibbon
Richard Liebson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17034

Committee Members

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March 7, 2008

Ms. Wendy Lukas

The staff of the Committee on 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. Lukas:

I have received your correspondence in which you indicated that you have encountered difficulty in gaining access to records from the Schuylerville/Victory Water Authority. On January 29, your request for records was acknowledged but no date was given indicating when a determination would be made.

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

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

cc: Schuylerville/Victory Water Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17035

Committee Members

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March 10, 2008

E-MAIL

TO: Mr. Bill Ryan

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. Ryan:

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to requests for records made to the Manhasset-Lakeville Water/Fire District. In an effort to assist you and the District, and to address issues raised in your correspondence, we offer the following comments.

First, the Freedom of Information Law has been construed expansively in relation to matters involving records stored electronically. That statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

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

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

When information is maintained electronically, it has been held by the Court of Appeals that if the information sought is available under the Freedom of Information Law and may be retrieved with

reasonable effort [see Data Tree, L.L.C. v. Romaine, 828 NYS2d 512, 36 AD3d 804 (2007)], an agency is required to do so. 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.

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, in keeping with the above judicial decisions, the District has indicated that it will provide the requested data to you in "RTF" format on CD Rom. If this format is acceptable to you, and you are willing to pay the requisite fee, we believe the District is acting in compliance with law. Similarly, if the format is not acceptable to you and the District has the ability to transfer the data into a more usuable format, we believe that it would be required to do so.

Second, and in response to the District's indication that it requires payment for the CD Rom to which the data is transferred and "...the cost of personnel time of the employee(s) who must generate the transfer of data...", we note that an agency is permitted to charge only the actual cost of reproducing the data.

The specific language the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR §1401.8)."

Based upon the foregoing, the fee for reproducing electronic information ordinarily would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or disk) to which data is transferred.

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

With respect to your request for the number of providers at each level, the District indicated "This information was provided by the ambulance unit and is not a District Original document. Consequently there is information on this report that must be redacted out. It is a one page document (Cost $.25)" Here, although the District correctly indicated that it will provide the one page to you, it failed to articulate a basis for partial non-disclosure.

Regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the FOIL. Section 1401.2(b)(3) states that an agency's records access officer is responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor." Due to the

District's apparent attempt to comply with all provisions of the law, we recommend that you contact the District for clarification of the basis for non-disclosure of certain portions of the record.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

cc: Manhasset-Lakeville Fire District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17036

Committee Members

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March 11, 2008

Mr. Charles E. Vickery III

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

Dear Mr. Vickery:

We have received your request for an advisory opinion concerning application of the Freedom of Information Law to certain requests you made to the New York Racing and Wagering Board for records pertaining to the pari-mutuel cash reward programs. In response to your request for quarterly reports and other related records, the Board provided copies of records with substantive data redacted. In your opinion, the redacted information should be released to the public in order for the public to meaningfully participate in an evaluation of the efficacy of the program. In this regard, we offer the following comments.

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

In denying access to portions of the records provided to you, the Board relied on §87(2)(d), commonly known as the "trade secret" exception, 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..."

As is the case here, when a commercial entity is required to submit records to a state agency, pursuant to §89(5), at the time of submission, it may request that the records or portions thereof be kept confidential in accordance with §87(2)(d). According to the Board's July 6, 2007 correspondence to you, the New York Racing Association, upon submission, requested that certain information remain confidential. If you consider it worthwhile to do so, you could request a copy of the initial communication through which the New York Racing Association requested confidentiality. Although in our opinion, the record would be required to be made available upon request, portions may be redacted in keeping with the provisions of §89(5), so as not to "defeat the purpose for which the exception is sought" (§89[5][a][1]).

More importantly, 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.

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

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

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however,

> contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here", (id., 419-420).

It is the Board's contention that pari-mutuel wagering operators offer rewards programs as a method of attracting and retaining betting patrons who might wager at other venues. In its response to you, the Board described the competitive nature of the industry, and relied on the commercial value of this information to competitors, and the inability to gather this information by any other means, to justify its denial. "Certainly, revelation of the details of the programs, e.g., number of accounts, amounts wagered and on what types of wagers, net cost, would permit competitors to gain insight into what works and what does not - all to the potential detriment of the submitting entities. Application of the exception would protect the entities from the harmful effects of disclosing confidential commercial information. The mere fact that the amount wagered or net income is or is not material to a wagering entity's overall operation is not controlling."

You contend that regardless of the effect of disclosure of this information, because the public cannot evaluate the Board's characterization of the situation in a meaningful manner without this information, it should be disclosed.

Although we have minimal knowledge regarding the value of this information to competitor pari-mutuel wagering entities, we are persuaded by the Board's contention that the industry is competitive in nature. We have difficulty understanding, however, why disclosure would cause harm, if the amount of revenue generated from rewards programs is small in comparison to overall revenues. In our opinion, only when disclosure would cause substantial injury to the competitive position of the corporate entity as a whole would this provision apply.

Another consideration involves the extent to which the information sought or similar information is publicly available. If, as you contend, this information could be obtained through publicly available bankruptcy filings, in our opinion, it should be made available to that extent.

Notwithstanding the foregoing, it is emphasized that the effects of disclosure may change due to the occurrence of events or the passage of time. Disclosure of a report containing detailed current financial information could be devastating to an entity's competitive position. However, the effect of disclosing the same report years from now would likely not be as significant. Often the harmful effects of disclosing financial information will diminish or even disappear over the course of time. When that is so, the ability to assert §87(2)(d) also diminishes.

We note, too, that when an agency's denial of access is challenged in court, the agency bears the burden of proving that an exception was justifiably asserted [see §89(4)(b)]. The Court of

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

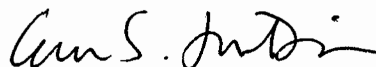
> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d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

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, emphasizing that:

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

On behalf of the Committee on Open Government, we hope this helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Gail Pronti
Robert A. Feuerstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17037

Committee Members

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March 12, 2008

Mr. Kenneth F. Dillon

The staff of the Committee on Open 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:

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to requests for records made to the Schuyler County Industrial Development Agency ("Development Agency") and the Schuyler County Partnership for Economic Development ("Partnership"). Among other questions, due to the relationship between the two entities, and their shared executive director, you request that we address whether the Partnership is subject to the Freedom of Information Law. In this regard, we offer the following comments.

First, in order to determine the Partnership's status under the Freedom of Information Law, it is necessary to determine the extent of government control over the Partnership.

Based on our research, we can confirm that the Development Agency and the Partnership share the same mailing address, the same telephone number and some staff. Beyond that, we have minimal knowledge about the overlapping responsibilities of the two entities, or what authority the Development Agency or the County have over the Partnership board. We note that the Partnership board consists of seven government members (including the Chair of the Development Agency), seven private members and two ex officio members (one from the Schuyler County Chamber of Commerce and the other from the Schuyler County Cooperative Extension). In our opinion, these factors are insufficient to indicate, whether the Partnership is an agency subject to the Freedom of Information Law.

Section 86(3) of that statute defines the term "agency" to mean:

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

In consideration of the foregoing, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York.

Although for profit and not-for-profit corporations typically are not governmental entities and, therefore, fall beyond the scope of the Freedom of Information Law, the courts have found that the corporate status of those entities is, alone, not determinative of their status under that statute. Rather, they have considered the extent to which there is governmental control over those corporations in determining whether they fall within the coverage of those statutes.

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

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

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

"The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.

"The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

Most recently, in a case involving a not-for-profit corporation, the "CRDC", the court found that:

"...the CRDC was admittedly formed for the purpose of financing the cost of and arranging for the construction and management of the Roseland Waterpark project. The bonds for the project were issued on behalf of the City and the City has pledged $395,000 to finance capital improvements associated with the park. The CRDC denies the City has a controlling interest in the corporation. Presently the Board has eleven members, all of whom were appointed by the City (see Resolution #99-083). The Board is empowered to fill any vacancies of six members not reserved for City appointment. Of those reserved to the City, two are paid City employees and the other three include the City mayor and council members. Formerly the Canandaigua City Manager was president of the CRDC. Additionally, the number of members may be reduced to nine by a board vote (see Amended Certificate of Incorporation Article V(a)). Thus the CRDC's claim that the City lacks control is at best questionable.

"Most importantly, the City has a potential interest in the property in that it maintains an option to purchase the property at any time while the bonds are outstanding and will ultimately take a fee title to the property financed by the bonds, including any additions thereto, upon payment of the bonds in full. Further, under the Certificate of Incorporation, title to any real or personal property of the corporation will pass to the City without consideration upon dissolution of the corporation. As in Matter of Buffalo News, supra, the CRDC's intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that

> it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law...
>
> "In Smith v. City University of New York, supra at page 713, the Court of Appeals held that 'in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies.' In the present case, the CRDC is clearly exercising more than an advisory function and qualifies as a public body within the meaning of the Public Officers Law. The CRDC is a formally constituted body with pervasive control over the entity it was created to administer. It has officially established duties and organizational attributes of a substantive nature which fulfill a governmental function for public benefit. As such its operations are subject to the Open Meetings Law" (Canandaigua Messenger, Inc. v. Wharmby, Supreme Court, Ontario County, May 11, 2001).

We note that the Appellate Division unanimously affirmed the findings of the Supreme Court [292 AD2d 835 (2002)].

Accordingly, because we have no information as to the authority to appoint the Partnership board members, or the authority the County has over the Partnership, we are unable to render an opinion on this issue. Should you obtain such information, you could resubmit your request and we will respond accordingly.

Second, we believe that some of the Partnership's records may fall within the coverage of the Freedom of Information Law when the issue is approached from a different vantage point. That statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

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

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

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. 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)].

In sum, insofar as records sought are maintained for the County or the Development Agency i.e., as the parent of a subsidiary corporation, we believe that those agencies would be required to direct the custodian of records sought that are maintained apart from the County or Development Agency records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

With respect to the remainder of your questions regarding the applicability of the Freedom of Information Law to email, the authority of an agency to require use of a particular form to make a request for records, and various time limits, we offer the following:

The scope of the Freedom of Information Law is expansive, for, as indicated earlier, it encompasses all government agency records within its coverage.

The definition of the term "record" makes clear that email communications made or received by government officers and employees fall within the scope of the Freedom of Information Law. Based on its specific language, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. Whether information is stored on paper, on a computer tape, or in a computer, it constitutes a "record." In short, email is merely a means of transmitting information; it can be viewed on a screen and printed, and we believe that the email communications at issue must be treated in the same manner as traditional paper records for the purpose of their consideration under the Freedom of Information Law.

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

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

It is noted that new language was added to that provision in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

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

Further, although an agency may, pursuant to §89(3) of the Freedom of Information Law, require that a request be made in writing, 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

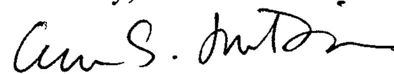
promulgated by the Committee (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Neither the law nor the regulations refers to, requires or authorizes the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the law does not preclude an agency from developing a standard form, as suggested earlier, we do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in our opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is our opinion that the use of standard forms is inappropriate to the extent that it unnecessarily serves to delay a response to or deny a request for records.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:tt

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FOIL AO 17038

From: Freeman, Robert (DOS)
Sent: Thursday, March 13, 2008 1:46 PM
To: Janet Fram

Dear Ms. Fram:

I have received your inquiry and recommend, first, that you inform that assessor that if the records sought are in possession of the Town, they are Town records, irrespective of their origin, and second, that, therefore, the Town must disclose the records to the extent required by law. It is also recommended that you contact the Town Clerk. It is likely that he/she is the designated records access officer and that it his her duty, not that of the assessor, to determine when records must be disclosed.

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FOIL AO 17039

VIA EMAIL
From: Jobin-Davis, Camille (DOS)
Sent: Thursday, March 13, 2008 10:33 AM
To: 'Tom Cayler'
Subject: RE: FOIL

Tom:

The following is a copy of subsection (8) of Education Law section 6510:

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

Based on this provision, in my opinion the Department of Education does not have the discretionary authority to release the file, only a court could order disclosure.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17040

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March 13, 2008

Mr. James Bell

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

Dear Mr. Bell:

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to a request made to the Division of Parole for a copy of a letter sent to the Division by the New York Police Department pertaining to your ability to ride the New York City subway. You submitted your request in correspondence dated October 22, 2007 and have not received a response. In this regard, we offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law. A communication between two agencies, such as the Division of Parole and the New York City Police Department, would fall within §87(2)(g) of the Freedom of Information Law. 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.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure.

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).

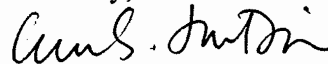
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request 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 that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:tt

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FOIL AO 17041

VIA EMAIL

From: Freeman, Robert (DOS)
Sent: Thursday, March 13, 2008 4:22 PM
To: dpellow

Dear Mr. Pellow:

The language to which you referred concerning the disclosure of salaries of public employees to "bona fide members of the news media" appeared in the Freedom of Information Law as originally enacted in 1974. That statute was repealed in 1977, and since 1978, the law has required that each agency must maintain a record containing the name, public office address title and salary of every officer or employee of the agency [see §87(3)(b)]. The record is available to any person, and you are correct in your contention that there "are no special rules for the news media in FOIL."

It is suggested that the policies and the form to which you referred are obsolete and inconsistent with law.

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

Robert J. Freeman
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FOIL AO 17042

VIA EMAIL
From: Freeman, Robert (DOS)
Sent: Thursday, March 13, 2008 4:15 PM
To: kyle.dobbs

Dear Mr. Dobbs:

When an agency cannot accept requests for records via email, requests can be made in writing and transmitted by mail or delivered to an agency. I note that each agency is required to required to designate one or more records access officers. A records access officer has the duty of coordinating an agency's response to requests, and requests should be made that person. In most towns, the town clerk is the records access officer.

I hope that I have been of assistance.

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March 14, 2008

FOIL AO 17043

Mr. D. Stokes
04-B-2706
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

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

Dear Mr. Stokes:

I have received your letter concerning your inability to obtain records pursuant to the Freedom of Information Law from your attorneys.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, pertains to records maintained by agencies. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Therefore, in general, the Freedom of Information Law is applicable to entities of state and local government. Based on the foregoing, it does not apply to a private attorney or law firm.

It is my understanding the there are a variety of entities within New York that use the name "Legal Aid". 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 organizations which are agencies of local government may be subject to the Freedom of Information Law, most are not "agencies" as that term is defined in the Freedom of Information Law and, as such, are not subject to that statute.

I am not fully familiar with the specific status of the “Legal Aid Bureau” to which you referred. However, it appears to be a corporate entity separate and distinct from government. If

that is so, it is not an "agency" subject to the Freedom of Information Law and its records would be outside the scope of public rights of access.

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

FOIL-AO-17044

From: Freeman, Robert (DOS)
Sent: Monday, March 17, 2008 9:30 AM
To: Moore, Elizabeth
Subject: RE:

Section 87(2)(g)(ii) and (iii) respectively require that those portions of intra-agency materials consisting of instructions to staff that affect the public or which constitute an agency's policy must be disclosed. That being so, I believe that the memo to which you referred must be disclosed.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17045

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Robert J. Freeman

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

March 17, 2008

E-MAIL

TO: Ken Cohen

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Cohen:

I have received your letter and hope that you will accept my apologies for the delay in response.

The issue involves the propriety of a school district policy concerning email that states as follows:

> "Email, including attachments, that were 'prepared, or having been or being used, received, possessed, or under the control of any public body,' may be, depending on the content, subject to disclosure as a public record (Freedom of Information Act, 5 ILCS 140/2). Most email sent or received by individual Board members do not satisfy this definition of 'public record' even when the content concerns District business. This is because individual Board members generally have no authority other than during a properly called Board meeting. However, there may be exceptions. Accordingly, Board members must be able to distinguish between official record and non-record messages."

The reference in the foregoing appears to relate to the federal Freedom of Information Act, which differs in many respects from the statute that governs, the New York Freedom of Information Law. From my perspective, email kept, transmitted or received by a school board member or school district employee in relation to the performance of his or her duties is subject to the Freedom of Information Law, even if the official uses his/her private email address and his/her own computer. Further, there is nothing in that law that relates to a characterization of records as "official."

In this regard, I offer the following comments.

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

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

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

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

Also pertinent is the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", in which the matter involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

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

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

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

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

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

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Second, the definition of the term "record" also makes clear that email communications between or among board members or district employees fall within the scope of the Freedom of Information Law. Based on its specific language, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. Whether information is stored on paper, on a computer tape, or in a computer, it constitutes a "record." In short, email is merely a means of transmitting information; it can be viewed on a screen and printed, and I believe that the email communications at issue must be treated in the same manner as traditional paper records for the purpose of their consideration under the Freedom of Information Law.

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

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

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

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

In this vein, the Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in <u>Gould v. New York City Police Department</u> [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)" (<u>id.</u>, 275).

Just as significant, the Court in <u>Gould</u> 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 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).

You also asked whether an individual board member may disclose the contents of the records considered above to the public. In this regard, many judicial decisions have focused on access to and the ability to disclose records, and this office has considered the New York Freedom of Information Law and the federal Freedom of Information Act in its analyses of what may be "confidential." To be confidential under the Freedom of Information Law, I believe that records must be "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a).

Both the state's highest court 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

FOIL-AO - 17046

From: Freeman, Robert (DOS)
Sent: Monday, March 17, 2008 3:29 PM
To: Brendan Scott, New York Post

Hi Brendan:

As you may know, FOIL states that an agency may charge up to 25 cents per photocopy or the actual cost of reproducing other records (i.e., the contents of a database), unless a different fee is prescribed by statute. In this instance, the Department of State has relied on a statute, §96 of the Executive Law, which includes reference to a variety of fees that it may charge. Subdivision (16) states that:

"Consistent with the provisions of the corporate laws of the state of New York, the department of state shall produce or reproduce the content of any informational systems maintained pursuant to such laws. The secretary of state shall establish the type and amount of the reasonable fees to be collected by the department of state for such informational systems. Such fees shall be subject to approval of the director of the budget and shall be promulgated in the official rules and regulations of the department of state in accordance with the provisions of the state administrative procedure act."

In short, the Department has statutory authority, separate from the FOIL, to establish and charge fees for its "informational systems."

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FOIL AO 17046

VIA EMAIL
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Sent: Monday, March 17, 2008 3:29 PM
To: Brendan Scott, New York Post

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In short, the Department has statutory authority, separate from the FOIL, to establish and charge fees for its "informational systems."

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FOIL-AO-17047

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March 17, 2008

Mr. Qabail Hizbullahankhamon
89-B-2119
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

Dear Mr. Hizbullahankhamon:

I have received your letter concerning "FOIL requests to the Bronx Administrative Judge and the Bronx County Clerk" that have been "ignored."

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."

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

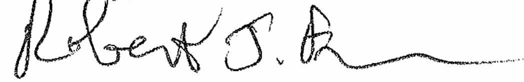
> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing the courts are not subject to the Freedom of Information Law.

This not to suggest that courts are not required to disclose their records. On the contrary, other statutes (see e.g., Judiciary Law, §255) generally require that court records are accessible. It is suggested that your request be made to the clerk of the proper court, citing an applicable provision of law as the basis of the request.

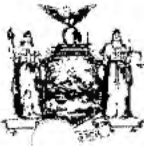
I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt



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FOIL-AO-17048

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March 17, 2008

Ms. Kathleen Chamberlain

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

Dear Ms. Chamberlain:

This is in response to your request for an advisory opinion regarding the interaction between the New York State Freedom of Information Law (FOIL) and two federal acts, the Individuals with Disabilities Education Act (IDEA) and the Family Educational Rights and Privacy Act (FERPA). Specifically, you are concerned that the New York State Department of Education's representation to you that it will release student records to a parent upon receipt of a written request pursuant to FOIL, represents an effort to delay parental access to student records and would result in a violation of the law. We agree with your opinion in part, and offer the following comments.

First, the Committee on Open Government is empowered to issue legal advisory opinions concerning application of the Freedom of Information Law. While only a court can make a judicial determination as to whether there has been a "violation" of the law, it is our hope that our written opinions are educational and persuasive and that they serve as helpful guidance.

Second, based on our understanding of both the IDEA, FERPA and Mr. Waxman's representations on behalf of the Department, while public access to student records is prohibited, parental access is permitted. Accordingly, we agree with your assertion that upon request, parents have the right to inspect, review and obtain copies of their children's educational records.

Third, FOIL specifies that an agency such as the Department has the ability to deny access to records when there is a particular state or federal statute that prohibits disclosure (Public Officers Law §87[2][a]). Here, where federal law grants parental access to student records, the FOIL preserves that right [see §89(6)]. Conversely, the opposite is generally true; the Department would be required to deny access to student records if the request were made by someone other than the student's parent, based on §87(2)(a) and the prohibitions contained in IDEA and FERPA.

Further, an agency may, pursuant to §89(3) of the Freedom of Information Law, require that a request be made in writing. The same provision states that an applicant must "reasonably describe"

the records sought. Consequently, a request should include sufficient detail to enable agency staff to locate and identify the records.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of

Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance,

the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Based on the materials you submitted, it appears that a parent initially submitted a verbal request for records that was relayed to Mr. Waxman. In his September 17, 2007 letter to the parent, Mr. Waxman informed the parent that the request should be made in writing to the records access officer at the Department of Education. Then, on November 20, 2007, in response to correspondence from the parent to the Deputy Commissioner of VESID dated November 15, 2007, Mr. Waxman again wrote to inform the parent of the process for requesting records in writing. Based on the November 20, 2007 correspondence, it is our opinion that VESID and the State Education Department received a written request for records from the parent, and that it should have dealt with the request directly or forwarded the request to the records access officer for handling in compliance with the time limits set forth above.

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 require that the request be received by the records access officer directly, only that the records access officer has the duty to coordinate an agency's response to requests. Based on the information provided, it is our opinion that the agency received a written request for records pursuant to the Freedom of Information Law by correspondence dated November 15, 2007. Accordingly, if the parent has not already done so, and has not received a response, it is our opinion that s/he has the right to appeal a constructive denial of access to the requested records.

We note that legislation enacted in 2006 broadened 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.

On behalf of the Committee on Open Government we hope that this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Robert P. Waxman

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL AO - 17049

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March 17, 2008

Mr. Kevin Patterson
03-A-2575
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. Patterson:

This office is in receipt of inquiry concerning access to court records. 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."

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

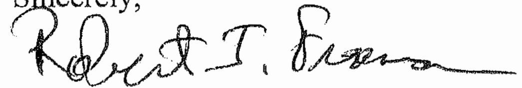
> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing the courts are not subject to the Freedom of Information Law.

This not to suggest that courts are not required to disclose their records. On the contrary, other statutes (see e.g., Judiciary Law, §255) generally require that court records are accessible. It is suggested that your request be made to the clerk of the proper court, citing an applicable provision of law as the basis of the request.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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FOIL-AO-17050

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March 17, 2008

Mr. Ruben Reyes
91-A-4702
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. Reyes:

I have received your letter in which you indicated that you have encountered difficulty in obtaining 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..."

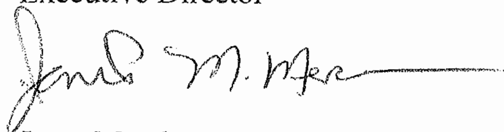
It was also confirmed that "Criminal Procedure Law Sec. 390.50 is the exclusive procedure concerning access to such reports, as they are confidential and specifically exempted from disclosure pursuant to State and Federal Freedom of Information Laws. Petitioner...must make a proper application to the Court which sentenced him" (Matter of Roper v. Carway, Supreme Court, New York County, NYLJ, August 17, 2004).

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17051

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March 17, 2008

Ms. Kathy Hoey

The staff of the Committee on 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. Hoey:

I have received your letter in which you indicated that you were denied access to certain records from the Brentwood Union Free School District and appealed to the Superintendent of Schools. As of the date of your letter, March 12, you had not received a determination of that appeal.

In this regard,§89(4)(a) of the Freedom of Information Law states in relevant part that:

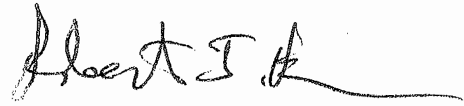
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted 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 legislation enacted in 2006 broadened 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Donna Jones, Superintendent

OML-AO-4580
FOIL-AO-17052

From: Freeman, Robert (DOS)
Sent: Wednesday, March 19, 2008 12:28 PM
To: Ms. Mary Cedeno

Dear Ms. Cedeno:

I have received your letter concerning "meeting terminology", and you referred to such items as "move to", tabling, ayes, nays, etc.

In short, those terms are generally not found in a law such as the Open Meetings Law. They are based on an entity's own rules of procedure. In terms of legal requirements, a motion is simply a proposal to have an entity, such as a public body required to comply with the Open Meetings Law, vote on a matter. Typically, although not required by a law, a motion is "seconded" by a person other than the member who introduced the motion. Also, the Open Meetings Law requires that minutes of meetings include a record or summary of motions, proposals resolutions, action taken and the vote of the members. With respect to "ayes and nays", the Freedom of Information Law has long required that a record be prepared when a vote is taken that indicates how each member of a government body cast his or her vote.

I hope that I have been of assistance.

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FOIL-AO - 17053

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, March 19, 2008 4:04 PM
To: 'patrick.cremo@wcb.state.ny.us'
Subject: RE: New Employer Proof of Coverage Search on Board's Webpage

Pat:

Given my lack of experience with and information about computer data mining capabilities, I would first seek the expertise of someone in the data mining industry, to learn exactly what another computer could collect from the Board's database, in light of the design of the existing "portal".

My limited familiarity with what I think are anti-mining devices, such as the one on the OCA website, that requires a human to look at a picture and type in numbers from the picture, leads me to believe that it is likely that a computer with the appropriate software could mine bulk coverage data from the Board's website.

If we can safely assume that bulk coverage data could be mined, right now, I/we would have a hard time supporting the Board's denial of a request for bulk coverage data.

As you suggest, if the Board were to remove coverage dates from the website, requiring someone to physically telephone into the Board for that particular information, or requiring a written FOIL request, then I/we believe our answer would be different.

As far as a contractual obligation not to use information for direct marketing goes, I think it's clear it wouldn't work. FOIL doesn't permit an agency to condition release based on an agreement to contain the information once it is released, it only permits the agency to ask the applicant to certify that it will not be used for the commercial or fundraising purpose. As you know, it's up to the agency to assess the credibility of the certification, and/or to deny access if it has reason to believe that it would be used for either of those purposes.

I hope it helps. Let me know if you have more 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-17054

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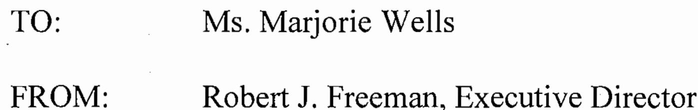
March 19, 2008

E-Mail



TO: Ms. Marjorie Wells

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. Wells:

I have received your letter concerning public access to "computer emails of a public school administrator..."

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

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

Second, the definition of the term "record" also makes clear that email communications between or among board members fall within the scope of the Freedom of Information Law. Based on its specific language, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. Whether information is stored on paper, on a computer tape, or in a computer, it constitutes a "record." In short, email is merely a means of transmitting information; it can be

viewed on a screen and printed, and I believe that the email communications at issue must be treated in the same manner as traditional paper records for the purpose of their consideration under the Freedom of Information Law.

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

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

When communications are made between or among agency officials, those communications fall within one of the exceptions, §87(2)(g). Due its structure, however, that provision may require substantial disclosure. Specifically, §87(2)(g) enables an agency to withhold records that:

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

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

Other exceptions might also apply. For instance, the federal Family Educational Rights and Privacy Act generally gives parents of minor students rights of access to records to records identifiable to their children. It also prohibits disclosure of records identifiable to students to the public at large, unless a parent of a student consents to disclosure. Additionally, portions of other communications to or from members of the public might properly be withheld when disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17055

Committee Members

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March 19, 2008

E-Mail

TO: Mr. Donald Biegun

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. Biegun:

I have received your letter in which you indicated that you appealed a denial of access to records to the NYS Department of Correctional Services but had not received a determination of that appeal.

In this regard,§89(4)(a) of the Freedom of Information Law states in relevant part that:

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

Section 89(4)(b) states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted 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 legislation enacted in 2006 broadened 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.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17056

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March 19, 2008

E-Mail

TO: Mr. Dan Kuchta

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Kuchta:

I have received your inquiry in which you indicated that you submitted a Freedom of Information Law request to the Town of Patterson fifteen days 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.

I hope that I have been of assistance.

RJF:jm

cc: Hon. Antoinette Kopeck

FOIL-AO-17057

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, March 20, 2008 9:13 AM
To: Shane.Rowe, Workers' Compensation Board
Subject: RE: CLE

Hi Shane:

The ever present internal procedures question. The answer is that "received" is received by the agency... see section 89(3)(a).. not the records access officer. I hope it's helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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518/474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 17058

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March 20, 2008

E-Mail

TO: Ms. Heather Tanner

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. Tanner:

I have received your inquiry concerning rights of access to a tape recording of a town board meeting prepared by the town and the length of time that the tape must be retained.

In this regard, first, the Freedom of Information Law is applicable to all agency records, and §86(4) of the Law defines the term "record" to include:

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

Since the tape recording is produced by the Town, I believe that it constitutes a "record" subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. In my view, a tape recording of an open meeting is accessible, for none of the grounds for denial would apply. Moreover, there is judicial precedent indicating that a tape recording of an open

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

Lastly, there are laws and rules dealing with the retention of records. Specifically, pursuant to §57.25 of the Arts and Cultural Affairs Law, the Commissioner of Education is authorized to adopt regulations that include reference to minimum periods of time that records must be retained by local governments. That provision also specifies that a local government cannot "destroy, sell or otherwise dispose of" records, except in conjunction with a retention scheduled adopted by the Commissioner, or the Commissioner's consent. Having contacted the Education Department, I was informed that tape recordings of meetings must be retained for a period of four months after transcription and/or approval of minutes.

I hope that I have been of assistance.

RJF:jm

FOIL-AO - 17059

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, March 20, 2008 1:33 PM
To: Helen Rose
Subject: RE: FOIL REQUEST/APPEAL

Dear Helen:

Please accept my apology for not being able to respond in a more timely fashion. I agree, the Commission still appears to be parsing words; however, in its earlier response, the Commission indicated that there were "studies and reports exempted from your request". I cannot interpret this statement any other way than to believe that there are reports that the Commission believes are not required to be disclosed to you.

Your strategy sounds excellent. Without supporting documentation or data, what is the basis for proposing the size of the facility?

It appears that your appeal was not forwarded to the FOIL Appeals Officer. The law requires that agencies receive and respond to request for records via email, but it is silent with respect to any obligation to receive and respond to appeals via email. Therefore, my recommendation is to send your appeal via ground mail to Mr. Donegan. You should attach copies of the emails that you forwarded to me, along with a brief explanation of the basis for your appeal, as you did in your March 7 email. If you still do not receive a satisfactory response, you then have the authority to bring an Article 78 proceeding in Supreme Court, and in the interim, as I believe we discussed previously, you could request a written opinion from our office.

As an aside, in light of the Commission's language about "studies and reports exempted from your request", I believe the Commission not only had an obligation to indicate the basis for denying you access to those reports, but also had an obligation to indicate to whom you should address your appeal, in conjunction with the denial. This is set forth in the Committee's regulations (21 NYCRR 1401), as follows:

1401.7 Denial of access to records.
(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall determine appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
(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.

Again, I hope this is helpful. Please do not hesitate to contact me if you have further questions.

Camille

Camille S. Jobin-Davis, Esq.
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17060

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March 20, 2008

TO: joma50

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 Joma50:

I have received your letter in which you sought information concerning your ability to know whether "a town employee was paid to do work at the town highway superintendent's home."

In this regard, first, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency, such as a town, is not required to create records in response to a request. In short, if no town records exist concerning work performed by a public employee, that law would not apply. If the highway superintendent paid for work performed with his own resources, and not with town funds, it is unlikely that there would be records or that the Freedom of Information Law would be applicable.

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

From my perspective, any records indicating payments by the town must be disclosed, for none of the grounds for denial of access would be pertinent.

Third, each agency is required to have designated at least one "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should be made to him or her. In most towns, the town clerk is the records access officer, and I point out that the town clerk, according to §30 of the Town Law, is the legal custodian of all town records, irrespective of the location of the records.

Lastly, while it is unclear whether it is relevant, §29(4) of the Town Law states that a supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

In addition, subdivision (1) of §119 of the Town Law states in part that:

> "When a claim has been audited by the town board of the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours."

I hope that I have been of assistance.

RJF:jm

FOIL-AO-17061

From: Freeman, Robert (DOS)
Sent: Friday, March 21, 2008 9:39 AM
To: Dr. Denise Lynn

Dear Dr. Lynn:

I have received your letter concerning a request made to the New York City Police Department in 2005 relating to the disappearance of an individual in 1937. You wrote that the receipt of your request was acknowledged, that you were informed that a response might involve up to 6 months, and that you later sent another letter to the Department to inquire as to the status of the request. However, you indicated that you had not received any further response.

In this regard, the Department's failure to respond could have been deemed a denial of your request. When an agency fails to respond in accordance with the time limits imposed by the Freedom of Information Law, the applicant can consider his/her request to have been denied and may appeal to the head of the agency or that person's designee. When an appeal is made, the appeals officer has ten business days from the receipt of the appeal to grant access to the records or fully explain in writing the reasons for further denial. If the appeal is not determined within the statutory time, the appeal may be deemed denied, and the person denied access may initiate a lawsuit to attempt to compel disclosure. To obtain more detail regarding agencies' responsibilities relative to responding in a timely manner, it is suggested that you go to our website and click on to "What's New" and then the passage involving time limits or to our advisory opinions regarding the Freedom of Information Law. The opinions are indexed by subject matter, and you can click on to "T" and scroll down to "Time limits." The higher the number of the opinion, the more recent it is.

Under the circumstances, due to the passage of time, it is recommended that you resubmit your request to the Department's records access officer, with copies of your original request and the Department's acknowledgment of its receipt and that you stress that you expect a response granting the request in whole or in part within a reasonable time as required by law [see §89(3)].

I hope that I have been of assistance.

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FOIL-AO- 17062

From: Freeman, Robert (DOS)
Sent: Friday, March 21, 2008 8:09 AM
To: Kicinski Christine J, New York City Department of Education
Subject: RE: Hypothetical situation

First, if your agency does not have the records, your response is not a denial of a request, but merely an indication that you do not maintain the records. Second, I am unaware of the content of a VENDEX application and, therefore, cannot comment on the Mayor's policy. However, once the application is in possession of another agency, that agency would have the responsibility to deal with a request for that record in a manner consistent with FOIL.

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FOIL-AO-17063

From: Freeman, Robert (DOS)
Sent: Friday, March 21, 2008 8:41 AM
To: Ms. A. Jane Johnston

I have received your inquiry concerning the time for responding to a request that is made via email. There is no judicial decision on the matter, and it is suggested that reasonableness should provide proper guidance. If a request is received, for example, at 4 p.m., in my view, the next business day should be considered the first business day of receipt. On the other hand, if a request is received at 10 a.m., that day should be considered the first business day. If five business days have passed and an agency has failed to respond to a request in any way, the request may be deemed denied, and the applicant has the right to appeal the denial in accordance with §89(4)(a) of the Freedom of Information Law.

There is no particular way of making a request. The law merely states that an agency may require that a request be made in writing and that the request must "reasonably describe" the records sought. "Your Right to Know", a general guide to the Freedom of Information Law that is available on our website, includes a sample letter of request. There are also several chapters on our educational video available on our website that may be useful to you.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave., Suite 650
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-17064

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

March 21, 2008

Mr. Richard Danavin
90-A-8241
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

Dear Mr. Danavin:

I have received your letter in which you appealed a denial of your request for records made by the parole officer 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 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."

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

I hope that the foregoing serves to clarify your understanding 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-17065

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
Michelle K. Rea
Dominick Tocci

Executive Director

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March 21, 2008

Mr. Shawn C. Bulow
07-B-4036
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Bulow:

I have received your letter in which you appealed a denial of your request for records by the Erie County Probation Department.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel 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."

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: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 17066

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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March 21, 2008

Mr. William Hollis
02-A-3070
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. Hollis:

I have received your letter and the materials attached to it. You have sought guidance concerning "how [you] could get the directives, policies or procedures of the Inspector General Narcotics Unit."

In this regard, having reviewed your requests, you sought information by asking questions. Here I point out that the Freedom of Information Law does not require that agency officials supply responses to questions. Rather, that law deals with the obligation to disclose existing records in a manner consistent with its provisions. In the future, instead of asking questions, it is suggested that you request records, i.e., directives or procedures that indicate the manner in which the Inspector General conducts investigations.

Second, each agency is required to designate one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests, and it is suggested that a request be made to the records access officer at the Department of Correctional Services central office in Albany.

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-17067

Committee Members

Laura L. Anglin
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John C. Egan
Stewart F. Hancock III
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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March 21, 2008

Mr. Said Gssime
98-A-5384
Marcy Correctional Facility
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. Gssime:

I have received your letter, and as I understand the matter, you have attempted without success to obtain records pursuant to the Freedom of Information Law from a mental health facility and a private attorney.

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

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

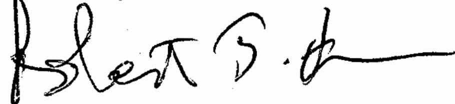
Based on the foregoing, an agency is generally an entity of state or local government. Neither private medical or mental health facilities nor private attorneys or firms fall within the coverage of that statute.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If the entity to which you referred maintains the records as a facility, I believe that it would be required to disclose the records to you to the extent required by §33.16 of the Mental Hygiene Law. Alternatively, it is possible that the records in question were transferred when you were placed in a state correctional facility, and that the records

may be maintained by a mental health "satellite unit" that operates within a state correctional facility. Those units are "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17068

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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

March 21, 2008

Mr. Curtis Richardson
07-A-2634
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. Richardson:

I have received your letter concerning a request made under the Freedom of Information Law. Based on my understanding of your remarks, I offer the following comments.

First, the two entities to which you referred are part of the same agency, the Department of Correctional Services. That being so, I know of no provision that would prohibit one of those entities from transferring your request to another.

Second, the time limit for responding to a request begins to run, in my opinion, when the agency receives a request.

And 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) states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted 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 for the Department is Mr. Anthony J. Annucci, Counsel to the Department.

Enclosed for your review is a guide to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17069

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
Michelle K. Rea
Dominick Tocci

Executive Director

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March 21, 2008

Mr. Jose Figueroa
06-B-3034
Groveland Correctional Facility
7000 Sonyea Road
Sonyea, NY 14556

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

Dear Mr. Figueroa:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from the Erie County Sheriff's Department. The Department has responded to your request and indicated that you would receive the information "when it becomes available."

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

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

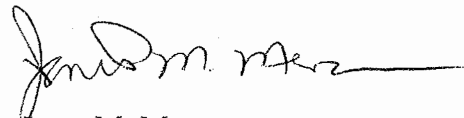
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17070

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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March 21, 2008

Mr. Homer Aki Mathis
04-A-3627
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. Mathis:

I have received your letter in which you indicated that you made a request for records to the New York City Police Department on September 18, 2007. The Department responded to your request stating that you would receive the records by January 26, 2008. You still have not received the records.

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

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

It is noted that new language was added to that provision in 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:

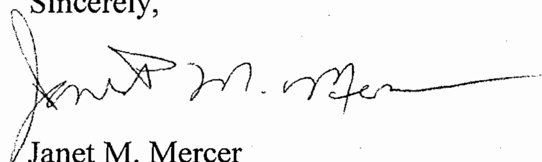
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

I hope that I have been of assistance.

Sincerely,



Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17071

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
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Stewart F. Hancock III
Michelle K. Rea
Dominick Tocci

Executive Director

Robert J. Freeman

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March 21, 2008

E-Mail

TO: Ms. Michele Roberts

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. Roberts:

I have received your letter in which you asked whether, in order to inspect records, "you have to see where it resides." You also asked whether an agency can require an applicant "to look for [records] in their files."

In this regard, first, the regulations promulgated by the Committee on Open Government, which have the force of law, state in relevant part that "Each agency shall designate the locations where records shall be available for inspection and copying" [21 NYCRR §1401.3]. Therefore, a person seeking to inspect records can be asked to do so at a designated location.

Second, with respect to "looking" in an agency's files, a key issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. In its consideration of that requirement, the Court of Appeals, the state's highest court, has held that a request meets that standard when an agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the

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

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number, and I believe that a request would reasonably describe the records insofar as the records can be located with reasonable effort. When records can be found by agency staff with reasonable effort, I believe that they are required to do so and make them available to an applicant.

On the other hand, if particular records cannot be located except by means of a review of what may be voluminous records individually, the request would in my opinion not reasonably describe the records. If, for example, minutes of meetings are not indexed by subject matter but rather are kept chronologically, a request for minutes of meetings during which a particular subject or address was discussed, particularly if the request does not include reference to a time period, might not reasonably describe the records. In that instance, it may be necessary to review the minutes of every meeting held over the course of years in order to locate those of interest. In that kind of situation, I believe that an agency could offer an applicant an opportunity to search for the records of his/her interest, for its staff would not be required to engage in a prolonged or unreasonable search.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-17072

From: Jobin-Davis, Camille (DOS)
Sent: Monday, March 24, 2008 4:04 PM
To: Shapiro, Daniel (DOS); Ball, Joseph (DOS)
Subject: Intra-agency

Dan and Joe:

The case I was thinking of, that I believe would apply, General Motors v. Town of Massena , is described below in language lifted from Advisory Opinion 15744. The FOIL request was for the documentation on which an appraiser relied to reach his professional recommendation.

> The "comparable sheets" that you describe refer to particular parcels as the focus and those other parcels that an assessor or consultant believes may be comparable in value. The selection of those other parcels essentially represents the opinion of the evaluator (an assessor or appraiser), and in a decision involving a request for records identifying "properties which he or she [an appraiser], subjectively, deems similar enough to warrant analysis", the Appellate Division upheld the agency's denial of access [General Motors Corporation v. Town of Massena, 180 Misc.2d, 693 NYS2d 870 (New York County, 1999)....]
>
> In General Motors, the petitioner challenging its assessments, sought "descriptions of the comparables and any sales information including dates and terms of sale" contained in appraisals submitted to the Town by the consultant (id. at 871). The Town refused to disclose such records, taking the position that "the determination of an appraiser to use any particular sale as a comparable represents a professional decision which is part of the expert's deliberative process in formulating his ultimate determination of value" (id. at 871-872). Based on that contention, the court held that the Town "need not disclose... that portion of the consultant's appraisal which contains information concerning comparable properties used in determining the fair market value" [id. at 872 (emphasis added)].

The General Motors case, I think, is unusual because the court did not use the traditional language of Gould v. NYPD:

> "...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, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996);

However, I think the GM case is correct in light of how it applies the balance to protect the deliberative process. In my opinion, the DOS could make a convincing argument that the subjective selection of events that culminate in a person's opinion that he can no longer remain objective would be protected as part of the deliberative process.

I hope it helps.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17023

Committee Members

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Tedra L. Cobb
Lorraine A. Cortés-Vázquez
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Stewart F. Hancock III
Michelle K. Rea
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Executive Director

Robert J. Freeman

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March 25, 2008

Mr. Keith Eddings

The staff of the Committee 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. Eddings:

I have received your letter and the correspondence attached to it. You have asked that I engage in an "assessment of the grounds on which [your] requests" for records directed to the State Police were denied.

The records sought include "the transcript of a cell phone call made to state police by a guy [you were] involved in an accident with, and...the transcript of the radio broadcast between the officer who responded and his barracks." The cell phone call was, according to your appeal, a 911 emergency call. You indicated that neither you nor the other driver were injured, that you exchanged insurance information with him, and then drove off. You were later arrested and charged with leaving the scene of an accident. Despite the nature of the event and the fact that you have obtained a copy of the motor vehicle accident report that identifies the other driver, the State Police denied the request, contending that "the records you seek concerns [sic] a case that is still pending adjudication" and "were compiled for law enforcement purposes and which, if disclosed, would interfere with judicial proceedings."

From my perspective, based on the correspondence and our discussion of the incident, it is unlikely in my view that disclosure of the records sought would interfere in any way with a judicial proceeding. 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. 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 Division of State Police has engaged in a blanket denial of access in a manner which, in my view, may be equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by that agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the

grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

The provision upon which the denial is based, §87(2)(e)(i), authorizes an agency to withhold records that "are compiled for law enforcement purposes and which, if disclosed, would...interfere with law enforcement investigations or judicial proceedings..." In an Appellate Division decision that is often cited in the context of records relating to law enforcement, Pittari v. Pirro, [258 Ad2d 202 (1999)], it was stated that:

> "[t]he question is whether the nature of the records sought and the timing of the FOIL request rendered those records exempt from disclosure under FOIL. The Court of Appeals, in *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572, 419 N.Y.S.2d 467, 393 N.E.2d 463 noted:
>
>> '[T]he purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution'" (id., 169).

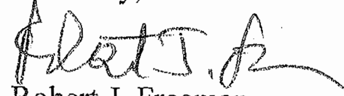
In consideration of the documentation that has already been disclosed, the routine nature of the event and the relative simplicity of the proceeding, in which there is likely minimal written material and few, if any, witnesses, it is difficult to envision how disclosure could interfere with a judicial proceeding or the means by which the State Police could meet the burden of defending its denial of access.

I note, too, that it has been found that "tape recordings of certain communications broadcast over police radio" were accessible, for the agency was unable to prove that an exception to rights of access could properly be asserted [Buffalo Broadcasting Co., Inc. v. City of Buffalo, 126 AD2d 983 (1987)].

In an effort to encourage a review of the denial of your request, a copy of this opinion will be forwarded to the Division of State Police.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: William J. Callahan

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FOIL AO - 17074

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March 25, 2008

E-MAIL

TO: Charles Pernice

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. Pernice:

I have received your letter in which you refer to a refusal by the Hepburn Library in the Town of Norfolk to disclose its records based on its attorney's contention that the Library is not an "agency" required to comply with the Freedom of Information Law.

From my perspective, whether the Library receives nearly all of its funding from the government is not determinative of whether it is subject to the Freedom of Information Law. If it is a municipal or a school district library, I believe that its records clearly fall within the coverage of that law. However, if it is a not-for-profit corporation known as an association or free association library, the Library would not, in my opinion constitute an "agency."

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

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

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.

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

The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

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

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries must be conducted in accordance with that statute, even though the records of those entities fall beyond the coverage of the Freedom of Information Law.

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

RJF:tt

cc: Hepburn Library

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Dmc-Ao-4586
FOIL-Ao-17075

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March 26, 2008

Dr. Peter M. Byron, President
Great Sacandaga Lake Association
P.O. Box 900
Northville, NY 12134

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

Dear Mr. Byron:

We are in receipt of your request for an advisory opinion regarding application of the Freedom of Information Law to the Hudson River-Black River Regulating District. Specifically, you asked about the timeliness of the District's responses, the contents of meeting minutes, and access to electronic records. The District responded to your request by submitting correspondence dated January 22, 2008, a copy of which is enclosed herein. In an attempt to address the issues raised in both of the submissions, we offer the following comments.

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

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

It is noted that new language was added to that provision in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a

> standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

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

With respect to the particular circumstances of your request for records presented at a September 10, 2007 Board Meeting, we note that the District responded within five business days of receipt of your request. Although there might have been some confusion, it is clear that your request was received on September 11 and that the District's acknowledgment was sent on September 17. The District then followed up in writing within an additional twenty business days, indicating that paper copies of the records were available at the Sacandaga Field Office, that one of the records was available online, and that if you preferred to have copies mailed to you, you should submit payment to the District.

The following day, Saturday, October 6, 2007, you wrote to the District via email and asked for a link to the online records and asked whether the remaining records were available electronically. On October 15, 2007 the District responded with a link to the online record, an electronic copy of the minutes, an explanation of why preparation of the minutes was delayed, and clarification that one record was not available electronically.

In our opinion, it is implicit in a request for records sent via email that the records be transmitted electronically, unless specific direction is provided to the contrary. As you noted, §89(3) of the Freedom of Information Law was amended in 2006 to require agencies that are able to accept requests via email to respond to such requests by electronic mail. Accordingly, while it is not clear why the District did not initially provide a link to the records that were available on the District's

website, we believe that would have been the most expedient response. In our view, when a request is made for access to records via email, the intent of the law is best served by responding with an electronic version of the records sought if they are available, or a link to the corresponding webpage.

With respect to your concerns about the District's response to your request for an electronic copy of the minutes, from our perspective, it is clear that minutes must be prepared and made available to the public within two weeks of the meetings to which they relate.

Section 106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

In view of the foregoing, it is clear in our opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting." Because it is likely that the minutes did not exist at the time you requested them (one day after the meeting), it is our opinion that the District could have immediately indicated that to be so. Instead, a few weeks later, the District indicated that the minutes were "available for pickup". Again, in our opinion, once they are prepared, the District should have forwarded an electronic copy of the records in response to your request.

With respect to your question concerning the adequacy of the minutes, we note that §106(1) of the Open Meetings Law pertains to minutes of open meetings and requires that :

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

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

From our perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. Based on that presumption, we believe that minutes must be sufficiently descriptive to enable the public and others (i.e., future Town officials), upon their preparation and upon review perhaps years later, to ascertain the nature of action taken by a public body.

Review of the minutes you provided indicates that after an informal competitive bid process in accordance with the District's purchasing policy, the District unanimously approved a resolution to purchase a compact track loader. Further, and with respect to the record of the unanimously approved resolution to award public relations consulting services work, our review of the minutes indicates the name of the winning firm and the period of the service contract. In our opinion, these minutes include sufficient information to ascertain the nature of the District's action.

We note that if underlying factual information such as a purchase price or the amount of the lump sum awarded to the winning firm are set forth in a resolution, such resolution could be attached to or incorporated by reference into the minutes. Although in our opinion it is not necessary to do so, it is a simple method of ensuring that information is readily available.

Finally, we note that while an agency is not required to create a record in response to a request, it is our view that if the agency has the ability to scan records in order to transmit it via email, and when doing so will not involve any effort additional to an alternative method of responding, it would be required to scan the records. For example, when copy machines are equipped with scanning technology that can create electronic copies of records as easily as paper copies, and the agency would not be required to perform any additional task in order to create an electronic record as opposed to a paper copy, we believe that the agency is required to do so. Further, it appears in that instance that transferring a paper record into electronic format would diminish the amount of work imposed upon the agency in consideration of the absence of any need to collect and account for money owed or paid for preparing paper copies, and the availability of the record in electronic format for future use.

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.

cc: William L. Busler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17076

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March 27, 2008

Mr. James P. Langton

The staff of the Committee on Open 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:

This is in response to your request for an advisory opinion regarding redactions made in records provided to you by the Newfane Central School District in response to a request made pursuant to the Freedom of Information Law. You indicated that the materials provided were redacted to "make the information given almost useless" and that in doing so, you believe the District is not in compliance with the law. You sent copies of the redacted records, and we have reviewed them in light of your request.

Please note that the Committee on Open Government is empowered to issue advisory opinions concerning application of the Freedom of Information Law; however, only a court has the authority to render a determination or compel disclosure. Accordingly, we offer the following comments in an effort to provide guidance on these issues.

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 our view, this phrase evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, 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 disclosed contained 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 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, 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.

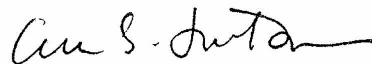
In the context of your request and the deletions made by the District, we believe that names of students, private citizens and witnesses, for example, could be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. 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, we believe that deletions would have been proper. However, we do not believe that the name of a current or former officer or employee of the District in relation to a discussion involving the performance of that person's duties could be withheld in every instance. For example, if the second notation from 7/10/07, "Examined matters of _____ and ______ in preparation for meeting with _____; traveled to _____ and met with ______.", involved conferring with a District official, and did not include an actual description of the legal issues, there would appear to be no basis for deletion of the name of the person with whom the attorney met or the location of the meeting. On the other hand, if the attorney met with a witness in preparation for a hearing, the District may have grounds to deny access to the name of the witness, for disclosure could cause an unwarranted invasion of personal privacy and possibly indicate legal strategy.

There are numerous references to "Telephone Conference with ______", "briefly conferred with _____" and "conferred with _____". In these instances it appears that the names of District staff and perhaps the names of other attorneys in the firm were deleted. Again, it does not appear that those deletions may be justified or proper in every instance. That kind of disclosure, in our view, does not indicate the general nature of services rendered, legal strategy, or the substance of the communications that may fall within the scope of the attorney-client privilege.

Accordingly, while grounds exist for redacting information that would identify students, employees against whom charges are pending, and possibly witnesses interviewed, there is no basis in the law, in our opinion, for nondisclosure of the identities of those District officers or employees with whom an attorney spoke or corresponded.

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: Sandy Meyers, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17077

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March 27, 2008

Mr. Charlie C. Pope
07-A-6201
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. Pope:

I have received your letter in which you questioned your right to obtain medical records pertaining to a deceased person.

In this regard, first, the statute within the advisory jurisdiction of this office, the Freedom of Information Law, pertains to government agencies; private hospitals or medical facilities fall outside the coverage of that law.

Second, the New York statute dealing with access to patient records is §18 of the Public Health Law. 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:

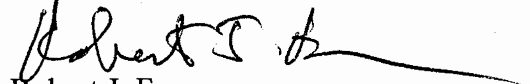
> "any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law, or a parent of an infant, a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record pursuant to paragraph © of subdivision two of this section, or an attorney representing or acting on behalf of the subject or the subjects estate."

If you are not a "qualified person", I believe that the medical records of your interest would be exempt from disclosure. To obtain additional information regarding access to patient information, it is suggested that you contact:

Access to Patient Information Coordinator
NYS Department of Health
Office of Professional Medical Conduct
433 River Street, Suite 303
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-17078

Committee Members

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March 27, 2008

Mr. Armando Guzman, Sr.
241-07-10700
15-15 Hazen Street
G.M.D.C. C-73 Facility
East Elmhurst, NY 11370

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

Dear Mr. Guzman:

I have received your letter in which you questioned your right to obtain medical records pertaining to a deceased person.

In this regard, first, the statute within the advisory jurisdiction of this office, the Freedom of Information Law, pertains to government agencies; private hospitals or medical facilities fall outside the coverage of that law.

Second, the New York statute dealing with access to patient records is §18 of the Public Health Law. 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 © of subdivision two of this section, or an attorney representing or acting on behalf of the subject or the subjects estate."

If you are not a "qualified person", I believe that the medical records of your interest would be exempt from disclosure. To obtain additional information regarding access to patient information, it is suggested that you contact:

Access to Patient Information Coordinator
NYS Department of Health
Office of Professional Medical Conduct
433 River Street, Suite 303
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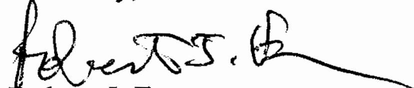
I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17079

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March 27, 2008

E-MAIL

TO: Joe DeJong

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. DeJong:

I have received your letter in which you asked whether you have the right to obtain police reports concerning break ins at a particular address.

In this regard, I believe that a record indicating that an incident precipitated a visit to a certain address by a state trooper or police officer must be disclosed. This is not to suggest that detailed or personal information must be made available, but rather that a record including the fact that a visit was made by a law enforcement officer to a particular address is not secret.

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

As you 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 my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an

obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

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

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

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

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

Considering the matter in relation to issues that arose concerning the traditional police blotter or equivalent records, I believe that such records would, based on case law, be accessible. In Sheehan v. City of Binghamton [59 AD2d 808 (1977)], it was determined, based on custom and usage, that a police blotter is a log or diary in which events reported by or to a police department are

recorded. That kind of record would consist of a summary of events or occurrences, it would not include investigative information, and would be available under the law.

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

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

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

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

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

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

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g),

the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

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

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected

> by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [id., 276-277 (1996); emphasis added by the Court].

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

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

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

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

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

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

In sum, police blotters and incident reports, by their nature, differ in content from one situation or incident to another. To suggest that they may be withheld in their entirety, categorically, in every instance, is in my opinion contrary to both the language of the Freedom of Information Law and its judicial construction by the state's highest court.

When a trooper or police officer is called to a certain location, the presence of that person with his or her vehicle, again, is not secret. It is an event that can be known by any person present or any passerby. That being so, I believe that a record or portion of a record indicating that a state trooper or other police officer visited a certain address must be disclosed. Additional details contained within that record or related records might properly be withheld.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17080

Committee Members

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March 27, 2008

Mr. Frank X. Didik

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

Dear Mr. Didik:

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to a request for records made to the New York City Department of Transportation. Among other items, you requested a copy of the request for proposal (RFP), a list of the responding entities, and any resulting contract for a "stray voltage warning system." The receipt of your August 25, 2007 written request for these records was acknowledged by the Office of Litigation Services and Records Management at the Department by correspondence dated September 5, 2007. To date, you have not received any further response in writing, although it is apparent, through a series of phone calls that you made, that the records you requested are either under review by the Department's attorneys, or are not being provided to the Office of Litigation Services. In this regard, we offer the following comments.

First, you indicated that you believe that the Department is reluctant to release the records because your father holds a patent on stray voltage warning systems, and the City may have decided to use [y]our patented technology, without bothering to get a license from us...". As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules (CPLR). Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is

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

Based upon the foregoing, the possibility of litigation would not, in our opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

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

Potentially relevant here is §87(2)(c), which enables agencies to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." From our perspective, the key word in the quoted provision is "impair", and the question involves how disclosure would impair the process of awarding contracts.

Section 87(2)(c) often applies in situations in which agencies seek bids or RFP's. While we are not experts on the subject, we believe that bids and the processes relating to bids and RFP's are different. As we understand the matter, prior to the purchase of goods or services, an agency might solicit bids. So long as the bids meet the requisite specifications, an agency must accept the low bid and enter into a contract with the submitter of the low bid. When an agency seeks proposals by means of RFP's, there is no obligation to accept the proposal reflective of the lowest cost; rather, the agency may engage in negotiations with the submitters regarding cost as well as the nature or design of goods or services, or the nature of the project in accordance with the goal sought to be accomplished. As such, the process of evaluating RFP's is generally more flexible and discretionary than the process of awarding a contract following the submission of bids.

When an agency solicits a number of bids, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage *vis a vis* those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, when the deadline for submission of bids has been reached, all of the submitters are on an equal

footing and, as suggested earlier, an agency is generally obliged to accept the lowest appropriate bid. In that situation, the bids would, in our opinion, be available.

In the case of RFP's, even though the deadline for submission of proposals might have passed, an agency may engage in negotiations or evaluations with the submitters resulting in alterations in proposals or costs. Whether disclosure at that juncture would "impair" the process of awarding a contract is, in our view, a question of fact. In some instances, disclosure might impair the process; in others, disclosure may have no harmful effect or might encourage firms to be more competitive, thereby resulting in benefit to the agency and the public generally.

In your case, it is not clear whether negotiations relating to the RFP's have been completed, or whether the parties to which contracts will be or have been awarded have been selected. If the contract has been awarded, we do not believe that there would be a basis for withholding under §87(2)(c), for disclosure would not in any way "impair" the contracting process. We point out, too, that it has been held that bids are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2D 951, 430 NYS 2D 196, 198 (1980)]. While the cited decision involved bids and related documents, we believe that it is implicit that the agreement itself had been made public or would be an accessible record.

In sum, if a contractor has been selected, we believe the submissions, the names of the entities who made submissions, and the agreement should be made public. In any event, the request for proposal in our view should be made available.

With respect to your request for a list of the entities that responded to the request, we note that an agency need not create a record in response to a request, for the Freedom of Information Law pertains to existing records (§89[3]). Therefore, if, for example, the Department does not maintain a list of the entities that responded, the Department would not be required to create such a list; however, as detailed above, the record identifying those who submitted proposals in the response to the RFP would be required to be made public once the contract award has been made.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the

> acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions,

> submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

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

Accordingly, due to the Department's failure to respond in writing within the 20 business days, you now have the right to appeal the constructive denial of your request.

We note that legislation enacted in 2006 broadened 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.

On behalf of the Committee on Open Government we hope that this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Penny Jackson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17081

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
Michelle K. Rea
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Executive Director

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March 27, 2008

Mr. Alex Mercado
DC# B01619
Sumter Correctional Institution
9544 County Road 476B
Bushnell, Florida 33513

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

Dear Mr. Mercado:

I have received your letter and the materials attached to it. You have sought assistance relating to delays in responding to your requests for records made to the New York City Police Department, the Office of the Kings County District Attorney, and the New York City Criminal Court.

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

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

In turn, §86(1) defines "judiciary" as follows:

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

Based on the foregoing the Police Department and the Office of the District Attorney clearly are "agencies" required to comply with the Freedom of Information Law. Courts, however, fall beyond the coverage of that law. This is not to suggest that courts are not required to disclose records, but rather that rights of access to court records are conferred by different provisions of law (see e.g., Judiciary Law, §255). When seeking court records, it is suggested that you do so by writing to the clerk of the proper court, citing an applicable provision of law as the basis of the request.

Second, when a request is made to an agency, the Freedom of Information Law as amended in 2005 provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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."

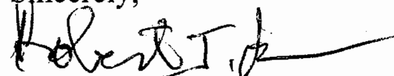
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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 - 17082

Committee Members

Laura L. Anglin
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March 27, 2008

Mr. Glen Maclean
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. Maclean:

I have received your letter in which you wrote that your requests for records of the Monroe County Jail have not been answered.

In this regard, the Freedom of Information Law as amended in 2005 provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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:

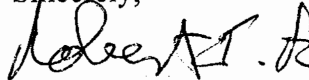
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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, I believe that the County Attorney has been designated to determine appeals following denials of access by agencies within Monroe County government.

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-17083

Committee Members

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March 27, 2008

Ms. Susan Blum
Associate Counsel
The State University of New York
at Stony Brook
Administration Building, Room 328
Stony Brook, NY 11794

Mr. Jay I. Zuckerman
Associate Director
Peconic Bay Medical Center
1300 Roanoke Avenue
Riverhead, NY 11901

Dear Ms. Blum and Mr. Zuckerman:

I have received your letters, both of which relate to an advisory opinion addressed to Mr. Anthony J. Dolan on February 26 pertaining to the status of the Peconic Bay Medical Center under the Freedom of Information Law.

As you may be aware, that statute is applicable to "agencies", entities of state and local government in New York. To reiterate a point made in my response to Mr. Dolan, §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."

Private entities that are not governmental in nature nor creations of a government agency are in most instances not "agencies" and, therefore, are not subject to the requirements of the Freedom of Information Law.

As the Medical Center's letterhead states, it is affiliated with Stony Brook University Hospital. Because an affiliation is not necessarily indicative of the extent of the relationship between the Medical Center and the University, I contacted the Medical Center by phone and asked, very

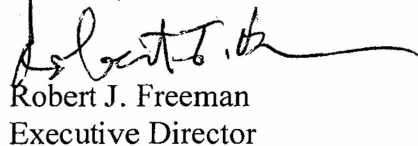
simply, whether the Medical Center is part of the State University at Stony Brook, and the response given by its employee was in the affirmative. On the basis of that response, it was advised that the Medical Center, as part of the University, is required to give effect to the Freedom of Information Law.

It appears that the staff person at the Medical Center with whom I spoke was either uninformed or mistaken, for in both of your letters, you wrote that the Medical Center is a not-for-profit corporation that is "separate" from the University, the University Hospital and the University School of Medicine. That being so, I do not believe that the Medical Center is an "agency" or that it is required to give effect to the Freedom of Information Law.

In an effort to inform Mr. Dolan of the revision of my opinion, a copy of this response will be forwarded to him.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Dolan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17034

Committee Members

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March 27, 2008

Mr. Ali Zaidi

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

Dear Mr. Zaidi:

I have received your letter in which you referred to a request for records made to Bronx Community College 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 note that one element of your request involved all communications from certain College administrators that refer to you and that are not contained within your personnel file. A potential issue relating to that request involves the extent to which it "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

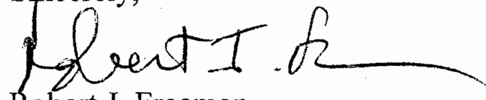
> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal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

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Mary Rogan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17085

Committee Members

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Lorraine A. Cortés-Vázquez
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Executive Director

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March 27, 2008

Ms. Cynthia L. Haskins
Brighter Choice Charter Schools
250 Central Avenue
Albany, NY 12206

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

Dear Ms. Haskins:

This is in response to your February 14, 2008 correspondence in which you transmit records pertaining to an appeal by the New York State United Teachers (NYSUT) subsequent to a denial of access to records rendered pursuant to the Freedom of Information Law. It is our opinion that the records requested by NYSUT should be made available, at least in part. In this regard, we offer the following comments.

First, 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."

While the status of charter schools may be somewhat unclear (i.e., as to whether they may by governmental, not-for-profit, or profit-making entities), the Legislature clearly intended that they be accountable to the public in a manner analogous to public schools, "agencies" that are unquestionably governmental in nature, for subdivision (1)(e) of §2854 of the Education Law specifies that charter schools shall be subject to both the Freedom of Information Law and the Open Meetings Law. As such, charter schools are intended to comply with the same statutes requiring accountability and disclosure as public schools and school districts. Accordingly, it is our opinion that the Freedom of Information Law apples to "agencies" and charter schools alike.

Second, with certain exceptions, the Freedom of Information Law does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

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

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be "maintained" to comply with the Freedom of Information Law. As originally enacted, the analogous provision in the Freedom of Information Law (formerly Public Officers Law §88(1)(g)] referred to a payroll record identifying employees by name and address. That provision did not indicate which address, either home or public office, should be disclosed. Having received questions and complaints regarding the disclosure of the home address of public employees, the "payroll provision" was clarified by the Legislature in 1977, and has long referred specifically to the "public office address" of public officers and employees.

Third, it has been advised that the disclosure of home addresses and home telephone numbers would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Seelig v. Sielaff, 201 AD2d 298 (1994) regarding social security numbers]. In our view, a public employee's home address and home telephone numbers are largely irrelevant to the performance of his or her duties.

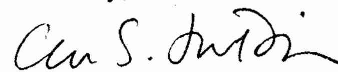
Finally, §89 (7) states that:

> "Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit or an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of an officer, employee or retiree of such employer, if such name or home address is otherwise available under this article."

The language quoted above indicates in its initial clauses that the home addresses of present and former public employees need not be disclosed under the Freedom of Information Law. Further, although the last clause of the provision refers to rights of access to home addresses by an employee organization, the cited provision grants such rights "if such name or home address is *otherwise available under this article.*" Since we do not believe that there is a right to home addresses granted by "this article", it does not appear that a public employee union has the right to obtain home addresses of employees under the Freedom of Information Law.

On behalf of the Committee on Open Government, we hope this is helpful of you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Ms. Marilyn Raskin-Ortiz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17086

Committee Members

Laura L. Anglin
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Lorraine A. Cortés-Vázquez
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Stewart F. Hancock III
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Executive Director

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March 28, 2008

Hon. Richard A. Lemcke
Town Supervisor
Town of Parma
P.O. Box 728
Hilton, NY 14468

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

Dear Supervisor Lemcke:

I have received your letter and the material attached to it. Please accept my apologies for the delay in response.

In your capacity as Supervisor of the Town of Parma, you wrote that you requested "daily work reports" and a monthly vacation schedule from the Highway Superintendent concerning the employees of the Highway Department. The request was rejected by the Highway Superintendent, and your appeal to the Town Board resulted in a vote of 2 to 2, with one abstention.

From my perspective, the records at issue must be disclosed to any person in response to a request made pursuant to the Freedom of Information Law. In this regard, I offer the following comments.

First, although records might be in the physical possession of the Highway Superintendent, or in some cases, other Town officers or employees, according to §30 of the Town Law, all town records are in the legal custody of the Town Clerk. In a related vein, the regulations promulgated by the Committee on Open Government require the governing body of a municipality to designate at least one "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records [see 21 NYCRR §1401.2]. In most towns, the clerk is the records access officer. If that is so in the Town of Parma, she would have the authority to acquire records requested under the Freedom of Information Law from any Town officer or employee and to review their content to determine the extent to which the law requires disclosure. Unless the Highway Superintendent has been designated as records access officer, I do not believe that he would have had the authority to deny your request.

Second, an attachment to your letter includes notes, apparently handwritten by the Town Clerk, indicating that he would not provide the records because they were "wanted for a purpose that the Supervisor has no jurisdiction over..." That the Supervisor may have no jurisdiction is irrelevant. It was held more than thirty years ago that when records are accessible under the Freedom of Information Law, they must be made equally available to any person, without regard to the status or interest of the person seeking the records [Burke v. Yudelson, 51 AD2d 673 (1976)].

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.

Most pertinent is §87(2)(b), which authorizes an agency, such as a town, 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, and according to those decisions, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Capital Newspapers v. Burns, [67 NY2d 562 (1986)] involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal employee, and in granting access, the state's highest court 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 daily work reports and employees' vacation schedules are accessible under the Freedom of Information Law and available to you, as Supervisor, or to any member of the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Brian Speer, Highway Superintendent
Donna K. Curry, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17082

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March 28, 2008

Mr. Kevin Patterson
03-A-2575
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. Patterson:

I have received your letter concerning your ability to gain access to a "securing order."

Attached is a copy of a blank securing order, and based on its content, if it is maintained by an agency subject to the Freedom of Information Law, I believe that the subject of such an order has the right to obtain a copy from the agency. In short, none of the grounds for denial of access appearing in §87(2) of that statute would apply. Similarly, if that record is maintained by a court, in my opinion, it would be available pursuant to a different provision of law, i.e., Judiciary Law, §255.

As you requested, also attached is a booklet regarding the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17088

Committee Members

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March 28, 2008

Ms. Joyce Saly

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

Dear Ms. Saly:

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to a request for records made to the Special Commissioner of Investigation for the New York City School District. Specifically, you requested a copy of a report generated pursuant to an investigation concerning yourself. Although at first, the Special Commissioner denied access to the report in its entirety, portions of the report were later released to you. Along with such records, the Special Commissioner's office indicated that they enclosed "the final determination of this office and the portion of the report relating to statements made by you during the investigation". The remainder of the report was withheld "to prevent an unwarranted invasion of personal privacy of others and as an intra-agency document." In this regard, we offer the following comments.

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

As indicated by the Special Commissioner's Office, and in our opinion, there are two provisions of §87(2) that would apply to permit the Special Commissioner to deny access to portions of the report. Section 87(2)(b) enables an agency to withhold records to the extent that disclosure would constitute an unwarranted invasion of personal privacy. If, for example, a complaint was made concerning you, that portion of the complaint which if disclosed would identify the

complainant could in our view be withheld. Similarly, if disclosure of the statement of a witness interviewed during the course of an investigation would disclose the identify of the witness, in our opinion, such statement could be withheld. Further, it is noted that unless portions of records may otherwise be withheld, §89(2)(c) of the Freedom of Information Law states in essence that you cannot invade your own privacy and that you may obtain records pertaining to yourself.

Additionally, §87(2)(g) permits an agency to withhold records that:

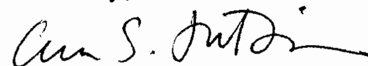
> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller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

Accordingly, it appears that the remainder of the report was withheld in keeping with law.

On behalf of the Committee on Open Government we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17089

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March 31, 2008

Mr. Jaime Rodriguez
07-A-1979
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. Rodriguez:

This office is in receipt of your correspondence in regard to your difficulty in obtaining records of your interest from the New York City Department of Correction.

In this regard, the Freedom of Information Law as amended in 2005 provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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

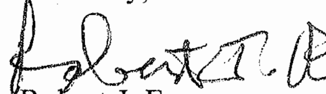
approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have 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
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17090

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March 31, 2008

S. Neal Currie, Jr.
Principal
Albany Community Charter School
42 S. Dove Street
Albany, NY 12202

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

Dear Mr. Currie:

This is in response to your February 21, 2008 correspondence in which you transmit records pertaining to an appeal by the New York State United Teachers (NYSUT) subsequent to a denial of access to records rendered pursuant to the Freedom of Information Law. It is our opinion that the payroll records requested by NYSUT must be made available, at least in part. In this regard, we offer the following comments.

First, 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."

While the status of charter schools may be somewhat unclear (i.e., as to whether they may by governmental, not-for-profit, or profit-making entities), the Legislature clearly intended that they be accountable to the public in a manner analogous to public schools, "agencies" that are unquestionably governmental in nature, for subdivision (1)(e) of §2854 of the Education Law specifies that charter schools shall be subject to both the Freedom of Information Law and the Open Meetings Law. As such, charter schools are intended to comply with the same statutes requiring accountability and disclosure as public schools and school districts. Accordingly, it is our opinion that the Freedom of Information Law apples to "agencies" and charter schools alike.

Second, with certain exceptions, the Freedom of Information Law does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

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

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be "maintained" to comply with the Freedom of Information Law. As originally enacted, the analogous provision in the Freedom of Information Law (formerly Public Officers Law §88(1)(g)] referred to a payroll record identifying employees by name and address. That provision did not indicate which address, either home or public office, should be disclosed. Having received questions and complaints regarding the disclosure of the home address of public employees, the "payroll provision" was clarified by the Legislature in 1977, and has long referred specifically to the "public office address" of public officers and employees.

Third, it has been advised that the disclosure of home addresses and home telephone numbers would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Seelig v. Sielaff, 201 AD2d 298 (1994) regarding social security numbers]. In our view, a public

employee's home address and home telephone numbers are largely irrelevant to the performance of his or her duties.

Finally, §89 (7) states that:

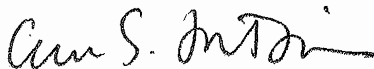
> "Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit or an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of an officer, employee or retiree of such employer, if such name or home address is otherwise available under this article."

The language quoted above indicates in its initial clauses that the home addresses of present and former public employees need not be disclosed under the Freedom of Information Law. Further, although the last clause of the provision refers to rights of access to home addresses by an employee organization, the cited provision grants such rights "if such name or home address is *otherwise available under this article.*" Since we do not believe that there is a right to home addresses granted by "this article", it does not appear that a public employee union has the right to obtain home addresses of employees under the Freedom of Information Law.

In sum, we believe that every agency has a responsibility to create, maintain, and make available upon request, payroll records indicating the name, public office address, title and salary of every officer and employee of the agency.

On behalf of the Committee on Open Government, we hope this is helpful of you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Ms. Marilyn Raskin-Ortiz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17091

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April 1, 2008

Mr. Reuben Bramble
04-A-4591
Downstate Correctional Facility
Box F, Red School House Road
Fishkill, NY 12524-0445

Dear Mr. Bramble:

I have received your letter in which it appears that you appealed to this office following a denial of your request for records made to the Chief Clerk of the Supreme Court, Criminal Term, in Kings County.

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. The provision in that statute pertaining to the right to appeal a denial of a request by an agency, §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. "

Second, and more importantly, the Freedom of Information Law applies to agencies, and §86(3) defines the term "agency" to mean:

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

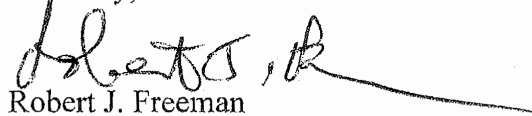
In turn, §86(1) defines "judiciary" to mean:

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts, and I know of no provision that provides an administrative appeal when a court denies access to records. It is suggested that you follow the instructions indicated in the correspondence attached to your letter.

I hope that the foregoing serves to clarify your understanding.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 17092

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April 1, 2008

E-Mail

TO: Mr. Joseph Karner

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Karner:

I have received your letters and hope that you will accept my apologies for the delay in response.

You wrote that you have been attempting without success to "obtain information from Rudy Giuliani pertaining to a statement he made to the media (ABC News) on Sept. 11, 2001..." You indicated that you have sent email messages to his election website but that you have received no response, and you asked "if and how it would be possible to obtain this information through New York's FOI." You also expressed interest in learning "who told him that the WTC Tower was going to collapse...." In this regard, I offer the following comments.

First, as you are aware, Mr. Giuliani is now a private citizen and, therefore, neither he nor election-related or private organizations with which he is now associated are required to disclose records pursuant to the Freedom of Information Law. That statute applies to agency records, and §86(3) defines the term "agency" to mean:

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

Based on the definition quoted above, the Freedom of Information Law pertains to records of entities of state and local government; it does not include private persons or organizations within its scope.

Second, if the information of your interest exists in the form of a record and is maintained by or for an agency, such as the City of New York, any such record would fall within the coverage of the Freedom of Information Law. If the information of your interest was not prepared in the form or a record or records, or if any records that had been prepared no longer exist, the Freedom of Information Law would not apply. In short, statute 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.

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

Lastly, since Mr. Giuliani has not been in public office for several years, I would conjecture that records that have been preserved and continue to be maintained by the City of New York would be kept at the Municipal Archives. It is suggested, therefore, that you might contact the Municipal Archives to attempt to ascertain whether the information that you seek is contained in records in its possession.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-AO-17093

Committee Members

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April 1, 2008

E-MAIL

TO: Marilyn Richardson

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Richardson:

I have received your letter and apologize for the delay in response. You have asked whether a "public school within NYS" is an "agency" that falls within the coverage of the Freedom of Information Law.

In this regard, that statute in §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 public school district is a kind of public corporation (see General Construction Law, §66). Since the definition of "agency" includes public corporations, it is clear in my opinion that a public school district constitutes an agency that is 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.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17094

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April 1, 2008

Mr. Michael Jones
91-A-2512
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 12733

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

Dear Mr. Jones:

I have received your letter in which you indicated that you have sent numerous Freedom of Information Law requests to a New York City correctional facility and, as of the date of your letter to this office, that you had not received any responses 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 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:

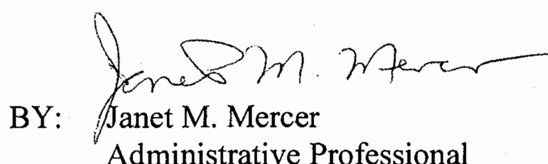
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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-17095

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April 1, 2008

Mr. Patrick Lynch
83-A-5139
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. Lynch:

I have received your letter, and as I understand its contents, you are interested in obtaining "certified copies" of a certain report.

In this regard, §89(3) of the Freedom of Information Law states in relevant part that, in response to a request for a record, "the entity shall provide a copy of such record and certify to the correctness of such copy if so requested..." From my perspective, the certification required by the Freedom of Information Law does not involve an assertion that the contents of a record are accurate, but rather that a copy of a record made available in response to a request is a true copy. I note that the regulations promulgated by the Committee on Open Government, 21 NYCRR §1401.2(b), state that an agency's records access officer "is responsible for assuring that agency personnel....(6) Upon request, certify that a record is a true copy."

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-17096

C nmittee Members

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Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
Michelle K. Rea
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April 1, 2008

Mr. Jakeen Howard
97-A-7294
Wyoming Correctional Facility
P.O. Box 1501
Attica, NY 14011-0501

Dear Mr. Howard:

I have received your letter concerning a request made under the Freedom of Information Law to Family Court in the Bronx.

In this regard, the Freedom of Information Law excludes the courts from its coverage. That law pertains to agency records, and §86(3) of the Freedom of Information Law defines the term "agency" to include:

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

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

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

As such, the Freedom of Information Law does not apply to the courts, and there would be no administrative appeal available.

Of possible relevance to the matter is §166 of the Family Court Act. That statute states that:

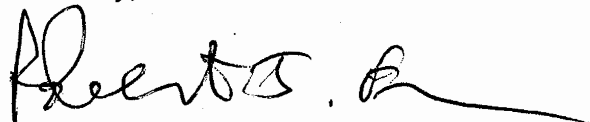
> "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or

> institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

In short, the matter that you described is outside the jurisdiction of this office. In consideration of §166, it is suggested that you explain the need for obtaining records from the court.

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-345
FOIL-AO-17097

(nmittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Stewart F. Hancock III
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April 1, 2008

E-MAIL

TO: Darlene E. Rivera

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. Rivera:

I have received your letter concerning a denial of a request by the New York City Transit Authority for a document pertaining to you, a "final evaluation of the separating employee", on the ground that it is "an interagency document." You have sought guidance concerning the propriety of the response, and in this regard, I offer the following comments.

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

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

Therefore, entities of state and local government in New York constitute "agencies". "Inter-agency" documents would be those transmitted between or among agencies; "intra-agency" documents would be those transmitted within an agency.

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

One of the exceptions to rights of access, §87(2)(g), pertains to inter-agency and intra-agency documents and states that an agency may withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Perhaps more significant in consideration of your request is the Personal Privacy Protection Law, which applies to state agencies only. The New York City Transit Authority is a subsidiary of the Metropolitan Transportation Authority (MTA), which is a state agency. The Freedom of Information Law deals with rights of access conferred upon the public generally; the Personal Privacy Protection Law deals with rights of access conferred upon an individual, a "data subject", to records pertaining to him or her. A "data subject" is "any natural person about whom personal information has been collected by an agency" [§92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

Rights conferred upon individuals by the Personal Privacy Protection Law are separate from those granted under the Freedom of Information Law. Under §95 of the Personal Privacy Protection Law, a data subject has the right to obtain from a state agency records pertaining to herself, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of that section or §96, which would deal with the privacy of others. Additionally, §95(2) provides a data subject with the right to attempt to correct or amend records pertaining to him or her "which he or she believes is not accurate, relevant, timely or complete."

It is suggested that you might either resubmit your request, citing §95 of the Personal Privacy Protection Law as the basis for the request, or that you refer to that provision in an appeal.

The full text of the Personal Privacy Protection Law is available on our website, as is "You Should Know", a guide to that law.

I hope that I have been of assistance.

RJF:tt

cc: Records Access Officer, NYC Transit Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17098

ommittee Members

Laura L. Anglin
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April 1, 2008

Mr. Diallo Madison
94-A-7376
Marcy Correctional Facility
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. Madison:

I have received your letter in which you sought an opinion concerning your right to gain access to a "transfer order" that is "submitted to DOCS prior to transferring a prisoner to another facility."

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

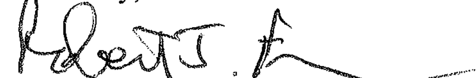
I point out that a decision rendered in 1989 might have dealt with the kinds of records concerning transfers similar to those in which you are interested. In that case, it was stated that:

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Kheel v. Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

Insofar as the records sought are equivalent to those described in Rowland D., it appears that they could be withheld.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-17099

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, April 02, 2008 9:45 AM
To: Mr. Tim Baroody'
Subject: RE: how to ask

Tim,

I would ask for "assistance identifying records, including an indication of the manner in which the records are filed, retrieved or generated, so that [you] may reasonably describe certified payroll records, etc., in keeping with 21 NYCRR part 1401.2(b)(2)." Additionally, I would include the questions you have set out below – there are no particular legal terms that you must employ.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

FOIL-AO- 17100

From: Freeman, Robert (DOS)
Sent: Thursday, April 03, 2008 8:35 AM
To: Mark Mahoney, Glens Falls Post Star
Subject: RE: Question for you when you get a chance

In general, unsubstantiated or unproven complaints or allegations regarding public employees may be withheld. However, records indicating findings or admissions of misconduct relating to public employees are, in most instances, accessible. An exception to the rule of access to those records relates to police officers. In short, §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; they cannot be disclosed absent consent by a police officer or a court order. Consequently, the records of interest to the resident are exempt from disclosure under the Freedom of Information Law.

Glad to know that your Right to Know blog is doing so well.

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave., Suite 650
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

FOIL-AO - 17101

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, April 03, 2008 3:49 PM
To: Hoffman, Richard (DOS); 'ariettaplanning@wildblue.net'
Subject: RE: APRAP Survey Confidentiality

Rick and Brad:

First, sorry for the delayed response. I've been out of the office and slow to catch up on the backlog.

Second, there are no provisions of law that would permit blanket confidentiality for the survey responses, however, I think public access to the responses given depends on the questions posed and how the answers are given.

As you point out, Rick, because the survey responses are likely to be intra or inter-agency communications, section 87(2)(g) would apply to require disclosure of the statistical or factual portions of the materials, but not opinions or recommendations. There is a 1993 Appellate Division ruling, Professional Standards Review Council of America, Inc. v. NYS Department of Health, 193 AD 2d 937, that makes the distinction between numerical ratings assigned to opinions, and the comments or opinions themselves, which can be protected as part of the deliberative process. The following is a link to an advisory opinion that includes a discussion of this case, that I believe you will find helpful: http://www.dos.state.ny.us/coog/ftext/f10011.htm

Accordingly, while I don't think there would be a basis for redacting the names of the officials who respond to the surveys, it is likely that if their opinions are not characterized by numerical ratings, those portions of the responses would not be required to be released to the public.

I hope this is helpful. If you have further questions, please contact me.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4592
FOIL-AO-17102

mmittee Members

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Executive Director

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April 3, 2008

E-MAIL

TO: Thomas H. Finnegan

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. Finnegan:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information and Open Meetings Laws to the East Meadow Board of Fire Commissioners. You indicated that your son, who is 15 years old, has repeatedly been excluded and ultimately banned from meetings and that requests for records sent to the Board have gone unanswered. In this regard, we offer the following comments.

First, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean:

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

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, §66(1)], a board of commissioners of a fire district in our view is clearly a public body subject to the Open Meetings Law.

Second, with respect to the ability of a person to attend a meeting of a public body, regardless of age or gender or residence, we 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 our 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. Further, we believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must permit anyone and everyone who wishes to attend, the opportunity to attend to observe and hear the proceedings, regardless of age, gender or residency. To do otherwise would in our opinion be unreasonable and fail to comply with a basic requirement of the Open Meetings Law.

Third, 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."

Again, a fire district is a public corporation. Consequently, we believe that it is an "agency" required to comply with the Freedom of Information Law.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents

> requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

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

Finally, legislation enacted in 2006 broadened 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.

On behalf of the Committee on Open Government we hope that this is helpful to you. In an effort to enhance compliance with and understanding of the above, a copy of this opinion will be forwarded to the Board.

CSJ:tt

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17103

mmittee Members

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Executive Director

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April 3, 2008

Mr. George L. Swan
07-B-3527
Livingston Correctional Facility
P.O. Box 1991
Sonyea, NY 14556

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

Dear Mr. Swan:

I have received your letter in which you complained that the Elmira Correctional Facility has not responded 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."

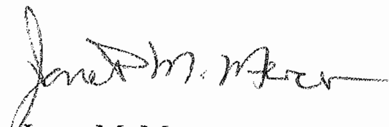
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

I point out that the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel.

I hope that I have been of assistance.

Sincerely,

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-17104

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Tedra L. Cobb
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Stewart F. Hancock III
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

April 3, 2008

Mr. Ronald Ranellucci
05-A-5952
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051

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

Dear Mr. Ranellucci:

I have received your letter in which you complained that your facility has not responded to your Freedom of Information Law requests.

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

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

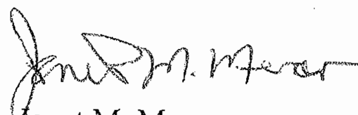
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

I point out that the person designated by the 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

OML-AO-4593
FOIL-AO-17105

From: Freeman, Robert (DOS)
Sent: Monday, April 07, 2008 1:19 PM
To: Tedra L. Cobb, St. Lawrence County Legislature
Cc: Steven G. Leventhal
Subject: RE: help on ethics code
Attachments: F9522.wpd

Hi - -

As suggested during our conversation, it appears that the structure of the proposal is derived from standards applicable to the Commission on Government Integrity (formerly the State Ethics Commission). That entity operates pursuant to the provisions of §94 of the Executive Law. Paragraph (a) of subdivision (17) of that statute specifies that the records the Commission are not subject to the FOIL (Article 6 of the Public Officers Law), and that only certain records listed in that provision are accessible to the public; similarly, paragraph (b) states that the meetings of the Commission are not subject to the Open Meetings Law (Article 7 of the Public Officers).

There are no similar statutes that deal with the records and meetings of a municipal ethics board. Consequently, records and meetings of those boards are subject to both the FOIL and the Open Meetings Law. As you know, both laws are based on a presumption of access. FOIL states that all records are accessible, except those records or portions thereof that fall within one or more of the exceptions to rights of access appearing in paragraphs (a) through (j) of §87(2); meetings of public bodies, such as ethics boards must be conducted open to the public, unless an executive session may be held in accordance with the provisions of paragraphs (a) through (h) of the Open Meetings Law.

Limiting the openness of records and meetings in the proposal offered for review would likely result in a variety of difficulties. In short, insofar as the proposal is inconsistent with FOIL or the Open Meetings Law, both of which are state statutes, they would be void. It noted that it has been held on several occasions that a local law or ordinance, for example, cannot create confidentiality when rights of access are conferred by a statute [see e.g., Morris v. Martin, 55 NY2d 1026 (1982)]. Further, §110(1) of the Open Meetings Law states, in essence, that any provision of a local enactment that is more restrictive than that statute is superseded. This is not intended to suggest that all records and meetings of a municipal ethics board must be open, for exceptions to rights of access often are pertinent in relation to the duties of those boards (see attached advisory opinion).

Rather than attempting to specify what is open or closed, it is suggested that any statement of intent might more appropriately indicate that the Ethics Board will abide by the provisions of the FOIL and the Open Meetings Law.

I hope that this is of value. If you would like to discuss the matter further, please feel free to call.

Robert J. Freeman, Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave., Suite 650
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-17106

ommittee Members

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April 7, 2008

Mr. Dempsey Hawkins
79-B-0609
Mt. McGregor Correctional Facility
1000 Mt. McGregor Road
Wilton, NY 12831

Dear Mr. Hawkins:

I have received your letter in which you requested information concerning the date on which you were placed on probation following a burglary in 1976.

Please be advised that this office does not have custody or control of records generally, and we maintain no records concerning the subject of your request.

To seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the government 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 for records. It is also noted that a request must "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable the staff of an agency to locate and identify the records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

PPPL-AO - 346
FOIL-AO - 17107

From: Freeman, Robert (DOS)
Sent: Monday, April 07, 2008 3:50 PM
To: Ms. Rivera

Dear Ms. Rivera:

I have reviewed your appeal to the Chair of the MTA, which indicates that a request for records was denied on December 18, 2007. In this regard, it is noted that §89(4)(a) of the Freedom of Information Law and §95(3) of the Personal Privacy Protection Law state that person denied access to records may appeal within thirty days of the denial. That being so, I believe that the person designated to determine appeals may reject the appeal because the appeal was made more than thirty days following the denial of your request. That person, however, may choose to waive that requirement and consider your appeal as if it were timely made.

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

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

FOIL AO - 17108

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April 8, 2008

Morgan Dennehy
Assistant District Attorney
Office of the District Attorney, Kings County
Renaissance Plaza, 350 Jay Street
Brooklyn, NY 11201-2908

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

Dear ADA Dennehy:

Thank you for sending a copy of your determination of an appeal by Cheryl L. Kates, who requested a sentencing transcript from your office under the Freedom of Information Law. You wrote that the transcript was "exempt from disclosure under FOIL", citing <u>Roque v. Kings County District Attorney's Office</u> [12 AD 3d 374 (2004)].

Although the Freedom of Information Law exempts the courts from its coverage, I believe that all records in possession of an agency, such as an office of a district attorney, constitute agency records subject to rights conferred by the Freedom of Information, and that the decision rendered in <u>Roque</u> is inconsistent with the clear guidance offered by the Court of Appeals in a decision rendered in 2002. Specifically, <u>Newsday v. Empire State Development Corporation</u> (98 NY 2d 746, 359 NYS2d 855) dealt with a request for copies of subpoenas issued by a court and served upon a state agency by the office of a district attorney. In concluding that those records, despite having been prepared by and emanated from a court are agency records subject to the Freedom of Information Law, it was stated that:

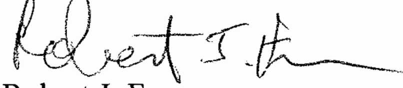
> "To be sure, had the subpoenas remained in the exclusive possession of the court on whose behalf they were issued, they would have been immune from compulsory disclosure under FOIL. That, however, would not have been due to the fact that it was the court that produced them, but because the Judiciary is expressly excluded from agency status under FOIL. Therefore, no 'information **** in any physical form' held or kept by a court as such is subject at all to FOIL, any more so than would records held or kept by a private person or any non-governmental entity. The immunity of the subpoenas from FOIL when once possessed by a court, however, does

> not run with those records. When they were served upon ESDC, a FOIL-defined agency, they were fully subject to FOIL disclosure in the absence of any showing by ESDC that some statutory exemption applies."

Based on the foregoing, records maintained by or for an agency, such as the Office of the District Attorney, irrespective of their origin, are subject to rights conferred by the Freedom of Information Law.

I hope that the foregoing will encourage you to review and reconsider your determination.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Cheryl L. Kates

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17109

C nmittee Members

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Stewart F. Hancock III
Michelle K. Rea
Dominick Tocci

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April 8, 2008

Mr. Mark Sims
04-R-4510
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-0010

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

Dear Mr. Sims:

I have received your letter in which you indicated that an appeal directed to the Town of Riverhead had not been answered.

In this regard, §89(4)(a) of the Freedom of Information Law states in relevant part that:

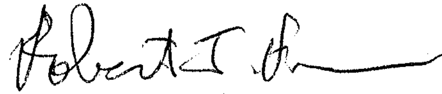
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

I note that §89(4)(b) states in part that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted 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, legislation enacted in 2006 broadened 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071. AO - 17110

Committee Members

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Executive Director

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April 8, 2008

Mr. Donald R. Gerace

The staff of the Committee 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. Gerace:

Thank you for sending a copy of your determination of an appeal of a denial of access to records submitted by Ms. Kelly DiMeo. Based on conversations with her, she requested a report concerning a roof prepared by a consultant retained by the Utica School District. You wrote that the records sought are "non-disclosable intra-agency records which are not final agency determinations" and sustained the initial denial of her request.

According to the Court of Appeals, that a record or report is not final is not determinative of rights of access. In this regard, I offer the following comments.

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

Although the provision to which you alluded as a basis for denial, §87(2)(g), potentially serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

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

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

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

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

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

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

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual

> tabulations or data' (Public Officers Law section 87[2][g][I], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

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

With respect to the contention that the records are not final agency determinations, I note that in Gould v. New York City Police Department, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

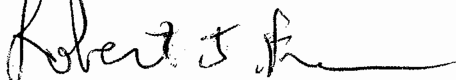
> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443,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

In short, that the records are not final would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access.

Again, based on the direction offered by the state's highest court, insofar as the records consist of "statistical or factual tabulations or data", they must be disclosed, even though they may not reflect a final agency determination.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
cc: Kelly M. DiMeo
Board of Education

FOIL-AO-17111

From: Freeman, Robert (DOS)
Sent: Wednesday, April 09, 2008 12:56 PM
To: Flo Santini
Subject: RE: FOIL Question

Hi - -

It has consistently been advised that an agency is not required to honor a request that is prospective in nature. In short, the Freedom of Information Law pertains to existing records, and in a technical sense, an agency can neither grant nor deny access to records that do not yet exist. For that reason, although an agency may choose to send or transmit certain records that have not yet been prepared to interested persons on an ongoing basis, I do not believe that it is required to so.

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

FOIL-AO-17112

mmittee Members

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Stewart F. Hancock III
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Dominick Tocci

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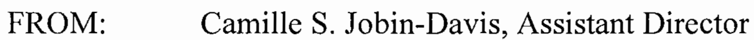
April 9, 2008

E-MAIL

TO: Timothy Chittenden

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. Chittenden:

This is in response to your requests for advisory opinions regarding application of the Freedom of Information Law to separate requests for records made via email to the Rye Police Department. In an effort to address the issues that your requests raise, we offer the following comments.

First, we note that the Department granted and denied portions of your November 13, 2007 request for "all e-mails from every member of the Rye Police Department either to or from Lt. Jeffrey Reichert, Lt. Robert Falk or Commissioner Conners, concerning the 2008 Squad Assignments." You requested that the Department (1) email records if possible, (2) advise you of the appropriate time to inspect records prior to obtaining copies, and (3) inform you of the cost of providing paper copies. The Department responded by indicating that it would make 47 pages available for inspection and copying, and that access to the remainder of the records identified as responsive to your request was denied based on paragraphs (f) and (g) of §87(2) of the Freedom of Information Law.

In response to your appeal, the Rye City Council adopted a resolution upholding the Department's denial, and indicated in part as follows:

> "WHEREAS, the Foil Request did not specify that Mr. Chittenden only wanted the responsive documents in electronic format; and ...
>
> "WHEREAS, the City Council, in an effort to comply with the spirit of the FOIL amendments to provide documents electronically, when practicable, and since the e-mails are already in electronic format recommends that the responsive records that are not exempt be sent to Mr. Chittenden electronically; ..."

The City Council further elaborated and supported the Department's partial denial, based on paragraphs (g) and (f) of §87(2) of the Freedom of Information Law.

As you know, in August of 2006, the Legislature amended the Freedom of Information Law to require agencies to receive and respond to requests for records via email, and for the Committee on Open Government to develop forms to assist with such requests. Accordingly, the Committee developed and made available forms on its website to serve as guidelines for those requesting and responding to requests via email. Use of the forms is optional, and we recommend that when utilizing a form, it be adapted to suit the situation. That may be the source of confusion, for in utilizing our form, you requested all three types of access: electronic copies, the opportunity to inspect records before copies were made, and the cost of copying the records in paper format. Accordingly, in our opinion, the Department's offer to permit you the opportunity to inspect records prior to purchasing copies was reasonable.

With regard to the City's direction that the Department forward those portions of the records available electronically to you in electronic format, we note that when a record is available electronically in its entirety, under the Freedom of Information Law, any person has the right to request and receive an electronic copy. However, there are often situations in which some aspects of an electronic record, but not the entire record, may properly be withheld in accordance with the grounds for denial appearing in §87(2). In that event, we do not believe that an applicant would have the right to receive an electronic copy of the record. Accordingly, it is our opinion, that if an electronic record is available in its entirety, it should be forwarded electronically, and conversely, if an electronic record is accessible in part and there is no means of making electronic redactions, an agency is not required to provide the record via email.

With regard to your concerns about accessible e-mail communications, §87(2)(g) permits an agency to deny access to records that,

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

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

With regard to your November 19, 2007 request for records and the Department's response, we note that §89(3) of the Freedom of Information Law, as well as the regulations promulgated by the Committee (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Neither the law nor the regulations require that the request be received by the records access officer directly, only that the records access officer has the duty to coordinate an agency's response to requests. Based on your recent correspondence with the Department, it is apparent that you are familiar with the appropriate email address to which you should send requests for records. Accordingly, and in order to avoid further confusion and delay, we advise that you utilize the email address designated for FOIL requests.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

cc: William R. Connors

FOIL-AO - 17113

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, April 10, 2008 8:38 AM
To: Lisa Baisley, Town of Huntington
Subject: Freedom of Information Law - driver's license

Lisa,

As promised, I conducted a search for relevant advisory opinions. Although I was not able to locate one that addresses your specific question regarding the accessibility of the particular type of license that a driver/employee maintains, I was able to locate the following:

http://www.dos.state.ny.us/coog/ftext/f11865.htm

In sum, this advisory opinion reinforces my advice to you that I believe disclosure of the personal information from the license would cause an unwarranted invasion of personal privacy. In my opinion, personal information does not include the type of license held by the driver.

If you would prefer a legal advisory opinion with respect to your exact question, please respond in writing, and I will add your request to our queue. Thank you and I hope this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-17114

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

April 10, 2008

E-MAIL

TO: Charles B. Smith

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Smith:

I have received your letter in which you asked whether an agency can "refuse to permit [you] to inspect records as opposed to making [you] pay the .25 page."

In this regard, when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there are 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. Again, however, if a record is available in its entirety, I believe that you would have the right to inspect it free of charge.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17115

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April 10, 2008

Ms. Margaret Chylinski

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

Dear Ms. Chylinski:

I have received your letter concerning the implementation of the Freedom of Information Law by the Mattituck-Cutchogue Union Free School District. Despite the preparation of an advisory opinion on the same subject in 2005, you indicated that the Superintendent refuses to accept requests made under the Freedom of Information Law, unless they are made on the District's prescribed form.

Since the issuance of that opinion, a new provision in the Freedom of Information Law makes reference, the only such reference, to a form. However, that reference relates to the use of an optional form prepared by this office for use by agencies in responding to requests made by email. In short, there is no aspect of the Freedom of Information Law requiring those seeking records to use a form prescribed by an agency. Further, for reasons described in the 2005 opinion, an insistence by an agency that the public use its form can result in failures to abide by the time limits for responding to requests imposed by §89(3)(a) of the Freedom of Information Law. I note that the provisions concerning timely responses to requests were amended in 2005, and that they are clearly intended to require agencies to do so without unnecessary delay. Separate amendments also enacted in 2005 expand a court's authority to award attorney's fees in litigation initiated under the Freedom of Information Law, and those amendments contain criteria involving agencies' failure to abide by the time limits for responding to requests and appeals.

In short, although an agency, such as a school district, may require that a request be made in writing and that the request "reasonably describe" the record or records sought, it is reiterated that an agency, in my opinion, cannot require a person seeking records to do so on a prescribed form.

In an effort to encourage compliance with law, a copy of this response will be sent to the Superintendent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: James McKenna

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17116

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April 11, 2008

Ms. Kathleen Chamberlain

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

Dear Ms. Chamberlain:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to the Mattituck-Cutchogue Union Free School District. This is to confirm previous opinions rendered concerning the Superintendent's refusal to accept requests made under the Freedom of Information Law, unless they are made on the District's prescribed form, the enforcement mechanism available under the law, and to provide guidance with respect to making requests for records via email. In this regard, we offer the following.

First, there is no aspect of the Freedom of Information Law requiring those seeking records to use a form prescribed by an agency or the Committee on Open Government. For reasons described in our 2005 opinion (copy enclosed) insistence by an agency that the public use its form can result in failure to abide by the time limits for responding to requests imposed by §89(3)(a) of the Freedom of Information Law. Please note that the provisions concerning timely responses to requests were amended in 2005, and that they are clearly intended to require agencies to do so without unnecessary delay.

In short, although an agency, such as a school district, may require that a request be made in writing and that the request "reasonably describe" the record or records sought, it is reiterated that in our opinion, an agency cannot require a person seeking records to do so on a prescribed form.

Second, when an agency fails to respond to a request and thereafter fails to respond to an appeal, as outlined in the attached advisory opinion, the applicant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules. Because the District has refused to respond to your requests unless they are submitted on a particular form or in a particular format, and because there was no response to your appeal, in our opinion, you now have the ability to bring a legal action.

Legislation enacted in 2006 broadened 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.

With regard to your questions concerning requests via email, this will confirm your understanding that there is no requirement in the law that an applicant use the form suggested by the Committee and available on its website for requests made via email.

Further, as previously indicated, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR 1401.8)."

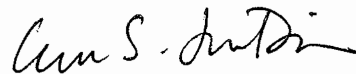
Based on the foregoing, there are two standards for charging fees. One involves photocopies up to nine by fourteen inches, in which case an agency may charge up to twenty-five cents per photocopy, irrespective of its cost; and the second involves "other records", those that cannot be photocopied (i.e., tape recordings, computer disks and tapes, etc.).

It has been held that the actual cost of reproducing a tape recording would involve the cost of a cassette (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978). In the alternative, we have advised that a person could place a tape recorder next to the municipality's tape recorder and have the machine record the sound from the other machine. In that instance, since no copy would be made, no fee could be charged.

Similarly, in our opinion, because sending electronic records via email does not involve a storage medium, no fee can be charged. E-mailing a copy of a record which exists in an electronic format involves the transmittal of that record, not the reproduction thereof.

On behalf of the Committee on Open Government we hope that this is helpful to you. In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the Superintendent of the Mattituck-Cutchogue Union Free School District and the Board of Education.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

Enc.

cc: James McKenna
Board of Education

FOIL-AO- 17117

From: Jobin-Davis, Camille (DOS)
Sent: Monday, April 14, 2008 4:50 PM
To: Bruce Greif
Subject: RE: FOIL and volunteer fire company - examine utility bills ..

Yes, we believe the Freedom of Information Law applies to the not-for-profit fire company corporations. See also:

http://www.dos.state.ny.us/coog/ftext/f7640.htm

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

FOIL-AO - 17118

From: Freeman, Robert (DOS)
Sent: Tuesday, April 15, 2008 8:11 AM
To: Michael Kolesar, Comptroller, Town of Greenburgh
Subject: RE: Ongoing Requsts

Dear Mr. Kolesar:

It is clear that the Freedom of Information Law pertains to existing records. That being so, in a technical sense, an agency can neither grant nor deny access to records that do not yet exist. Consequently, it has been consistently advised that an agency is not required to honor a request that is prospective and that deals with records that have not yet been prepared.

I hope that I have been of assistance.

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FOIL-AO - 17119

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, April 15, 2008 1:41 PM
To: Anthony Fusco
Subject: RE: Opinion Requested

Tony:
This is in support of your appeal to the Department for disclosure of the requested portion of the video tape, as set forth below. You may want to include a sentence or two regarding how disclosure of the tape and the other materials that you have requested would not interfere with judicial proceedings, but would assist in expediting final resolution of this matter. Although the law requires an agency to receive and respond to requests via email, because it is not clear whether an agency is required to receive and respond to appeals via email, I recommend you submit your appeal on paper, so as to avoid any unnecessary delay.

I hope this is helpful. 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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518/474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17120

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April 15, 2008

E-MAIL

TO: Phillip J. Bracchi

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Bracchi:

I have received your letter in which you raised a question concerning when a record submitted to a planning board, or other agencies, becomes subject to the Freedom of Information law.

In this regard, the Freedom of Information Law pertains to all government agency records, and §86(4) of that statute defines the term "record" expansively to mean:

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

Based on the foregoing, as soon as a document comes into the possession of a government agency or is prepared by or for a government agency, it constitutes a "record" that falls within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. With respect to the situation to which you referred in which a developer submits a document to a planning board, I believe it would be accessible under that law when it comes into the possession of a municipal board or official. In short, in my view, none of the grounds for denial of access would enable the agency to withhold the record.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 17121

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April 16, 2008

Mr. Anthony Brandon
06-A-6450
Auburn Correctional Facility
135 State Street
Auburn, NY 13024

Dear Mr. Brandon:

I have received your letter in which you requested a variety of material from this office relating to legislation. In this regard, please note that the functions of the Committee on Open Government involve providing advice and opinions pertaining to public access to government records, primarily in relation to the Freedom of Information Law. In short, this office does not maintain the information of your interest.

Having reviewed your request, however, I offer the following brief remarks.

First, the Freedom of Information Law pertains to existing records, and §89(3)(a) states in part that an agency is not required to create a new record in response to a request. Therefore, if, for example, no "breakdowns" that you requested exist, an agency, such as the Division of the Budget, would not be required to prepare new records on your behalf.

Second, the same provision requires that an applicant must "reasonably describe" the records sought. While some aspects of your request might meet that standard, others might not. I note that whether or the extent to which a request reasonably describes the records may be dependent on the nature of an agency's filing or recordkeeping systems. Insofar as an agency can locate and identify records with reasonable effort, a request would be proper. However, if staff must review hundreds or perhaps thousands of records individually to locate requested records, it has been held that the request does not reasonably describe the records [Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Lastly, although the federal Freedom of Information Act includes provisions concerning the waiver of fees, the New York Freedom of Information Law does not. Moreover, it has been held that an agency may charge its established fee, even though 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 and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-17122

From: Freeman, Robert (DOS)
Sent: Wednesday, April 16, 2008 11:32 AM
To: Timika Forstman

Dear Ms. Forstman:

I have received your letter in which you asked how you might use "FOIL pertaining to a specific last year about a 'crime' and how the detectives handled the proceedings to investigate."

In this regard, first, a request should be made in writing to the "records access officer" at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

Second, §89(3)(a) of FOIL requires that an applicant "reasonably describe" the records sought. Therefore, a request should include detail sufficient to enable the staff of an agency to locate and identify the records.

Third, FOIL is based on a presumption of access. Stated differently, all records of an agency, such as a police department, are available, except those records or portions thereof that fall within a series of exceptions to rights of access appearing in paragraphs (a) through (j) of §87(2). Without knowledge of the nature of the crime or the outcome of the investigation, specific guidance cannot be offered. However, several of the grounds for denial of access might be pertinent. For instance, §87(2)(e) authorizes an agency to withhold records compiled for law enforcement purposes insofar as disclosure would interfere with an investigation or judicial proceeding, deprive a person of a right to a fair trial, identify a confidential source, or reveal other than routine criminal investigative techniques and procedures. Section 87(2)(b) permits an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy, and that provision might apply with respect to witnesses or others interviewed during an investigation.

In short, the nature of the records and the effects of their disclosure are key factors in determining rights of access. It is suggested that you might link to our website to review the FOIL, our guide to the law entitled "Your Right to Know", and advisory opinions dealing with the kinds of issues that you have raised.

I hope that I have been of assistance.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17123

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April 16, 2008

Mr. Theodore Probst, Jr.

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

Dear Mr. Probst:

I have received your letter in which you questioned the propriety of a denial of access by the Division of State Police following your request for a copy of "the Stalker Dual Radar Manual." Based on the provisions of the Freedom of Information Law and judicial precedent, I believe that the record in question 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. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The state's highest court, the Court of Appeals, reiterated and expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

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

> these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

In a case involving a record analogous to the record of your interest, the request involved the "operator's manual for any radar speed detection device used" by the New York State Police and the New York City Police Department. The Division of State Police contended that disclosure would interfere with the ability to effectively enforce the law concerning speeding. Nevertheless, following an *in camera* inspection of the records, a private review by the judge, it was found that the Division could not meet it burden of proving that the harmful effects of disclosure appearing in the exceptions to rights of access would in fact arise [Supreme Court, New York County, NYLJ, July 11, 2001, modified, 300 AD2d 27 (2003)].

In its attempt to deny access to the records, the Division relied upon §87(2)(e)(i) and (iv) of the Freedom of Information Law as a means of justifying its denial. Those provisions permit an agency to withhold records that are "compiled for law enforcement purposes" to the extent that disclosure would "I. interfere with law enforcement investigations or judicial proceedings" or "iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

From my perspective, records prepared by manufacturer of a radar device could not be characterized as having been "compiled for law enforcement purposes. If my contention is accurate, §87 (2)(e) would not be applicable as a means of withholding those records.

Even if that provision is applicable, the court in Capruso determined that a denial of access would not be sustained. The leading decision dealing with law enforcement manuals and similar records detailing investigative techniques and procedures is Fink v. Lefkowitz [47 NY2d 567 (1979)], which was cited in Gould, supra, and] involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a

> specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate.

In consideration the direction given by the state's highest court in Fink, the court in Capruso rejected the contentions offered by the law enforcement agencies and determined that:

> "These arguments fail to establish a casual link as to how release of the information in the manufacturers' operational manual would enable a speeding driver to avoid detection. Similarly, absent from the affidavits is an explanation as to how the knowledge of the testing procedures used by the police to ensure the device is functioning properly would enable such driver to escape detection. Furthermore, the affidavits lack proof as to how the information in the manual would enable the use of a jamming device which could not otherwise be used. Thus, the claim that the release of these manuals would result in drivers engaging in dangerous behavior solely to avoid detection is speculative.
>
> The State also objects to the release of the State Police Radar and Aerial Speed Enforcement Training Manuals as they contain 'operational and legal considerations.' However, as the Court of Appeals stated in Fink v. Lefkowitz, supra at 571, 'To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement.' The Court explained, the question is 'whether disclosure of those procedures

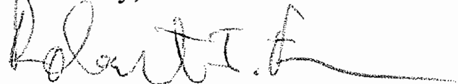
> would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel,' (citations omitted) Id.
>
> Thus, after an in camera review, the City and State have failed to establish that the release of these manuals would allow motorists who are violating traffic laws to tailor their conduct to evade detection."

Lastly, in essentially affirming the lower court decision in Capruso, the Appellate Division rejected a contention that the manuals at issue could be withheld under §87(2)(d), the "trade secret" exception, stating that: "There is no expectation of secrecy concerning the requested manuals, which accompany devices that are in public commerce."

Based on the foregoing, I believe that the record in question must be disclosed.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: William J. Callahan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17124

C .nmittee Members

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

April 16, 2008

Mr. Jamahl Clarke
07-A-1412
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. Clarke:

I have received your letter in which you indicated that you requested records under the Freedom of Information Law from the New York City Police Department, but that the Department wrote that it would take four months to reach a determination concerning your request.

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

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

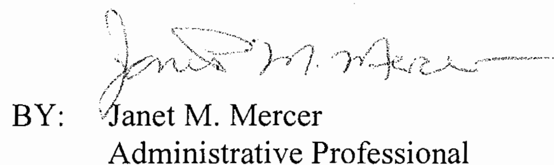
I point out that the person designated by the New York City Police Department to determine appeals is Jonathan David.

In an effort to enhance compliance with and understanding of the law, a copy of this opinion will be forwarded to Sergeant James Russo.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Sergeant James Russo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17125

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April 17, 2008

Ms. Robin A. Carlisi

The staff of the Committee on 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. Carlisi:

I have received your letter in which you indicated that you sent a Freedom of Information Law request to the NYS Education Department on November 4, 2007. Because you received no response, you submitted an appeal on January 23, 2008. As of the date of your letter to this office, you had received no response to the appeal.

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

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

It is noted that new language was added to that provision in 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 legislation enacted in 2006 broadened 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nellie Perez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

7071-190-17126

(nmittee Members

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April 18, 2008

Mr. Steve Barber
WKBW 7 News
7 Broadcast Plaza
Buffalo, NY 14202-2699

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

Dear Mr. Barber:

I have received your letter and the correspondence relating to it. You have sought an advisory opinion concerning the propriety of a partial denial of your request made under the Freedom of Information Law to Erie County. The records withheld involve the resume, application for employment and educational background of a specific County employee, and the denial was sustained following your appeal based on a contention that disclosure "would constitute an unwarranted invasion of privacy pursuant to Public Officers Law §87(2)." You were informed that you could further appeal in accordance with an Erie County Local Law No. 8.

Based on judicial precedent, I believe that substantial portions of the records in question must be disclosed. In this regard, I offer the following comments.

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

Judicial decisions clearly indicate that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978);

Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, 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.

Lastly, when informing you of an opportunity to submit a second appeal, reference was made to Erie County Local No. 8-1978. In a decision rendered more than twenty years ago, Reese v. Mahoney (Supreme Court, Erie County, June 28, 1984), the court focused on the portion of that local law concerning a second appeal and essentially found it to be invalid. It was stated that "a two-tiered appeals procedure before Article 78 CPLR review can be had, would be sufficient to invalidate the local law....as being inconsistent with the state law's single tier appeals procedure." Under the Freedom of Information Law, when a request is denied, the denial may be appealed, and if the appeal is denied, the person denied access may initiate a judicial proceeding under Article 78 of the Civil Practice Law and Rules. Under Local Law No. 8, an Article 78 proceeding cannot be initiated until a second appeal is made and determined, and the court found that "additional restriction" to constitute a basis for invalidating the local law. That being so, according to the decision, you may choose to challenge the County's denial of your request in court. However, in an effort to avoid litigation and to enhance understanding and compliance with the Freedom of Information Law, a copy of this opinion will be sent to County officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Christopher M. Grant
John Greenan
George Zimmerman

FOIL-AO - 17127

From: Freeman, Robert (DOS)
Sent: Tuesday, April 22, 2008 9:48 AM
To: Jeff Jones

Section 89(7) of FOIL specifies that the home addresses of present and former public officers or employees need not be disclosed. However, because FOIL is permissive, a village or other municipality is not barred from disclosing home addresses of its employees and may choose to do so.

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

OML-AO-4606
FOIL-AO-17128

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April 22, 2008

E-MAIL

TO: Bob Magee

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. Magee:

I have received your letter concerning the deliberations of a board of assessment review and whether the Open Meetings Law permits the public to attend those deliberations.

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 they came to a 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..."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17129

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April 22, 2008

E-MAIL

TO: Kerri Karvetski, Kathy Kinsella

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear Ms. Karvetski and Ms. Kinsella:

Thank you for the information regarding FOIL-AO-16777, a very brief opinion prepared in September of 2007, regarding access to a list of residential email addresses collected by a town to provide residents with "information about town events and commerce." In that opinion, we advised that such a list could be withheld based on a contention that disclosure would constitute an unwarranted invasion of personal privacy. Since then, various scenarios have been described with respect to public access to a list of email addresses pertaining to individuals in their private capacities. In an effort to clarify our opinion on these and other related issues, we offer the following comments.

First, and most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 one provision pertaining to the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

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

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

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an assurance that a list of names and addresses will not be used for commercial or fund-raising purposes. In that decision, it was stated that:

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

In addition, it was held that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the

> respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgement for that of the respondents" (id.).

Based on the foregoing, if it is determined that a list of names and addresses of private individuals is requested for commercial purposes, it appears that an agency could deny access based on §89(2)(b)(iii) as an unwarranted invasion of personal privacy.

There are statutes that require specific records be made available to the public, including names and residence addresses, with no exceptions. Section 89(6) of the Freedom of Information Law states that:

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

As such, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access [see e.g., Kwitny v. McGuire, 53 NY2d 968 (1981); Szikszay v. Buelow, 436 NYS 2d 558, 583 (1981)].

Subdivision (1) of §5-602 of the Election Law, for example, specifically requires 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."

Similarly, in Szikszay v. Buelow [436 NYS 2d 558, 583 (1981)], it was determined that an assessment roll maintained on computer tape must be disclosed, even though the applicant requested the tape for a commercial purpose, because that record is independently available under a different provision of law, §516 of the Real Property Tax Law. Since the assessment roll must be disclosed pursuant to the Real Property Tax Law, the commercial or fund-raising restriction concerning lists of names and addresses in the Freedom of Information Law was found to be inapplicable.

With respect to a list of names and home addresses of those persons who receive a municipal newsletter, it is our opinion that such a list would not be required to be released when disclosure is requested for commercial or fund-raising purposes. A more difficult question arises when disclosure is not requested for a commercial or fund-raising purpose. There are no controlling statutes or judicial decisions with respect to this issue. In light of the above cited statutory requirements for disclosure of names and home address information for election and assessment purposes, in our opinion, disclosure of the identities of those who receive a newsletter would not cause an unwarranted invasion of personal privacy.

The effect of disclosure of email addresses is different than disclosure of residential home addresses, and in our view, significantly different than disclosure of home telephone or personal mobile phone numbers. In our opinion, disclosure of a home telephone or personal mobile phone number would result in an unwarranted invasion of personal privacy in most instances, because of the possibility of unwanted interruptions. As evidenced by the existence of unlisted telephone numbers, and the dearth of directory information regarding mobile phone numbers, it is our opinion that many prefer to limit access to their personal telephone numbers. Unlike unwanted mail sent through the U.S. Postal Service which can easily be recycled or ignored, a telephone call, by nature, interrupts. Accordingly, in our opinion, disclosure of home and mobile telephone numbers would cause an unwarranted invasion of personal privacy in most every instance.

In our opinion, email communications involve a lesser invasion of privacy than a phone call or contact at a person's home address, because an email address does not divulge the geographic location of a person's home, and in many instances may not include a person's name or other identifying information. We know of individuals who maintain multiple email accounts, reserving one for internet business and another for social communications, and we believe that everyone receives unwanted emails at some point or another. Accordingly, we believe disclosure of an email address would be less likely to cause an unwarranted invasion of personal privacy than disclosure of a home address or a home or mobile telephone number.

We note that when an agency's denial of access to records is challenged in a judicial proceeding, §89(4)(b) of the Freedom of Information Law states that the agency has the burden of proving that the records were properly withheld in accordance one or more of the exceptions to rights of access. Should an agency deny access to a list of email addresses collected for purposes of distributing information, in our opinion it is likely that, without more, an agency could not meet the burden of proving that disclosure would cause an unwarranted invasion of personal privacy.

In sum, it is our opinion that disclosure of a list or email addresses would not result in an unwarranted invasion of personal privacy if a request is not made for a commercial or fund raising purpose.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

cc: Stephen Hughes
Association of Towns

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17130

Committee Members

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April 22, 2008

Frank Brill
Deputy Managing Editor/Data Desk
The Journal News
One Gannett Drive
White Plains, NY 10604

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

Dear Mr. Brill:

As you are aware, I have received your letter and the materials relating to it. You have sought an advisory opinion concerning the propriety of a denial of access to "inventory data" maintained by the Office of Real Property Services (ORPS).

Although ORPS had in the past disclosed the data at issue, it has reversed its stance due to the decision rendered in COMPS, Inc. V. Town of Islip [33 AD2d 796 (2006)] and denied access on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." The Appellate Division in COMPS affirmed the lower court decision sustaining the denial of access, stating that: "The Supreme Court also properly determined that the privacy exemption under FOIL was applicable because the petitioner intended to use the information for commercial purposes (*see*, Public Officers Law § 89[2][b][iii])", (id.). The cited provision states that an unwarranted invasion of personal privacy includes "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

For the following reasons, I do not believe that exception involving the disclosure of a list of names and addresses requested for "commercial or fund-raising purposes" serves as a valid basis for denying your request.

First, assuming that a request involves an effort to enhance the news gathering capacity of a news organization and to provide information in the nature of news to its readers, the request, in my opinion, does not involve a commercial purpose. Although members of the news media have no special rights under the Freedom of Information Law, it is clear that the State Legislature intended that the news media serve as an extension of the public, as the public's eyes and ears, when it enacted the law. The legislative declaration, §84 of the law, states in relevant part that "...government is the public's business and that the public, individually and collectively *and*

represented by a free press should have access to the records of government..." The reference to the press as the representative of the public in my view suggests that a request by a newspaper should be equated with a request by a member of the public in a manner fully consistent with the overall intent of the Freedom of Information Law.

The legislative history of the federal Freedom of Information Act (5 USC §552) and judicial interpretations of the Act also indicate that a request by a member of the news media for news gathering purposes does not constitute a commercial purpose, even though his or her employer is a profit-making entity In this regard, as you may be aware, the New York Freedom of Information Law is silent with respect to fee waivers for copies of records, and it does not distinguish among applicants for records regarding fees to be assessed. In contrast, the federal Act authorizes the assessment of fees for copying, as well as the cost of searching for and reviewing records, when a request is made "for commercial use" [5 USC §552(a)(4)(A)(ii)(I)]. However, a federal agency must waive or reduce fees when so doing would be "in the public interest because furnishing the information can be considered as primarily benefitting the general public" [5 USC §552(a)(4)(A)]. As such, fees charged under the federal Act are dependent in great measure on whether a request involves a commercial or non-commercial purpose.

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

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

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

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

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

If the request does not involve a commercial purpose, but rather a news gathering function, I do not believe that the basis for denial offered in Comps may appropriately be asserted.

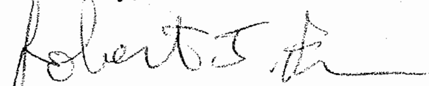
Second, in a recent decision rendered by the Court of Appeals, the state's highest court, Data Tree, LLC, "a commercial provider of online public land records", sought land records from Suffolk County in an "electronic format" [Data Tree, LLC v Romaine, 9 NY3d 454, 460 (2007)]. The Court confirmed that the interest or use of records is largely irrelevant in determining rights of access conferred by the Freedom of Information Law. It also held that a denial of access may not be justified when records would be used for a commercial use; rather, the court limited the ability to deny access to those instances in which a list of names and addresses is sought in order "solicit..business" Specifically, it was found that:

> "...FOIL does not require the party requesting the information to show any particular need or purpose (see Matter of Daily Gazette Co. v. City of Schenectady, 93 NY2d 145, 156 [1999]; Farbman, 62 NY2d at 80). Data Tree's commercial motive for seeking the records is therefore irrelevant in this case and constitutes an improper basis for denying the FOIL request.
>
> We note, however, that motive or purpose is not always irrelevant to a request pursuant to FOIL. Public Officers Law §89(2)(b)(iii) includes as an 'unwarranted invasion of personal privacy' the 'sale or release of lists of names and addresses if such lists would be used for commercial or fundrasing purposes' (emphasis added; see Matter of Federation of N.Y. State Rifle & Pistol Clubs v. New York City Police Dept., 73 NY2d 92 [1989] [organization's request denied under FOIL for use in direct mail membership solicitation of names and addresses of persons holding rifle or shotgun permits]). That particular exemption does not apply in this case however because Data Tree is not seeking a list of names and addresses to solicit any business. Rather, Data Tree is seeking public land records for commercial reproduction on line" (id., 463).

In sum, based on the preceding analysis, it is my opinion that a request for records for news gathering purposes may not be characterized as having been made for a "commercial purpose", and further, unless a list of names and addresses would be used for the purpose of soliciting business from those identified on the list, §89(2)(b)(iii) of the Freedom of Information Law cannot be asserted as a basis for denying access. If my analysis is accurate, I believe that you have the right to obtain the data at issue from ORPS.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: James J. O'Keeffe
Stephen J. Harrison

FOIL-AO - 17131

From: Freeman, Robert (DOS)
Sent: Wednesday, April 23, 2008 10:14 AM
To: Ms. Ann Payne
Subject: FOIL Request
Attachments: F10768.doc

I have received your letter in which you asked that this office "honor [your] request for telephone records, specifically 911 calls made from certain phones in the 212 area.

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

When seeking records, a request should be made to the "records access officer" at the agency that you believe would maintain the records sought. The records access officer has the duty of coordinating an agency's response to requests. Additionally, §89(3)(a) of the FOIL requires that an applicant "reasonably describe" the records of interest. Therefore, a request should include sufficient detail to enable staff of an agency to locate and identify the records. In this instance, it is likely that approximate dates of the calls would be significant.

Enclosed is a copy of an opinion rendered by this office concerning access to 911 records that might be of use to you.

Lastly, it would appear that the agency that would likely maintain the records, if they continue to exist, would be the NYC Police Department, whose FOIL Office is located at Department headquarters, Room 110 C, One Police Plaza, New York, NY 10038.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave., Suite 650
Albany, NY 12231
(518) 474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4609
FOIL-AO-17132

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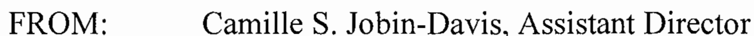
April 23, 2008

E-MAIL

TO: Mary Anne Kowalski

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



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

Dear Ms. Kowalski:

We are in receipt of your requests for advisory opinions concerning application of the Freedom of Information and Open Meetings Laws to various requests for records directed to, and proceedings of the Seneca County Industrial Development Agency. In an effort to address your concerns in a logical fashion, this is the second in a series of opinions prepared at your request. Here, we will address issues regarding access to minutes of the Agency, responses to requests for records sent electronically, and mandatory time limits for responding to requests.

From our perspective, it is clear that minutes of a meeting of a public body must be prepared and made available to the public within two weeks of the meetings to which they relate, irrespective of whether they are "approved."

Section 106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in our 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 we are aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that 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, we believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Although there is no requirement to do so, we welcome the Agency's decision to post minutes on its website, We agree that the advantages of proactive disclosure are obvious. The public can gain access to information of importance quickly, easily, and at no cost; the government, by anticipating the interest in certain information, eliminates the need to engage in the administrative tasks associated with receiving requests for records, locating the records, making them available after producing photocopies, printouts, or downloading information onto a computer tape or disk, calculating and collecting a fee for copying and perhaps putting documents in the mail. In short, in our opinion, placing frequently requested public records on the internet is positive.

Next, as you may know, in August of 2006, the Legislature amended §89(3) of the Freedom of Information Law to require agencies to receive and respond to requests for records via email, as follows:

> "b) 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..."

Accordingly, it is our opinion, that if an agency has the ability to receive and respond to requests via email, it must do so. In your case, in light of the Agency's demonstrated ability to provide access to electronic copies of records via email, in our opinion, it is under a legal obligation to consistently respond via email to your emailed requests. In our view, sending a letter by U.S. mail in response to an email request is not in keeping with the intent or language of the law, especially when records were previously provided to you via email.

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

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

It is noted that new language was added to that provision in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

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

On behalf of the Committee on Open Government we hope that this is helpful to you.

CSJ:tt

cc: Patricia Jones
Monica Novack
Stephen Dennis
Justin Miller
Seneca County IDA Board
Kenneth Lee Patchen, Jr., Secretary to the Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4610
FOIL-AO-17133

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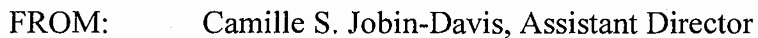
April 23, 2008

E-MAIL

TO: Mary Anne Kowalski

FROM: Camille S. Jobin-Davis, Assistant Director



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

Dear Ms. Kowalski:

We are in receipt of your requests for advisory opinions concerning application of the Freedom of Information and Open Meetings Laws to various requests for records directed to, and proceedings of the Seneca County Industrial Development Agency. In an effort to address your concerns in a logical fashion, this is the third in a series of opinions being provided to you. In this opinion, we will address issues regarding minutes of executive sessions and the appropriation of public money.

In response to your request for a copy of the minutes from a recent executive session, the Agency indicated as follows:

> "1) Pursuant to and in accordance with the Public Officers Law, there are no minutes of Executive Sessions as no agency actions may be taken in Executive Session
>
> 2) There was no specific Agency action taken with respect to a motion to dismiss the appeal, other than verbal authorization granted by the Agency's Executive Director pursuant to the Agency's standing authorization to Agency Staff and Counsel to represent the Agency's interests..."

We agree with your comment that it "seems to me that a 'verbal authorization' to represent the Agency is indeed an agency action", and in this regard, we offer the following comments.

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

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

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

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 must 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 Agency reached a "consensus" that is reflective of its final determination of an issue, or gave "verbal authorization" to take action on a particular issue, we believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. We note that §87(3)(a) of the Freedom of Information Law states that "each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot.

Further, §105(1) of the Open Meetings Law prohibits the appropriation of money during executive session. To the extent that any of the above noted transactions required the appropriation of public money by the Agency, in our opinion such authorization is required to be made during the public portion of the meeting and must be memorialized in the minutes.

As referenced in a previous opinion to you, the enforcement mechanism under the Open Meetings Law permits an aggrieved person to bring an Article 78 proceeding to invalidate action taken in private in violation of the law. You indicated that "The IDA and the EDC have acquired, sold, transferred and leased many pieces of real and personal property, yet the public minutes do not reflect votes or the terms of the sales or acquisitions." If this statement is accurate, that there is no record of Agency approval to purchase, sell, transfer or lease real or personal property, it may be opinion that if a legal action were brought in a timely manner, a court could invalidate such transactions as beyond the scope of the Agency. If Agency approval is not required, on the other hand, it is likely this would not be the outcome.

On behalf of the Committee on Open Government we hope that this is helpful to you.

CSJ:tt

cc: Patricia Jones
Monica Novack
Stephen Dennis
Justin Miller
Seneca County IDA Board
Kenneth Lee Patchen, Jr., Secretary to the Board

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17134

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April 23, 2008

E-MAIL

TO: Micpac

FROM: Robert J. Freeman, Executive Director RJF

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

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

FOIL AO - 17135

From: Freeman, Robert (DOS)
Sent: Wednesday, April 23, 2008 4:41 PM
To: Greg.Waldron
Cc: vclerk@stny.rr.com
Subject: RE: Thanks -- one more query

I believe that the response by the Clerk-Treasurer regarding "interoffice memorandums" is inaccurate. Those kinds of documents fall within one of the exceptions appearing in FOIL, §87(2)(g). However, that provision, due to its structure, often requires substantial disclosure. Although portions of "inter-agency or intra-agency materials" consisting of advice, opinions, recommendations appearing in narrative form may be withheld, others consisting of "statistical or factual tabulations or data" must be disclosed. Therefore, insofar as the interoffice memos at issue contain numbers, i.e., statistical or factual information, I believe that they must be disclosed.

Attached is an opinion written some time ago that deals with a similar issue. Copies of this response and the opinion will be forwarded to the Clerk-Treasurer.

Robert J. Freeman
Executive Director
Committee on Open Government
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FOIL-AO-17136

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, April 24, 2008 4:32 PM
To: 'Susan Siegel'
Subject: RE: Questions re FOIL

Hello Susan:

Thank you for the kind words. You seem to be a person well-educated in the FOIL realm, so I'm going cut to the chase. The following is an advisory opinion that is right on point: http://www.dos.state.ny.us/coog/ftext/f15923.htm

This will further confirm our opinion, in sum, that if the Town is able to transfer the data into the format you requested, based on judicial decisions, the Town is required to do so. Your motivation for requesting records in a digital format is irrelevant.

If you would like an advisory opinion pertaining to your particular situation, please advise, and I will put your submission in the queue. Please note that we have a current backlog of approximately 3 months.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

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FOIL-AO-17137

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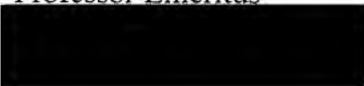
April 24, 2008

James Martin
Professor Emeritus



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

Dear Professor Martin:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request to the Onondaga Community College and that the response to that request stated that "your request will be granted or denied within forty-five (45) business days."

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

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

It is noted that new language was added to that provision in 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:

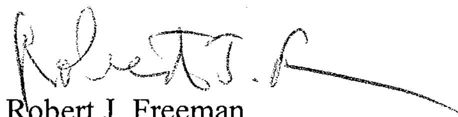
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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 legislation enacted in 2006 broadened 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Amy M. Russo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17138

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April 24, 2008

Mr. Don Pruchnowski

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

Dear Mr. Pruchnowski:

I have received your letter in which you indicated that you have been attempting to gain access to records from the City of Buffalo since January 28 and that, as of the date of your letter to this office, you still had not received the records.

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

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

It is noted that new language was added to that provision in 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)].

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> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on

> FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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I note that legislation enacted in 2006 broadened 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Cavette A. Chambers

FOIL-AO - 17139

From: Freeman, Robert (DOS)
Sent: Monday, April 28, 2008 2:40 PM
To: David Newman
Subject: RE: FOIL Question: Cost of Town Law on CD

When records other than photocopies are reproduced, §87(1)(b)(iii) states that the fee is based on the actual cost of reproduction.

Robert J. Freeman
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Committee on Open Government
NYS Department of State
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Albany, NY 12231
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www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17140

From: Freeman, Robert (DOS)
Sent: Monday, April 28, 2008 2:48 PM
To: Kathy Barrans
Subject: RE: FOIL question

Hi - -

With respect to the first question, FOIL does not distinguish among applicants, and it was held judicially years ago that when records are accessible under the law, they must be made equally available to any person, without regard to one's status or interest. That being so, there is no obligation to provide a reason for requesting records or explaining the intended use of the records.

With regard to the latter, often there is a distinction between salary and gross wages. Therefore, if the interest is in obtaining information indicating a public employee's gross wages, it is suggested that a request be made for a W-2 or other record that indicates the gross wages of a named employee. It is likely that such record might include other items, such as net pay, social security number, etc., which may be deleted on the ground that disclosure of those items would constitute "an unwarranted invasion of personal privacy." It is clear, however, that a portion of a record reflective of a public employee's gross wages must be disclosed.

Hope all is well.

Robert J. Freeman
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FOIL-AO - 17141

From: Freeman, Robert (DOS)
Sent: Tuesday, April 29, 2008 4:09 PM
To: Ms. D. Palmisano

Dear Ms. Palmisano:

To seek records under the FOIL, a request should be made to the "records access officer" at the government agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. The law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records of interest. A request may be made on paper, or when an agency has the ability to accept it, by email.

To obtain additional detailed information, on our website is a guide to the Freedom of Information Law, "Your Right to Know", which includes a sample letter of request, procedural regulations that describe agencies' responsibilities, and a video that deals with various elements of both the Freedom of Information and Open Meetings Laws. There is also information concerning requests made via email in the "What's New" link on the website.

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL AO - 17142

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April 29, 2008

E-MAIL

TO: Patrick A. Russo

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Russo:

I have received your inquiry in which you asked whether "autopsy results [are] public record."

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 to the matter is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." If the autopsy was performed outside of New York County, §677 of the County Law would be pertinent. In brief, under that statute, autopsy reports and related records are available as of right only to the next of kin and a district attorney; others could only obtain such records by means of a court order. If the autopsy report was performed in New York City by the Office of the Chief Medical Examiner, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts records from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994].

I point out that although there is no right of access to records relating to an autopsy conferred upon the public, there is no law that forbids a coroner or medical examiner from disclosing those records.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17143

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April 29, 2008

Clifford D. Bloomfield, Esq.
Attorney & Counselor at Law
349 East 149th Street
Bronx, NY 10451-5603

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

Dear Mr. Bloomfield:

I have received your correspondence and hope that you will accept my apologies for the delay in response. In brief, you have sought an advisory opinion concerning the propriety of a denial of a request for records made to the City of Yonkers pursuant to the Freedom of Information Law on behalf of a client who is a party to litigation brought against the City. The City denied the request on the basis that a ruling involving discovery under Article 31 of the Civil Practice Law and Rules (CPLR), in your words, "shields them from production under FOIL."

From my perspective, the application of the Freedom of Information Law and other disclosure devices, such as Article 31 of CPLR, are separate and distinct.

In this regard, as you are aware, the courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the CPLR in civil proceedings, and discovery in criminal proceedings under the Criminal Procedure Law (CPL). The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the public generally, while the disclosure provisions of the CPLR or the CPL, for example, are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

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

between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the CPLR. Specifically, it was found that:

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

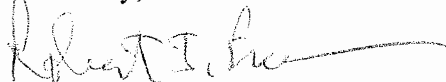
More recently, the Court of Appeals held that the CPL does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law [Gould v. New York City Police Department, 89 NY2d 267 (1996)].

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law or judicial decisions that may require disclosure based upon one's status, e.g., as a litigant or defendant, and the nature of the records or their materiality to a proceeding.

Lastly, you asked whether a failure to comply with the Freedom of Information Law "is sanctionable." The only "sanction" that may imposed involves the possibility of an award of attorney's fees to a petitioner, payable by an agency, in accordance with §89(4)(c) of that statute.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. Philip A. Amicone
Eric Arena

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17144

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April 30, 2008

Mr. Doug Schneider
Public Affairs Editor
Press & Sun Bulletin
P.O. Box 1270
Binghamton, NY 13902-1270

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

Dear Mr. Schneider:

I have received your letter and a variety of material relating to it, all of which relates to denials of access to incident reports prepared by municipalities in the coverage area of the *Press & Sun Bulletin*. You have sought an advisory opinion concerning the propriety of the rejection of your requests by four municipalities.

By way of background, you requested "records (in electronic form if possible) that police commonly record via the DCJS-3205 NYS Incident Report form". The request involves "five years' worth of records in order to use the data to produce crime maps." You wrote that you indicated in your requests that certain aspects of the forms could be withheld, specifically field 25, which would identify victims, complainants, witnesses and others, as well as the names, addresses, social security numbers and telephone numbers of suspects and defendants, which appear in fields 36-41 and 55-56 on the form.

Having reviewed the responses to your requests, you received a variety of reasons for denying access, and I will attempt to address the issues raised in generic fashion, rather than focusing on a response by a particular municipality. In short, you wrote that: "The bottom line for the newspaper is: Are we entitled to the information we requested, and what if anything are the government agencies required to do to make it available."

In this regard, I offer the following comments.

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

the items to which you referred to be redacted would, in my view, be accessible in some circumstances, it appears that the references to items to be redacted largely involve an agency's authority to deny access to the extent that disclosure would constitute "an unwarranted invasion of personal privacy" in accordance with §87(2)(b). The remainder of the forms, in my view, are accessible, for none of the grounds for denial would apply.

Second, the Freedom of Information Law is expansive in its scope, for it pertains to all government agency records, whether the records are maintained solely on paper or in electronic form. Section 86(4) defines the term "record" expansively to include:

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

Based 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. 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)]. As stated recently by the Court of Appeals in Data Tree , LLC v. Romaine, "FOIL does not differentiate between records stored in paper form or those stored in electronic format" [9 NY3d 454, 464 (2007)].

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

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

seem that an agency should follow the more reasonable and less costly and labor intensive course of action.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

Also pertinent is a decision concerning a request for records, data and reports maintained by the New York City Department of Health regarding "childhood blood-level screening levels" (New York Public Interest Research Group v. Cohen and the New York City Department of Health, Supreme Court, New York County, July 16, 2001; hereafter "NYPIRG"). The agency maintained much of the information in its "LeadQuest" database. I am unaware whether the LeadQuest system is used by other counties in the state. Nevertheless, the principles enunciated in that decision would likely be applicable with respect to information maintained electronically in the context of your requests.

In NYPIRG, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'

> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the

> number of employees engaged), and probably would not be as accurate as computer generated redactions."

The Court of Appeals in Data Tree essentially confirmed the holding in NYPIRG and the advice rendered by this office that is particularly apt in the context of your inquiry. Your request involves forms, portions of which may be redacted, and in Data Tree, it was held that:

> "...if the records are maintained electronically by an agency and are retrievable with reasonable effort, that agency is required to disclose the information. In such a situation, the agency is merely retrieving the electronic data that it has already compiled and copying it onto another electronic medium. On the other hand, if the agency does not maintain the records in a transferable electronic format, then the agency should not be required to create a new document to make its records transferable. A simple manipulation of the computer necessary to transfer existing records should not, if it does not involve significant time or expense, be treated as creation of a new document" (id., 464-465).

In my opinion, when the forms of your interest are maintained electronically, because they consist of a variety of items entered by means of fields, assuming that an agency has the ability to do so with reasonable effort, it is required to disclose the forms after having deleted the fields to which you referred in your requests. As suggested in NYPIRG and inferred in Data Tree, when electronic redaction can be accomplished with reasonable effort and is less burdensome than engaging in manual redactions, an agency must carry out the process of electronic redaction to comply with the Freedom of Information Law.

In consideration of the time span of your request, there may be instances in which an agency maintains recent reports electronically and others only on paper. In those instances in which the records are maintained only on paper, I do not believe that an agency would be obliged to scan or otherwise transfer their content to an electronic storage medium, particularly if redactions must be made prior to disclosure. In such cases, photocopies must be made, again, following appropriate redactions. In similar circumstances in which a substantial number of copies of the same form is requested, it has been suggest that a stencil be developed, so that windows within the stencil permit reproduction of those portions of the form that must be disclosed, while blocking entries that may be withheld. I note, too, that in situations in which a record undergoes redactions, the agency is authorized to charge up to twenty-five cents per photocopy (VanNess v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999) and may require advance payment (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

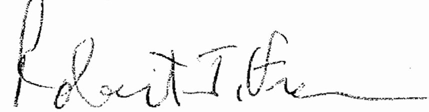
With respect to contentions that your request may be overly broad or voluminous, the issue in my view is whether the request "reasonably describes" the records sought as required by §89(3)(a) of the Freedom of Information Law. Based on a decision rendered by the Court of Appeals, that standard does not focus the volume of a request, but rather the ability of an agency to locate and identify the records with reasonable effort based on the nature of its filing, recordkeeping or retrieval systems [Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. If a request involves hundreds

or perhaps thousands of records, and those records are maintained in manner in which they can be located and retrieved with reasonable effort, a request would meet the requirement of reasonably describing the records, despite its volume. If, however, requested records can be found only by reviewing hundreds or thousands of records, one by one, to locate those falling within the scope of a request, a request, in my view, would not meet the standard prescribed in the law.

Copies of this opinion will be sent to the agencies identified in your correspondence.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Holly Zurenda-Cruz
Eric Denk
Shannon K. Starowicz
Chief John Butler
David S. Berger
Chief Michael R. Cox
Michael S. Fauci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17145

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April 30, 2008

Jennifer M. Wilson
Law Office of Marc S. Gerstman
313 Hamilton Street
Albany, NY 12210

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

Dear Ms. Wilson:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Town of Pine Plains Planning Board. Specifically, among other items, you requested:

> "Comment letters from municipalities and/or their agents to Carvel Property Development ("the applicant") concerning Chapter 14, Community Services and Fiscal Impacts, of the applicant's Draft Environmental Impact Statement (DEIS) and its appendices... [including] comments by Nan Stolzenburg, the Hudson Group and the LA Group."

Upon advice of counsel, the Town denied your request, stating, "These documents are considered intra-agency documents which are exempt from "FOIL" requests." Further, in response to your appeal, the Town indicated that:

> "Until such time as the DEIS is accepted by the Planning Board, and the public review process is commenced, there will be no comment letters from municipalities or members of the public."

We disagree with the Town's denial of access to the requested records and the characterization of the records as intra-agency documents. In this regard, we offer the following comments.

First, a key provision in an analysis of this issue is §86(4) of the Freedom of Information Law which defines the term "record" expansively to mean:

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

The Court of Appeals has construed the definition as broadly as its specific language suggests. In the first decision focusing on the definition of "record", the Court emphasized that the Freedom of Information Law must be construed broadly in order to achieve the goal of government accountability, for the court found that:

> "Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (Westchester Rockland Newspapers v. Kimball, 50 NY2d 575, 579 (1980)].

In short, based on the language of the definition of "record", it is clear in our view that the materials in question, correspondence from a municipality or a municipality's agent to a developer, are subject to rights conferred by the Freedom of Information Law as soon as they exist. Whether a Draft Environmental Impact Statement has been "accepted" by the Town Planning Board has no relevance to whether the requested records are subject to the Freedom of Information Law if they are in the possession of the Town, it's officers, or its agents.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. From our perspective, it is unlikely that any of the grounds for denial could be asserted to withhold the kinds of records that you described.

In the context of §87(2)(g), which enables an agency to withhold portions of "inter-agency and intra-agency materials", developers are neither agency officials nor 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."

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 records at issue consist of records sent from municipalities to entities that are not governmental, they would not constitute inter-agency or intra-agency materials, and §87(2)(g), therefore, would not apply, regardless of the manner in which the correspondence came into the possession of the Town.

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 in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business

days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

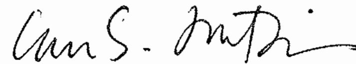
have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

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

On behalf of the Committee on Open Government we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Warren Replansky
Judy S. Harpp

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17146

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Tedra L. Cobb
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John C. Egan
Stewart F. Hancock III
Michelle K. Rea
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April 30, 2008

Hon. Robert L. North
Town Clerk
Town of Richland
P.O. Box 29
Pulaski, NY 13142

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

Dear Mr. North:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Town of Richland, specifically, for a copy of an "independent external audit report from the accounting firm of Bonadio and Company." In this regard, we offer the following comments.

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

Although §87(2)(g), the provision pertaining to internal government records, potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

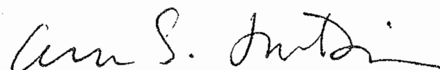
> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller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

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

Accordingly, in our opinion, based on the statutory language, the audit report is required to be disclosed.

On behalf of the Committee on Open Government we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Town Board
Allison Nelson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17147

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April 30, 2008

Mr. Allan G. Schulman
Eastland Construction, Inc.
110 East End Avenue
New York, NY 100028

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

Dear Mr. Schulman:

We are in receipt of your request for an advisory opinion relating to the Hartsdale Fire District's alleged "violations" of the Freedom of Information Law, as well correspondence you received from the District regarding requests you made to review documents. You indicated that a previous advisory opinion from the Committee, dated December 21, 2007, has had little effect on the District's response to your requests. In this regard, we offer the following comments.

First, as fully expressed in our December 21, 2007 opinion, this will reiterate and summarize our opinions as follows: the enforcement mechanism in the Freedom of Information Law involves the initiation of a legal challenge under Article 78 of the Civil Practice Rules after exhausting your ability to appeal; the District is required to permit inspection of records during normal business hours if it maintains them; and a prohibition against the utilization of a camera to take pictures of documents, an activity which is not ordinarily disruptive, would be unreasonable.

Second, while we know of no judicial decision dealing with an agency's obligation to accept requests for records via facsimile transmission, §87(1) of the Freedom of Information Law requires that agencies promulgate rules and regulations to implement that statute in a manner consistent with the statute and the regulations issued by the Committee on Open Government (21 NYCRR Part 1401). Neither the statute nor the Committee's regulations refers specifically to requests made by fax. Consequently, the issue in our opinion is whether the policy of an agency is inconsistent with the Freedom of Information Law, the Committee's regulations or is otherwise unreasonable. In general, it is our view that an agency must accept requests made via a fax machine, unless the use of the machine adversely impacts on the agency's capacity to carry out its duties. For example, if a law enforcement agency uses a fax machine to carry out essential law enforcement functions,

interference with the use of the machine could hamper its ability to perform its duties effectively. In short, in a circumstance in which public use of a fax machine would interfere with an agency's functions, its use for making requests under the Freedom of Information Law might be restricted, so long as requests traditionally made are accepted, i.e., requests made in writing by mail or by personal delivery. In that event, such a policy would likely be valid, for it would not unreasonably inhibit the public's ability to seek records under the Freedom of Information Law.

On behalf of the Committee on Open Government we hope that this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Fred Overing, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17148

Committee Members

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Tedra L. Cobb
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John C. Egan
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Michelle K. Rea
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May 1, 2008

Mr. David Seth Michaels
Attorney & Counselor at Law
P.O. Box 96
Spencertown, NY 12165

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

Dear Mr. Michaels:

I have received your correspondence and hope that you will accept my apologies for the delay in response. You have sought an opinion concerning certain practices in the Town of Taghkanic.

As I understand the matter, you asked to review records "to be copied by the Town and/or by [your] friends" and were informed, in your words, that "it was and always had been the Town Clerk's policy that all documents produced in response to [your] FOIL request had to be copied by the Town." Even though there is no litigation pending between or your clients and the Town, the Clerk told you that the "Town's copying procedure was the result of the Town's desire to understand [your] supposed litigation strategy." Similarly, in a letter addressed to you by the Town Attorney, he wrote that "when dealing with a FOIL request that involves litigation", he wants the Clerk to provide him "with a copy of any information that was copied." To accomplish that procedure, he offered those seeking records the ability to use their own copiers for the purpose of "making copies at their own expense and leisure", but only if they are willing to provide the copies to the Town so they may be duplicated." Alternatively, records could be inspected and then marked with "sticky notes" to identify those desired to be copied. It is your view that neither of those options is acceptable. You also asked for the Town's procedures implementing the Freedom of Information Law and were told that none had been adopted.

In this regard, I offer the following comments.

First, it is noted 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 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)].

In short, that litigation might ensue or has been initiated by a person seeking records under the Freedom of Information law is irrelevant in considering rights of access.

Second, §87(2) provides the public with the right to inspect and copy accessible records, and §89(3)(a) states that an agency must make copies of records on request. Therefore, members of the public may read records at government offices and take notes or photographs, and when an agency authorizes them to do so, to photocopy records themselves, using either an agency's photocopy machine or their own photocopiers. In those instances, I do not believe that an agency, such as the Town, may require that records of interest or copied be made available to the Town. In short, people's notes, photographs or photocopies made by themselves are their property, and I do not believe that an agency may condition the right to take notes or copy records on providing an agency with an indication or copies of records that might have been noted or copied.

On the other hand, when an applicant asks an agency to prepare copies, there is nothing that would preclude the agency from making a second set of copies for its own purposes, whatever those purposes might be. That practice has been implemented in situations in which portions of records are withheld or redacted, so that a person or body designated to determine appeals can be aware of the nature of the denials of access or redactions should an appeal be made.

Lastly, a requirement that agencies adopt procedures for the implementation of the Freedom of Information Law has existed for more than thirty years. By way of background, §89(1)(b)(iii) of that statute requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

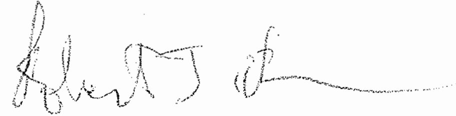
> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining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

In this instance, the governing body of a public corporation, the Town Board, was and is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The regulations promulgated by the Committee, 21 NYCRR Part 1401, are available on its website. In addition, model regulations have been developed that enable agencies to adopt proper procedures by filling the blanks as appropriate. The model regulations are also available on the website.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Cheryl E. Rogers, Town Clerk
Robert J. Fitzsimmons

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17149

Committee Members

Laura L. Anglin
Tedra L. Cobb
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May 1, 2008

Ms. Shirley Motyl

The staff of the Committee on 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 in which you described a series of difficulties relating to the Saratoga County Sheriff and your efforts to acquire information concerning him and his functions.

In this regard, it is emphasized that the duties of the Committee on Open Government involve providing advice and opinions concerning public rights of access to government records, primarily in relation to the state's Freedom of Information Law. This office is not empowered to issue binding decisions or compel an agency to disclose its records or otherwise comply with law. However, in an effort to offer guidance and an opinion as you requested, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3)(a) states in part that an agency is not required to create a record in response to a request for information. Similarly, while agency officials may choose to provide answers to questions, they are not required to do so to comply with the Freedom of Information Law. Again, that law deals with existing records.

For instance, in your request, you asked how the Sheriff would investigate "someone using [your] name and filing false medical reports and magazine subscriptions (criminal)"; additionally, you sought "his written procedure on how he 'fully' investigates this", and "how he investigates the matter of [your] missing mail ([your] medical reports), another criminal matter." If no records or "written procedure" exist indicating the methods used to investigate the matters that you described, the Freedom of Information Law would not apply, and there would be no obligation to create new records in order to supply the information of your interest or answers to your questions.

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

that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 a recent decision cited in your appeal, <u>Gould v. New York City Police Department</u> [87 NY 2d 267 (1996)], stating that:

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

Just as significant, the Court in <u>Gould</u> 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" (<u>id.</u>, 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" (<u>id.</u>, 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

> *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In considering rights of access to a law enforcement manual or investigative procedures established by a law enforcement agency, several of the grounds for denial of access are relevant.

All such records would constitute intra-agency materials that fall within the scope of §87(2)(g). However, due to its structure, that provision frequently requires substantial disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

A second provision of potential significance is §87(2)(e), which permits an agency to withhold records that:

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

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

While I am not familiar with the contents of any existing records falling within the scope of your request, it seems unlikely that every aspect of the records would, if disclosed, interfere with an investigation or that the Sheriff could meet the standard of articulating a "particularized and specific justification" for a broad denial. I would conjecture that some aspects of the records may be routine and that the effects of disclosure would not be damaging.

Perhaps most relevant would be §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the investigative techniques or procedures contained in existing records could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

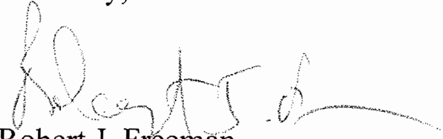
The remaining exception of potential significance is §87(2)(f). That provision permits an agency to withhold records insofar as disclosure "could endanger the life or safety of any person." The extent to which that exception might apply would be dependent on the effects of disclosure and the impact on the safety of the public and law enforcement personnel.

Lastly, one of your questions involves the Sheriff and "who he reports to" and his response that he reports "to the people of the state of New York." Since a sheriff is elected by the voters of a county, I do not believe that his response is inaccurate.

Copies of this opinion will be sent to Sheriff Bowen and the Clerk of the Board of Supervisors.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Sheriff James D. Bowen
Barbara Plummer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4620
FOIL-AO-17150

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May 2, 2008

Ms. Bonnie Holmes

The staff of the Committee on 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. Holmes:

As you are aware, I have received your correspondence in which you sought opinions concerning the Katonah Lewisboro School District and its Board of Education in relation to a matter involving the Freedom of Information and Open Meetings Laws.

The issues that you raised pertain to a situation in which a community member serving on the District's finance committee became aware that a custodian had been transferred from the night shift to the day shift, but was authorized to retain his night differential in pay, an amount involving an overpayment of approximately twelve thousand dollars. When a member of the Board asked how the District might recoup the money, he was, according to your letter, "silenced by the Superintendent who said he could not talk about it in public." Thereafter, you requested the document that authorized the transfer and were told by the Superintendent that no such document exists. It is your belief that the document does in fact exist.

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

Additionally, §89(8) of the Freedom of Information Law and §240.65 of the Penal Law, entitled "Unlawful prevention of public access to records", include essentially the same language. Specifically, the latter states that:

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

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record.

The issues involving the Open Meetings Law relate to the Superintendent's opinion that, in your words, the controversy deals with "a Personnel Matter and could not be discussed in public." In my view, if the statement attributed to Superintendent was accurately expressed, it is erroneous. Section 105(1) of the Open Meetings Law prescribes a procedure that must be accomplished by a public body, such as a board of education, before an executive session may be held. Specifically, the introductory language of 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..." (emphasis mine).

Based on the foregoing, the Open Meetings Law is permissive; even when a matter *may* be discussed in executive session, there is no requirement that it *must* be discussed in executive session. Stated differently, while that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session must be held even though a public body has the right to do so. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial of access, it has been held by the Court of Appeals, the state's highest court, that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records, even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I note, too, that the term "personnel" appears nowhere in the Open Meetings Law and, in my opinion, is greatly overused. While some discussions relating to personnel may properly be discussed in executive session, many others must be discussed in public. 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.

If the issue before the board involved the manner in which money might be recouped, and not discipline or penalty that might be imposed on a "particular person", it does not appear that there would have been a basis for conducting an executive session. On the other hand, insofar as it dealt with the possibility of discipline, a sanction or a penalty to be imposed with respect to a particular employee, to that extent, I believe that an executive session could properly be held.

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

In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Appellate Division stated that:

> "...the public body must identify the subject matter to be discussed (<u>See</u>, Public Officers Law § 105 [1]), and it is apparent that this must

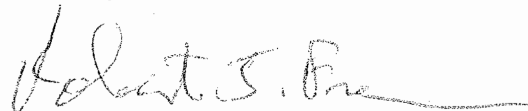
> be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

In an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be sent to District officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Robert J.Roelle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17151

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May 5, 2008

Mr. Norman Rosenberg
751 Argyle Road
Brooklyn, NY 11230

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

Dear Mr. Rosenberg:

I have received your letter and the correspondence attached to it. Please accept my apologies for the delay in response.

In short, you requested an audit prepared by the State Department of Transportation relating to payments made to a particular company involved in the reconstruction of the West Side Highway in Manhattan. You were informed that the record at issue was not "completed" and that it is "unlikely that the report will be finalized." That being so, substantial portions of the audit were withheld.

From my perspective, that the audit is not "completed" or "finalized" is irrelevant in analyzing right of access. In this regard, I offer the following comments.

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

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

In view of the breadth of the language quoted above, it is clear in my view that the document and the underlying documentation relating to it consist of "information...produced...for an agency" and, therefore, constitute "records" subject to rights of access, irrespective of their characterization.

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. Moreover, it is emphasized that the introductory language of §87(2) refers to the authority of an agency to withhold "records or portions thereof" that fall within one or more of the grounds for denial that follow. The language quoted in the preceding sentence indicates that a single record or report might be both accessible or deniable, in whole or in part. I believe that it also requires that agency officials review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

In my view, only one of the grounds for denial, that cited by the Department, is relevant in determining rights of access. Due to its structure, however, that provision often requires disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

The document at issue appears to be an internal, rather than an external audit. Nevertheless, there is no exception in the law pertaining to internal audits or records that may be incomplete or other than final. In this instance, the record clearly constitutes "intra-agency" material, and insofar as it consists of statistical or factual information, I believe that it must be disclosed.

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 incomplete or other than final does not necessarily signify an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

I note, too, it has been specifically held that statistical or factual information found within an internal audit is accessible, "whether or not embodied in a final agency policy or determination" [Gannett Co., Inc. V. Rochester City School District, 684 NYS2d 757, 759; aff'd 267 AD2d 964 (1998)].

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

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

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 of Appeal in Gould:

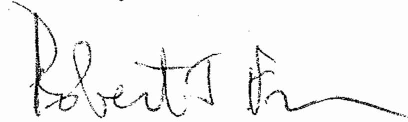
> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)]; see also Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion of leave to appeal denied (1979); Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985)].

In short, even though statistical or factual information contained within a record may be "intertwined" with opinions, the statistical or factual portions, if any, would in our opinion be available under §87(2)(g)(iii).

Lastly, the underlying records used in the preparation of the audit, so-called "audit workpapers", were found to be accessible to the extent that they consist of statistical or factual information [Polansky v. Regan, 81 AD2d 102 (1981)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Janice A. McLachlan
John B. Dearstyne

FOIL-AO- 17152

From: Jobin-Davis, Camille (DOS)
Sent: Monday, May 05, 2008 10:18 AM
To: 'Bradley Hanscom'
Subject: RE: denial or diligent search

Brad:

I think that if you cannot locate a record after diligent search, or if you learn that a record has been destroyed, you would respond to the request accordingly, without "denying" access, and you would not provide appeal information.

It's much more difficult to answer the question about creation of a record with a generic rule. I think it would depend on the circumstances. More likely it would involve the denial of access and the requisite appeal language.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17153

From: Jobin-Davis, Camille (DOS)
Sent: Monday, May 05, 2008 12:07 PM
To: 'Bradley Hanscom'
Subject: RE: denial or diligent search

Brad:

Yes, in general, you should deny access and send appeal information when you receive a request that does not reasonably describe records.

I agree that typically a request for all correspondence sent from a particular individual would not reasonably describe records. In that case DMV would deny access to the records, because DMV knows they probably exist, that most likely there are some records that are responsive somewhere, given the volume of correspondence that DMV receives and the number of years that a particular person has been in office (or even alive!), but that DMV would not be able to locate them with reasonable effort, based on the current indexing system. And yes, I think that because DMV denies access, the appeal information should be provided.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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518/474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 17154

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May 5, 2008

Mr. Robert Hennessey

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

Dear Mr. Hennessey:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

The matter deals with a partial denial of a request for a Department of Motor Vehicles Form DS-7, a Request for Driver Review. Portions of the form which if disclosed would identify the person who submitted the form were deleted on the ground that disclosure would constitute an unwarranted invasion of the privacy of the person who completed the form. In a letter sent to your attorney by the Department reference was made to your willingness "to consent to a redaction of the identity and other personal information of the reporting person..." However, the Department withheld additional aspects of the form, because the reporting person completed the form in his/her handwriting, and therefore, the handwriting could identify the reporting person. You wrote that you would accept a "typed version" of the statements that were handwritten on the form.

In this regard, I offer the following comments.

First, 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. 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 relevant exception to rights of access 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 similar record which identify reporting persons 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."

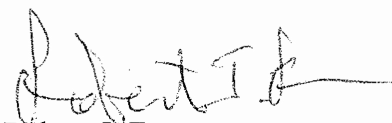
In my opinion, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of a person who made the complaint is often irrelevant to the work of the agency, and in most circumstances, I believe that identifying details pertaining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

From my perspective, if a record is handwritten, and if disclosure of handwritten entries would likely identify the reporting person, those entries may be withheld based on §87(2)(b).

Lastly, the Freedom of Information Law pertains to existing records, and §89(3)(a) states in part that an agency need not create a record in response to a request. That being so, I do not believe that the Department would be required to prepare a typewritten equivalent of a record containing handwritten entries.

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-4622
FOIL-AO-17155

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May 5, 2008

Mr. Joseph W. Sallustio, Jr.

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

Dear Mr. Sallustio:

I have received your letters and hope that you will accept my apologies for the delay in response. In brief, the issues that you raised involve the ability of the Rome Common Council to receive legal advice from its attorney in private.

In this regard, as suggested in the news article attached to your letter, 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.

Relevant is §108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law."

When an attorney-client relationship has been invoked, it is considered confidential under §4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would in my view be confidential under state law and, therefore, exempt from the Open Meetings Law.

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

In a judicial determination that described the parameters of the attorney-client relationship and the conditions precedent to its initiation, it was held that:

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

Insofar as a public body seeks legal advice from its attorney and the attorney renders legal advice, I believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. Therefore, even though there may be no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to §108, and legal advice may be requested even though litigation is not an issue. In that case, while the litigation exception for entry into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

There are several decisions in which the assertion of the attorney-client privilege has been recognized as a means of closing a meeting. In Cioci v. Mondello (Supreme Court, Nassau County, March 18, 1991), the issue involved the ability of a county board of supervisors to seek the legal advice of its attorney in private, and the court stated that "Clearly, the Supervisors' discussions with the County Attorney...are exempt from the provisions of the Open Meetings Law (see POL §108(3), CPLR §4503...)". In another decision citing §108(3), it was found that "any confidential communications between the board and its counsel, at the time counsel allegedly advised the Board of the legal issues involved in the determination of the variance application, were exempt from the provisions of the Open Meetings Law" [Young v. Board of Appeals, 194 AD2d 796, 599 NYS2d 632, 634 (1993)].

Notwithstanding the foregoing, it has been advised by this office and held judicially that the authority to assert the attorney-client privilege as an exemption from the coverage of the Open Meetings Law is narrow. In a decision that cited an advisory opinion of the Committee, the court in White v. Kimball (Supreme Court, Chautauqua County, January 27, 1997) found that:

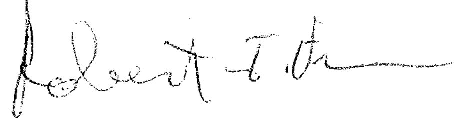
> "While there is no question that Executive Sessions can be conducted for proper reasons and that an exception exists under the Open Meetings Law for attorney-client privileged communications, the scope of that privilege is limited. Once the legal advice is offered, discussions with regard to substance (e.g.) the closing date of a bus system, do not fall within the privilege of the exception. See Exhibit C, April 8, 1996 Open Meetings Law Advisory Opinion #2595, Robert J. Freeman, Executive Director of Committee on Open government at page 4:
>
> > "I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, if at some point in a discussion, the attorney stops giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting."

The same kind of analysis would apply in considering rights of access conferred by the Freedom of Information Law. That statute, like the Open Meetings Law, is based upon a presumption of access. Stated differently, all records of an agency are 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 exception to rights of access, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Therefore, legal advice sought by a client and rendered by the client's attorney would be exempted from disclosure pursuant to §4503 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

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4623
FOIL-AO-17156

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May 5, 2008

Mr. Rick Shanks

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

Dear Mr. Shanks:

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 Catskill Fire Company, Catskill Fire Department and the Village of Catskill. In short, you made many requests to the Village, the Fire Company and the Fire Department, and have received very little in response. The records that you have requested, in our opinion, should be made available to you in large part, although there are portions that are not required to be made available. In an attempt to address the issues raised in your correspondence, we offer the following.

First, regardless of whether the records you requested are maintained by the Village, the Fire Company and/or the Fire Department, we believe that all three entities are required to comply with the Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

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

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

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 department and its fire companies, the Court of Appeals, found that volunteer fire entities, 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 department's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

In consideration of the legislative intent of the Freedom of Information Law to which the Court of Appeals referred, as well as the direction provided by the Court, we believe that records concerning volunteer firefighters should be accorded the same treatment for purposes of that statute as records pertaining to public employees generally. Again, the Court emphasized that it is "incumbent on the state and its localities to extend public accountability wherever and whenever feasible", and in view of the relationship between the Village, the Fire Company and the Fire Department, there is, in our opinion, an obligation on the part of all three entities to disclose their records in a manner that guarantees accountability.

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.

Your intended use of the records is irrelevant to your rights of access. When records are accessible under the Freedom of Information Law, it has been found that they must be made available to any person, notwithstanding one's status or interest [see 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 Health and Hosps. Corp., 62 NY 2d 75 (1984)]. Conversely, insofar as the records sought fall within a ground for denial, we believe that they may be withheld, irrespective of the purpose of the request.

Minutes of the meetings of the boards of the Village, the Fire Company and the Fire Department, for example, must be prepared and made available to the public within two weeks of the meetings to which they relate.

Section 106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

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

There is nothing in the Open Meetings Law or any other statute of which we are aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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, we believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

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

Please note that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From our perspective, when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, minutes reflective of its action would not have to 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)].

A final issue with respect to minutes is the maintenance of a roll call sheet that would indicate the identities of those who are present at a public meeting. Because persons who attend public meetings have no expectation that their attendance would be kept a private matter, in our opinion, there would be no basis in the law to deny access to any such sheets.

With respect to disclosure of a list of firefighters who are removed from an active membership roster, and a list of individuals sent registered letters of dismissal, in our opinion, an agency would not have a basis in the law to deny access to such records, if they exist. One of the exceptions to rights of access pertinent to an analysis, due to its structure, often requires substantial disclosure, and we 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 our opinion, therefore, a list of the names of those firefighters who were removed from an active membership roster, or sent letters of dismissal, would be required to be made available upon request.

With respect to tape recordings or video recordings or recordings made on a mobile phone, the Freedom of Information Law is applicable to all agency records and §86(4) of that statute defines the term "record" expansively to include:

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

In our view, one of the grounds for denial may be relevant to an analysis of rights of access. The extent to which it may properly be asserted is, in our opinion, dependent on the nature of the depictions in the audio and visual recordings.

Relevant is §87(2)(b), which authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy."

In a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

> "...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution. Moreover, respondents' regulations require disclosure to news media of an inmate's 'name *** city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7 NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff under §87(2)(f).

Further, in a case involving videotapes of events occurring at a correctional facility, in the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. However, other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy and endanger life and safety [see 174 AD2d 212 (1992)].

In sum, based on the language of the Freedom of Information Law and its judicial interpretation, we believe that the agency in possession of the recordings you seek is required to review each recording falling within the scope of your request to attempt to ascertain the extent to which their contents fall within the grounds for denial appearing in the statute. Recordings of a public meeting, of course, would be available in their entirety.

Likewise, the "contents of personnel files" of public officials and employees would be required to be disclosed only to the extent that disclosure would not cause "an unwarranted invasion of personal privacy."

There is nothing in the Freedom of Information Law that deals specifically with personnel records or files. The nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Typically, two of the grounds for denial are relevant to an analysis of rights of access to personnel records.

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

The other ground for denial of significance, as previously noted with respect to a list of names of firefighters, is §87(2)(g), which would require disclosure of those portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations. Again, as previously noted, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld.

If there are allegations or charges of misconduct that have not yet been determined or did not result in a finding of misconduct, the records relating to such allegations may, in our view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, we believe that records of those charges may be withheld. With respect to records reflective of disciplinary action taken against a public employee who is not a police or correction officer, such records must in our view be disclosed.

Insofar as you have requested "personnel files" of police officers, we note that §87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used "to evaluate performance toward continued employment or promotion" are confidential.

Based on the language of §50-a of the Civil Rights Law, various aspects of a personnel file pertaining to a police officer are exempt from disclosure, such as evaluations of performance, complaints and related records pertaining to allegations of misconduct. Other aspects of a personnel file, i.e., those portions that are not used "to evaluate performance toward continued employment or promotion", would not be subject to that statute. It is our opinion, therefore, that the agency would be required to review the contents of the personnel files of the officers, and determine which portions are required to be made available to you.

Whether your requests were sent directly to the appropriate agency or forwarded to the appropriate agency, each of the agencies to which you directed your requests are required to comply with the time limits set forth in the Freedom of Information Law. In an effort to avoid lengthening the text of this advisory opinion, the following is a link to an explanation of the time limits hereto: http://www.dos.state.ny.us/coog/explaination05.htm. As explained in the attached materials, should any of these agencies continue to deny access to records that are required to be made available to

you, or continue to ignore written requests and appeals, you have the authority to bring a judicial proceeding to compel disclosure.

We note that legislation enacted in 2006 broadened 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.

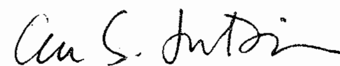
Finally, you allege that a certain recording may have been intentionally destroyed. In this regard, we note that §89(8) of the Freedom of Information Law and §240.65 of the Penal Law include essentially the same language. Specifically, the latter states that:

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

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

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: Catskill Fire Company
Village of Catskill Fire Department
Village Clerk

FOIL-AO-17157

From: Freeman, Robert (DOS)
Sent: Thursday, May 08, 2008 4:35 PM
To: Schneier, Roger (DOS)
Subject: RE: FOIL request

Hi Roger - -

Yes, when a request for copies of records maintained by an agency is made pursuant to FOIL, an agency is required to make copies upon payment of the appropriate fee. In the situation that you described, §302(2) of the State Administrative Procedure Act may be pertinent. That provision states in part that: "Except when any statute provides otherwise, the agency is authorized to charge not more than its cost for the preparation and furnishing of such record or transcript or any part thereof, or the rate specified in the contract between the agency and a contractor if prepared by a private contractor." That being so, if the Department contracts with a service to prepare a transcript, the Department may charge a fee based on the rate specified in the contract with the service.

Hope this helps.

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave., Suite 650
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - fax
www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17158

From: Freeman, Robert (DOS)
Sent: Thursday, May 08, 2008 4:19 PM
To: Kathy Barrans
Subject: RE: FOIL question

The federal Family Educational Rights and Privacy Act essentially prohibits a school district from disclosing personally identifiable information relating to a student unless a parent consents to disclosure. That being so, insofar as video identifies one or more students, consent to disclose would be needed from a parent of each student.

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17159

Committee Members

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Tedra L. Cobb
Lorraine A. Cortés-Vázquez
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Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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May 13, 2008

Mr. Clarence Delaney Jr.
05-A-1507
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. Delaney:

I have received your letter in which you complained that you submitted Freedom of Information Law requests to the Albany County Department of Social Services, the City of Albany Police Department and the Albany Medical Center and, that as of the date of your letter to this office, you had not received any responses.

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

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

As such, since the Albany Medical Center is not a government entity, it would not be subject to the requirements of the Freedom of Information Law.

However, since your request directed to the Albany Medical Center involved your medical records, I point out that a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

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

Lastly, with respect to your unanswered requests to the Albany County Department of Social Services and the City of Albany Police Department, 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 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:

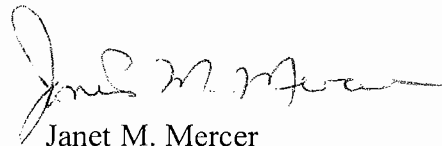
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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 - 17160

Committee Members

Laura L. Anglin
Tedra L. Cobb
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May 13, 2008

Mr. John Whitfield
88-A-5197
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. Whitfield:

I have received your letter in which you indicated that you have not received responses to your Freedom of Information Law request and appeal directed to the New York City Department of Correction.

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:

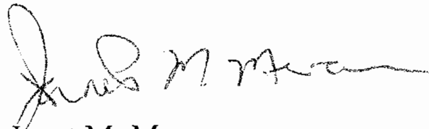
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

cc: Stephen J. Morello, Records Access Officer
Florence A. Hunter, Records Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17161

Committee Members

Laura L. Anglin
Tedra L. Cobb
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Clifford Richner
Dominick Tocci

Executive Director

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May 13, 2008

Mr. Seth Ritchie
07-A-5833
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. Ritchie:

I have received your letter in which you indicated that you have not received a response to your Freedom of Information Law request directed to your facility.

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

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

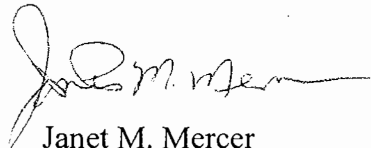
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-347
FOIL-AO-17162

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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(518) 474-2518
Fax (518) 474-1927
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May 13, 2008

Mr. John E. Glowacki
Attorney at Law
2010 West Genesee Street
Syracuse, NY 13219-1645

Dear Mr. Glowacki:

You have asked that I "look into" a matter involving a request made to the Town of Clayton Privacy Compliance Officer.

In this regard, please note that the Town is not obliged to designate a "privacy compliance officer", for the Personal Privacy Protection Law is applicable only to state agencies. For purposes of that statute, §92(1) defines the term "agency" to mean:

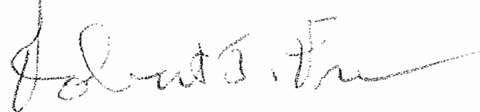
> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit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

Based on the foregoing, the Personal Privacy Protection Law excludes from its coverage "any unit of local government", such as a town.

Next, with respect to your request, I believe that the names of those who serve on a municipal board, such as the town's assessment review board, must be disclosed. However, §89(7) of the Freedom of Information Law specifies that the home addresses of present or former public officers or employees need not be disclosed. Further, based on judicial decisions, I believe that the home telephone number of the public officer or employee may be withheld pursuant to §87(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." In short, it has been held in a variety of contexts that those items pertaining to public officers or employees that relate to the performance of their official duties typically are accessible, for disclosure in those circumstances would result in a permissible, not an unwarranted invasion of personal privacy. Conversely, items that are irrelevant to the performance of one's duties, such as home addresses and home telephone numbers, a social security number, marital status, etc., may be withheld.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Bonnie L. Rose, Town Clerk
Denise Trudell, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17163

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

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May 14, 2008

E-Mail

TO: Tim Ashmore, Reporter, The Ithaca Journal

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Ashmore:

I have received your letter and the correspondence pertaining to it. You have sought an advisory opinion concerning the propriety of denials of access to settlement agreements involving cases brought before the State Division of Human Rights against Tompkins County that include provisions prohibiting the release of information relating to those cases.

In this regard, first, situations have arisen in which the parties to an agreement or stipulation of settlement have agreed to refrain from speaking about or disclosing the terms of the agreement or stipulation on their own initiative. In my view, it is likely that the parties may validly agree not to speak about a settlement or agreement. However, the Freedom of Information Law pertains to records, not to speech. In a decision that appears to be relevant to the matter that you described, Paul Smith's College of Arts and Sciences v. Cuomo, it was stated that:

> "Plaintiff was the subject of a complaint made by a former employee who alleged that he was a victim of age discrimination. Prior to a scheduled hearing and with the assistance of an employee of defendant State Division of Human Rights (hereinafter SDHR), plaintiff entered into a stipulation of settlement with the complaining employee. Plaintiff's stated purpose for settling was to eliminate any negative publicity resulting from a public hearing on the allegations. The order after stipulation signed by defendant Commissioner of Human Rights on August 23, 1989 provided for absolute confidentiality except for enforcement purposes. The order also provided for the withdrawal of the charges and discontinuance of the administrative proceeding. Plaintiff did not admit to a Human Rights violation. On October 27, 1989, SDHR issued a press release detailing the allegations, disclosing that the matter hade been settled and set forth certain parts of the settlement terms" [589 NYS2d 106,107, 186 AD2d 888 (1992)].

The Appellate Division determined that the issuance of the press release "was both arbitrary and capricious and an abuse of discretion" (id.). Nevertheless, it also found that the stipulation of settlement was subject to rights of access conferred by the Freedom of Information Law.

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

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

Second, I believe that the agreements 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. Unless records may justifiably be withheld in accordance with one or more of the grounds for denial, a claim, a promise or an agreement to maintain confidentiality would, based on judicial decisions, be meaningless.

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

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law [see FOIL, §87(2)(g)(iii)]. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

In another decision, the matter involved the subject of a settlement agreement with a town that included a confidentiality clause who brought suit against the town for disclosing the agreement under the Freedom of Information Law. In considering the matter, the court stated that:

> "Plaintiff argues that provisions of FOIL did not mandate disclosure in this instance. However, it is clear that any attempt to conceal the financial terms of this expenditure would violate the Legislative declaration of §84 of the Public Officer's Law, as it would conceal access to information regarding expenditure of public monies.
>
> "Although exceptions to disclosure are provided in §§87 and 89, plaintiff has not met his burden of demonstrating that the financial provisions of this agreement fit within one of these statutory exceptions (see Matter of Washington Post v New York State Ins. Dept. 61 NY2d 557, 566). While partially recognized in Matter of LaRocca v Bd. of Education, 220 AD2d 424, those narrowly defined exceptions are not relevant to defendants' disclosure of the terms of a financial settlement (see Matter of Western Suffolk BOCES v Bay Shore Union Free School District, ___AD2d___ 672 NYS2d 776). There is no question that defendants lacked the authority to subvert FOIL by exempting information from the enactment by simply promising confidentiality (Matter of Washington Post, supra p567).
>
> "Therefore, this Court finds that the disclosure made by the defendant Supervisor was 'required by law', whether or not the contract so provided" (Hansen v. Town of Wallkill, Supreme Court, Orange County, December 9, 1998).

In short, absent the assertion of a ground for denial appearing in §87(2) of the Freedom of Information Law, and none in my view would apply, I believe that the agreements must be disclosed in response to a request made under the Freedom of Information Law, notwithstanding the language regarding confidentiality in the agreement.

Third, I note that there is nothing in that statute that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

Of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers

employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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

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

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

In consideration of the judicial decisions cited in the preceding commentary, I believe that disclosure of the agreements would constitute a permissible rather than unwarranted invasion of personal privacy and that they must be disclosed to comply with law.

In an effort to enhance understanding of and compliance with the Freedom of Information Law, a copy of this opinion will be sent to the County Administrator.

I hope that I have been of assistance.

RJF:jm

cc: Stephen F. Whicher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17164

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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

May 14, 2008

Greg Waldron, President
Scott Machine Development Corp.
200 Prospect Avenue
Walton, NY 13856

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

Dear Mr. Waldron:

I have received your letter in which you raised the following question: "when an auditor produces a management letter as part of the annual audit, is that management letter subject to FOIL..."?

In this regard,§30 of the General Municipal Law requires that every municipal corporation and school district is required to make an annual report of its financial condition to the State Comptroller. Section 35 of the General Municipal Law states in subdivision (1) that:

> "A report of such examination shall be made and shall be filed in the office of the state comptroller...An additional copy thereof shall be filed with the chief fiscal officer, except that in the case of a school district, such additional copy shall be filed in the office of the chairman of the board of trustees, the president of the board of education or the sole trustee, as the case may be. When so filed, each such report and copy thereof shall be a public record open to inspection by any interested person."

Subdivision (2)(a) of §35 makes specific reference to management letters and states in relevant part that:

> "Within ten days after the filing of a report of examination performed by the office of the state comptroller, a report of an external audit performed by an independent public accountant or any management letter prepared in conjunction with such an external audit with the

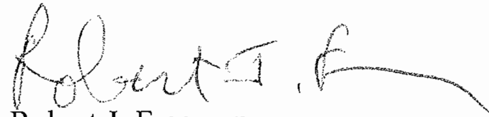
> clerk of the municipal corporation, industrial development agency, district, agency or activity, or with the secretary if there is no clerk, he shall give public notice thereof...and that the (report of examination performed by the office of the state comptroller or report of, or management letter prepared in conjunction with, the external audit by the independent public accountant) has been filed in my office [sic] where it is available as a public record for inspection by all interested persons."

Based on the foregoing, it is clear that a management letter must be made available to the public.

In an effort to enhance their understanding of the matter, copies of this response will be forwarded to Mayor Snow and Mr. Manzanero, the auditor.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Edward Snow, Mayor
Mr. Manzanero, Auditor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17165

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

May 14, 2008

Mr. Matt Dudek
Assistant Managing Editor/Administration
Democrat and Chronicle
55 Exchange Boulevard
Rochester, NY 14614

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

Dear Mr. Dudek:

I have received your letter concerning the ability to conduct "DMV searches" and restrictions on the use of driver license information imposed by the Department of Motor Vehicles (DMV).

In this regard, as you are aware, the state's Freedom of Information Law does not distinguish among applicants for records and imposes no restrictions on the use of records once they are disclosed. Although that law generally determines rights of access to records maintained by entities of state and local government in New York, in this instance, a federal statute, the Drivers' Privacy Protection Act (18 U.S.C. §2721 et seq.), governs. The provisions of the Act relevant to the matter state that:

> "(a) In General. - Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.
>
> (b) Permissible Uses. - Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or drive safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original

> owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331of title 49, and may be disclosed..."

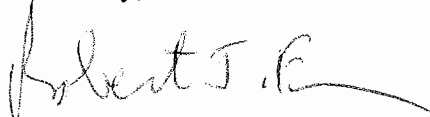
only in circumstances that are specifically enumerated.

The only circumstance pertinent in the context of the functions of the news media relates to the provision to which you referred, subdivision (5) of 18 USC §2721(b), which authorizes a state DMV to disclose driver license information "For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals."

Because the provisions quoted above reflect federal law, I do not believe that there is an alternative mechanism for obtaining driver license information from a state DMV. As you are likely aware, however, many news media organizations agree to the conditions imposed by the Act based on the assumption that records acquired via the Act will not be used in a manner contrary to its provisions.

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

FOIL-AO-17166

From: Freeman, Robert (DOS)
Sent: Friday, May 16, 2008 9:27 AM
To: Monica Moshenko, Disability News Radio
Subject: RE: FOIL request from June 18, 2007

When an agency fails to grant a request or deny access in writing within the time periods indicated in §89(3)(a) of the Freedom of Information Law, the applicant may consider the request to have been denied. In that circumstance, the applicant may appeal the denial in accordance with §89(4)(a). When the person designated to determine appeals receives the appeal, he/she has ten business to grant access to the records or fully explain in writing the reasons for further denial.

The person designated to determine appeals for SUNY is Ms. Stacy Hensterman, whose office is located at SUNY Central.

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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17167

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May 15, 2008

Mr. James L. Kapsis

Dear Mr. Kapsis:

I have received your letter of May 9 and the materials attached to it. You have requested an advisory opinion concerning "the alteration of documents from a state agency."

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, does not contain provisions concerning the alteration of documents. However, §89(3)(a) provides in part that the recipient of a record may ask that an agency "certify to the correctness" of a copy of a record made available in response to a request.

I note that I have read the documents that you attached, and that although they are different in format, the content of the memorandum of December 17, 2003 and the letter of the same date are exactly the same.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17168

Committee Members

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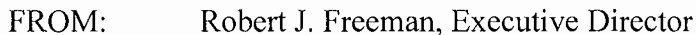
May 15, 2008

E-Mail

TO: Ms. Marnie Eisenstadt, Reporter, The Post Standard

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. Eisenstadt:

I have received your request for an advisory opinion "with respect to the public nature of fire department and emergency medical service response time records held in a database by Onondaga County." According to your letter, the records of your interest are kept in a database purchased by the County and manufactured by BIO-key, and the County's training manual for the system describes the manner in which users view reports stored in the database. One category of reports involves average response time, and you are seeking that report for each fire department and EMS provider in Onondaga County.

You wrote that County officials have informed you that the records at issue would be withheld for the following reasons:

> "1. The county does not 'own' the records of 911 calls. The records are 'owned' by the individual departments. These calls are taken by county dispatchers and the records are kept by the county.
>
> 2. The county does not have to provide the response time records because the Freedom of Information Law says officials do not have to create a record in order to fill a request.
>
> 3. The county is not an 'authorized user' of its own records management system in which the records reside, so officials cannot access the records in order to fill a request. Additionally, Onondaga

> County Attorney Gordon Cuffy said that it is the county that decides who the 'authorized users' are, and the county has decided not to give itself access to the system."

From my perspective, which is based on the language of the Freedom of Information Law and judicial precedent, the County is required to make the records sought available to you. In this regard, I offer the following comments.

The first and third reasons for denying access, that the County does not "own" records and that it is not an "authorized user" of the data, reflect a failure to recognize the scope of the Freedom of Information Law. That statute is applicable to all agency records, and §86(4) defines the term "record" expansively to include:

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

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

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

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

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute -

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

That the records in which you are interested may not be "owned" by the County or sought by an "authorized user" is, in my opinion, irrelevant. In short, irrespective of their origin or function, the fact that the records are in the physical possession of the County brings them within the coverage of the Freedom of Information Law and imposes a duty on the County to respond properly to a request made pursuant to that statute.

Next, when information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disc.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3)(a) 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, particularly if that effort involves less time and cost to the agency than engaging in manual deletions, I believe that an agency must follow the more reasonable and less costly and labor intensive course of action to comply with law.

Pertinent is a decision concerning a request for records, data and reports maintained by the New York City Department of Health regarding "childhood blood-level screening levels" (New York Public Interest Research Group v. Cohen and the New York City Department of Health, Supreme Court, New York County, July 16, 2001; hereafter "NYPIRG"). In NYPIRG, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not

> required to prepare pursuant to Public Officer's Law §89(3).'
>
> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.

> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

More recently, the Court of Appeals in Data Tree LLC v. Romaine [9 NY3d 454 (2007)] essentially confirmed the holding in NYPIRG and the advice rendered by this office that is particularly apt in the context of your inquiry, for it was held that:

> "...if the records are maintained electronically by an agency and are retrievable with reasonable effort, that agency is required to disclose the information. In such a situation, the agency is merely retrieving the electronic data that it has already compiled and copying it onto another electronic medium. On the other hand, if the agency does not maintain the records in a transferable electronic format, then the agency should not be required to create a new document to make its records transferable. A simple manipulation of the computer necessary to transfer existing records should not, if it does not involve significant time or expense, be treated as creation of a new document" (id., 464-465).

Based on your comments, it appears that the reports of your interest can be retrieved from a database containing various items or fields. As suggested in NYPIRG and inferred in Data Tree, when electronic extraction or retrieval of data can be accomplished with reasonable effort, an agency must do so to comply with the Freedom of Information Law.

Lastly, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. In my view, none of the grounds for withholding may properly be asserted to deny access to the records at issue.

Although records of 911 calls made to a county's emergency response system are exempt from disclosure under §308(4) of the County Law, that provision pertains only to the records of the calls themselves, i.e., tape recordings or transcripts of the conversation between the maker of the 911 call and the recipient of the call. You are not seeking those records, but rather records relating to them, specifically those indicating response times after the receipt of 911 emergency calls. I note that records analogous to those that you seek to obtain, those indicating response times by fire departments or providers of EMS services, are routinely made available by many agencies, and I believe that is so, in part, again, because none of the grounds for denial of access in the Freedom of Information Law may justifiably be asserted to withhold them.

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 County Attorney.

I hope that I have been of assistance.

RJF:jm

cc: Gordon Cuffy, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4627
FOIL-AO-17169

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May 16, 2008

Mr. Frederick H. Monroe
Executive Director
Adirondack Local Government Review Board
P.O. Box 579
Chestertown, NY 12817

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

Dear Mr. Monroe:

In your capacity as Executive Director of the Adirondack Park Local Government Review Board ("Review Board"), you requested an opinion concerning the Freedom of Information and Open Meetings Laws as they relate to a draft mediation protocol for an application filed by Preserve Associates, LLC regarding the Adirondack Club and Resort, Adirondack Park Agency Project No. 2005-100. Specifically, you indicated that the proposed protocol "includes a confidentiality agreement which all parties will be required to sign on April 23rd in order to participate in the mediation." You requested our views regarding "whether or not [you] may sign the confidentiality agreement on behalf of the Review Board; whether [you] may discuss tentative and final agreements and proposed stipulations with the Review Board in executive session; and whether documents that come into [your] possession during the mediation would be subject to the Freedom of Information Law." Subsequently, our office received a copy of the final version of the mediation protocol from the Adirondack Park Agency. Therefore, we offer the following comments pertaining to the final protocol ("protocol").

First, with respect to provisions in the protocol regarding the "confidentiality" of statements or verbal descriptions of the mediation process, as you are likely aware, the Open Meetings Law is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on provisions of Executive Law, we believe that the Adirondack Park Local Government Review Board is a public body that falls within the requirements of the Open Meetings Law. Created through legislation enacted in 1973, the Review Board is comprised of 12 members, each of whom is a resident of a county wholly or partly within the Adirondack Park, and is appointed by the legislature of the county in which the member resides. In addition to its responsibility to advise and assist the Adirondack Park Agency, §803-a of the Executive Law provides that:

> "7. In addition to any other functions or duties specifically required or authorized in this article, the review board shall monitor the administration and enforcement of the Adirondack park land use and development plan and periodically report thereon, and make recommendations in regard thereto, to the governor and the legislature, and to the county legislative body of each of the counties wholly or partly within the park."

From our perspective, each of the conditions necessary to conclude that the Review Board constitutes a public body can be met. There are twelve members who conduct public business collectively as set forth in the statute. By so doing and carrying out their powers and duties, the members of the Review Board perform a governmental function for the state. While we know of no specific reference to a quorum requirement, a separate statute, §41 of the General Construction Law, requires that "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly as a board or similar body", they may carry out their duties only through the presence of a quorum and action taken by majority of the vote the total membership of such entity.

We note that the protocol requires all signatories to keep "the development of the agendas for the mediation sessions as well as the substantive discussions held during the mediation sessions" confidential "to the fullest extent as allowed by law" (page 3), and further requires that "Nothing in this agreement precludes the parties from informing the party's decision makers regarding all aspects of the mediation process including substantive and procedures issues discussed in the mediation process. Such information will be kept confidential" (page 4). With respect to public statements the Protocol indicates that "The parties have agreed to preserve the confidentiality of the mediation in order to advance the mediation process" (page 4). And further, "Except as provided herein, nothing in this agreement precludes any party from issuing media releases, participating in public discussions, taking public positions or any other activity involving the proposed ACR Project or to appear before any local, state or federal agency that may be considering an application for the ACR Project, provided that the mediation sessions remain confidential" (pages 4-5).

If you were to have signed this Protocol on behalf of the Review Board, we believe that neither you nor the Review Board would have been able to fulfill the above outlined commitments, and concurrently comply with the Open Meetings Law.

By way of background, the Open Meetings Law pertains to meetings of public bodies, and §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". The definition of "meeting" has been broadly interpreted by the courts, and in a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

It is emphasized 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. Section 105(1) states in relevant part that:

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

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

Further, it has been held judicially that :

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807)"

We stress that a public body may validly conduct an executive session only to discuss one or more of the subjects listed in §105(1) and that a motion to conduct an executive session must be sufficiently detailed to enable the public to ascertain that there is a proper basis for entry into the closed session. In our opinion there is no basis in the law to enter into executive session to discuss the particulars of a mediation process regarding an application pending before the Adirondack Park Agency.

It is likely that the provision which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation" (§105[1][d]) would not apply. While the courts have not sought to define the distinction between "proposed" and "pending" or "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the general intent of the grounds for entry into executive session. Specifically, 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)].

In view of the foregoing, the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, so as not to divulge its strategy to its adversary, who may be present with other members of the public at the meeting. We note too, that the Concerned Citizens

decision cited in Weatherwax involved a situation in which a town board involved in litigation met with its adversary in an executive session to discuss a settlement. The court determined that there was no basis for entry into executive session; the ability of the board to conduct a closed session ended when the adversary was permitted to attend.

In the context of the matter at issue, there is no litigation pending between or among the parties to the mediation process, and both the developer and the other signatories, who may have interests adverse to each other, are present during the course of the mediation sessions. Accordingly, while one could contractually agree not to make statements to the press, or to refrain from answering questions about the process from the public, in our opinion, a quorum of the members of the Review Board would not be permitted to discuss the mediation process, or receive a briefing from you, in executive session. If you were required to obtain approval from the Review Board in order to proceed with an issue during the mediation process, for example in our opinion, it is likely that there would be no basis for the Review Board to discuss the issue in executive session.

We turn now to the issue of public access to records created and/or received and/or reviewed during the mediation process. Before addressing the individual restrictions proposed by the Protocol, we note that it has been held in variety of circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

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

We note that the while minutes of the mediation sessions will not be prepared, the protocol permits that each party "may keep notes of the mediation sessions". The protocol requires that "Such notes will remain confidential to the fullest extent as allowed by law."

With respect to the status of notes of meetings it is emphasized that the Freedom of Information Law is applicable to all agency records, that both the Adirondack Park Agency and the Review Board are "agencies" subject to the law, and that §86(4) of that statute defines the term "record" expansively to include:

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

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

that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

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

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

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

Perhaps most pertinent is a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he prepared the notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

The protocol further requires that "The mediation process, including but not limited to, the development of the agendas for the mediation sessions as well as the substantive discussions held during the mediation sessions, shall be kept confidential by the parties and the mediator to the fullest extent as allowed by law." Insofar as an agenda is created or an attendee during the mediation process makes notes indicating the parties' agreement to the items on an agenda for the next mediation session, we believe these materials would be "records" subject to rights conferred by the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law. Perhaps most pertinent here is §87(2)(g) which states that an agency may withhold records that:

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

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Accordingly, we believe that notes created by public officials or employees of the Adirondack Park Agency and/or the Review Board during the course of the mediation process in question are "records" that fall within §87(2)(g). To the extent that such notes detail factual information, in our opinion, they would be required to be made public.

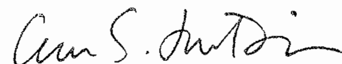
Similarly, although the protocol requires that "At the conclusion of the mediation process, or any mediation session, upon the request of a party which provided documents or other material to one or more parties, the recipients shall return the same to the originating party without retaining copies", in our opinion, such documents and materials are "records" that fall within the coverage of the Freedom of Information Law. Returning the document to the provider, in our view, would not remove the agency's responsibility to give effect to the Freedom of Information Law.

In keeping with the foregoing, we believe that other aspects of the protocol dealing with disclosure are inconsistent with law, particularly a provision requiring that "The parties and the mediator agree that government officials will seek to exempt from disclosure pursuant to the Freedom of Information Law all documents and records prepared for purposes of the mediation process. The parties, their designated representatives and consultants, as well as the mediator will not disclose information regarding the process, including draft and final settlement terms, to third parties, unless all parties agree otherwise" (page 3). Again, a promise or agreement regarding confidentiality cannot be sustained when none of the grounds for denial appearing in the Freedom of Information Law may justifiably be asserted.

In sum, insofar as the protocol may be inconsistent with the Open Meetings and Freedom of Information Laws, we believe that it is invalid and unenforceable.

On behalf of the Committee on Open Government, we hope this is helpful of you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Mitchell Goroski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17170

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

One Commerce Plaza, 99 Washington Ave., Suite 650, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 16, 2008

Mr. Gary Post

Dear Mr. Post:

I have received your letter of May 13 in which you appealed a denial of access to records that you requested from the Town of Richmondville.

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, such as the Town, to grant or deny access to records.

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

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

It is suggested that you contact the Town Clerk to ascertain whether the Town Board or a person or body appointed by the Board has been designated to determine appeals.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Maggie Smith, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17171

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

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May 16, 2008

Mr. Damien Lynch
06-A-0434
Eastern NY Correctional Facility
P.O. Box 338
Napanoch, NY 12458

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

Dear Mr. Lynch:

I have received your letter in which you indicated 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, 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."

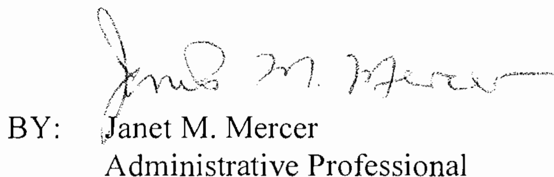
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to the New York City Police Department.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Sgt. James Russo, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17172

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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May 16, 2008

Mr. Donnell Shelton
98-A-5515
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

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

Dear Mr. Shelton:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request to the Schenectady County District Attorney's Office over two months ago and that, as of the date of your letter to this office, you had not received a response.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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."

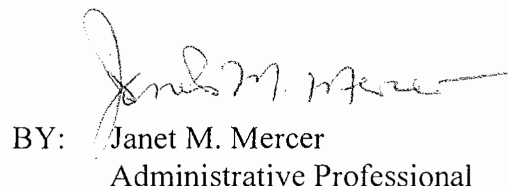
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive 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 the Schenectady County District Attorney's Office.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer

FOIL-AO-17173

From: Freeman, Robert (DOS)
Sent: Monday, May 19, 2008 9:59 AM
To: Kicinski, Christine J.
Subject: RE: a question

As you are likely aware, §89(7) of the Freedom of Information Law specifies that the name or address of an applicant for appointment to public employment need not be disclosed. That being so, it has been advised that any portion of a resume or application that would, if disclosed, permit identification of the applicant may be withheld.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave., Suite 650
Albany, NY 12231
(518) 474-2518
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www.dos.state.ny.us/coog/coogwww.html

OML-AO- 4628
FOIL-AO-17174

From: Jobin-Davis, Camille (DOS)
Sent: Monday, May 19, 2008 2:18 PM
To: Mr. Benja Schwartz
Subject: RE: a follow up to the email sent May 6th, 2008

Dear Mr. Schwartz:

In response to your question, my only concern would be whether the minutes are sufficiently descriptive to enable the public and others (i.e., future municipal officials), to ascertain the nature of the action taken. Is the reference number "2008-492" a contract number? Was the agreement described earlier in the minutes?

This is not to suggest that every aspect of the agreement must be memorialized in the minutes, but that the minutes should reflect, in my opinion, at a minimum, the nature of the agreement, or perhaps the town employee's name. As you may know, it is likely that the agreement itself is public. Based on the absence of information in the attached email, it is also likely that it would be difficult for the Town's records access officer to locate the agreement, upon receipt of a request.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO - 17175

From: Freeman, Robert (DOS)
Sent: Wednesday, May 21, 2008 2:23 PM
To: Ms. Tracey Haffner
Subject: RE: questions regarding FOIL request

In short, although the Freedom of Information Law does not require agencies to offer "explanations", insofar as the Town maintains records containing the information sought, I believe that they must be disclosed, for none of the grounds for denying access appearing in §87(2) of the Law would apply.

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave., Suite 650
Albany, NY 12231
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(518) 474-1927 - fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17176

Committee Members

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Tedra L. Cobb
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John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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May 21, 2008

Mr. George Rand

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

Dear Mr. Rand:

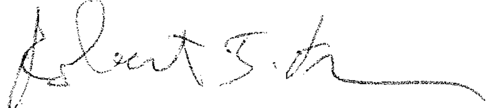
I have received your letter in which you requested an advisory opinion concerning the propriety of a denial of access to "salary statistics" by the Elmont Union Free School District. Although that District and others have in the past disclosed the records sought, your request was denied on the ground that the record at issue "contains information which is not accessible to you."

In this regard, having reviewed our files, an advisory opinion was prepared at your request in 1998 that dealt with essentially the same records. Rather than reiterating the content of that opinion, enclosed is a copy of you, and in addition, copies will be sent to District officials.

Nevertheless, it is emphasized that even though a record might include items that may be withheld, an agency is not permitted to withhold the entirety of the record. Section 87(2) of the Freedom of Information Law requires that all agency records, such as those of a school district, are accessible to the public, except those records "or portions thereof" that fall within the exceptions that follow. Therefore, an agency is required to review records to determine which portions, if any, may properly be withheld. If portions of the records may be withheld, the agency is required to make the appropriate redactions or deletions, and to disclose the remainder. If, for example, a record consists of employees' names, titles, salaries and gross wages, all of which must be disclosed, but the same record includes employees' social security numbers, the social security numbers may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. However, the remainder of such a record must be disclosed to comply with law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Al Harper, Superintendent
Celestine L. Lloyd, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17177

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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

May 21, 2008

Mr. Duane Parsons

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

Dear Mr. Parsons:

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 denial of access by Monroe County to records relating to an interview of your seven year old daughter conducted by a Sheriff's detective. The County denied access on the basis of §87(2)(f) of the Freedom of Information Law.

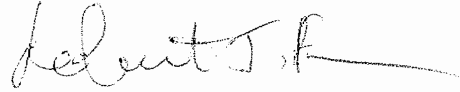
In this regard, it is noted initially that §87(2)(f) initially authorized a government agency to deny access to records when disclosure "would endanger the life or safety of any person" (emphasis added). That provision was amended several years ago, following the events of September 11, 2001, and now permits an agency to withhold records when disclosure "could endanger the life or safety of any person" (emphasis added). Therefore, when there is a reasonable likelihood that disclosure "could" endanger the life or safety, an agency has the ability to deny access.

Since I am unaware of the content of the record at issue, I cannot conjecture as to the propriety of the County's determination. I note, however, that upon the initiation of a judicial proceeding to seek review of the denial of a request, a court has the authority to inspect records *in camera*, in private, to determine the validity of an agency's determination.

Lastly, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. This office is not empowered to compel an agency to grant or deny access to records, and it has no authority to deal with "the question of official misconduct" on the part of a public employee.

I hope, however, that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: James P. Smith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4632
FOIL-AO-17178

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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

May 21, 2008

Mr. Henry Silverman

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

Dear Mr. Silverman:

I have received your letter in which you described difficulty in obtaining records from the Town of Riverhead, specifically, a video recording and minutes of a meeting held by the Town Board on April 13, 2006. Although a DVD of the meeting was given to you, you wrote that it "does not work" and that a second request is being ignored. You asked that I "investigate" the matter.

As indicated in a letter addressed to you on April 24, 2007, the Committee on Open Government has neither the jurisdiction or the resources to conduct an investigation. Nevertheless, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and I point out that, pursuant to rules adopted pursuant to Article 57-A of the Arts and Cultural Affairs Law, audio and video recordings of meetings must be retained for a minimum of four months. Following the expiration of that period, they may be discarded or, when possible, erased and reused. Whether recordings of meeting of the Town Board are routinely kept for more than four months is unknown to me. If they continue to exist, I believe that they must be made available in accordance with the Freedom of Information Law.

Second, judicial decisions indicate that the public may audio or video record open meetings of public bodies, so long as the use of a recording device is neither obtrusive nor disruptive [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Csorny v. Shoreham-Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003)].

Lastly, a "work session" is a "meeting" subject to the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. That being so, minutes of work sessions must be prepared and made available in accordance with

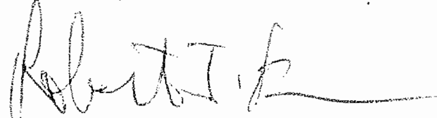
§106 of that law. Section 106(1) provides what might be viewed as minimum requirements concerning the contents of minutes and states that:

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

Only to the extent that the events referenced above occur, i.e., the making of motions, proposals, resolutions or actions taken, must minutes be prepared.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17179

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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May 21, 2008

E-Mail

TO: Mr. James A. Kirchmeyer

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. Kirchmeyer:

I have received your letter in which you sought an advisory opinion concerning the Freedom of Information Law. Please accept my apologies for the delay in response.

According to your letter, you and other appraisers in the past obtained "the entire state's assessor file in electronic format" from the Offices of Real Property Services (ORPS). ORPS recent denial is, in your words, "based on a very poor decision in the Comps, Inc Vs Town of Islip case." You have sought assistance in the matter.

In this regard, in COMPS, Inc. V. Town of Islip [33 AD2d 796 (2006)], the Appellate Division affirmed a lower court decision sustaining the denial of access, stating that: "The Supreme Court also properly determined that the privacy exemption under FOIL was applicable because the petitioner intended to use the information for commercial purposes (*see*, Public Officers Law § 89[2][b][iii])", (id.). The cited provision states that an unwarranted invasion of personal privacy includes "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes..."

In a recent decision rendered by the Court of Appeals, the state's highest court, Data Tree, LLC, "a commercial provider of online public land records", sought land records from Suffolk County in an "electronic format" [Data Tree, LLC v Romaine, 9 NY3d 454, 460 (2007)]. The Court indicated that the interest or use of records is largely irrelevant in determining rights of access conferred by the Freedom of Information Law. It also held that a denial of access may not be justified when records would be used for a commercial use; rather, the court limited the ability to deny access to those instances in which a list of names and addresses is sought in order "solicit..business" Specifically, it was found that:

> "...FOIL does not require the party requesting the information to show any particular need or purpose (see Matter of Daily Gazette Co. v. City of Schenectady, 93 NY2d 145, 156 [1999]; Farbman, 62 NY2d at 80). Data Tree's commercial motive for seeking the records is therefore irrelevant in this case and constitutes an improper basis for denying the FOIL request.
>
> "We note, however, that motive or purpose is not always irrelevant to a request pursuant to FOIL. Public Officers Law §89(2)(b)(iii) includes as an 'unwarranted invasion of personal privacy' the 'sale or release of lists of names and addresses if such lists would be used for commercial or fundrasing purposes' (emphasis added; see Matter of Federation of N.Y. State Rifle & Pistol Clubs v. New York City Police Dept., 73 NY2d 92 [1989] [organization's request denied under FOIL for use in direct mail membership solicitation of names and addresses of persons holding rifle or shotgun permits]). That particular exemption does not apply in this case however because Data Tree is not seeking a list of names and addresses to solicit any business. Rather, Data Tree is seeking public land records for commercial reproduction on line" (id., 463).

In sum, based on the preceding analysis, it is my opinion that unless a list of names and addresses would be used for the purpose of soliciting business from those identified on the list, §89(2)(b)(iii) of the Freedom of Information Law cannot be asserted as a basis for denying access.

I hope that I have been of assistance.

RJF:jm

cc: Stephen J. Harrison

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17180

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
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Michelle K. Rea
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Dominick Tocci

Executive Director

Robert J. Freeman

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

May 21, 2008

E-Mail

TO: Mr. Alan Isselhard

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Isselhard:

As you are aware, I have received your letter in which you requested an advisory opinion concerning the Freedom of Information Law. Please accept my apologies for the delay in response.

According to your letter, members of the Town Board in the Town of Wolcott have their "home email addresses listed on the town website", and you asked whether "anything relating to town business that is sent to their home by either email or regular mail [is] still subject to FOIL."

From my perspective, email or regular mail kept, transmitted or received by a town official, or an officer or employee of an agency (i.e., a city, a village or a school district) in relation to the performance of his or her duties is subject to the Freedom of Information Law, even if the official uses his/her private email address and his/her own computer. In this regard, I offer the following comments.

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

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

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

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

Also pertinent is the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", in which the matter involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

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

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

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

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

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

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Second, the definition of the term "record" also makes clear that email communications to or from members of the public, or between or among board members fall within the scope of the Freedom of Information Law. Based on its specific language, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. Whether information is stored on paper, on a computer tape, or in a computer, it constitutes a "record." In short, email is merely a means of transmitting information; it can be viewed on a screen and printed, and I believe that the email communications at issue must be treated in the same manner as traditional paper records for the purpose of their consideration under the Freedom of Information Law.

Third, the foregoing is not intended to suggest that the email or other communications sent to or from a board member's home must be disclosed in their entirety. Like other records, the content of those communications is the primary factor in ascertaining rights of access.

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

When records they involve communications between or among government officials, fall with one of the exceptions, §87(2)(g). Due its structure, however, that provision may require substantial disclosure. Specifically, §87(2)(g) enables an agency to withhold records that:

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

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

With respect to communications between board members and members of the public, the exception of greatest potential significance is §87(2)(b). That provision authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." Depending on their content, records or portions of records might be withheld under that provision.

Lastly, if an individual receives or sends email after he or she is no longer a public officer or employee, I do not believe that email or other records would be subject to the Freedom of Information Law. In short, that person would no longer be receiving or sending records as part of his or her governmental functions.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17181

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May 21, 2008

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, unless otherwise indicated.

Dear Ms. Carroll:

I have received your letter and the materials attached to it. In your capacity as Vice President and Deputy General Counsel of the New York Daily News, you have requested an advisory opinion concerning the propriety of a denial of access to records sought by Daily News columnist Michael Goodwin by the Albany County District Attorney.

The request involved:

> "Transcripts of witness interviews conducted as part of a preliminary inquiry by the District Attorney in 2007 into what the DA's office called 'the alleged misuse of New York State resources by the New York State Office of the Governor Eliot Spitzer (the 'Executive Chamber') and the New York State Division of State Police (the 'State Police').'"

In a report released in September of 2007, the District Attorney identified those interviewed, including former Governor Spitzer, four employees of the Executive Chamber, and the Acting Superintendent of the State Police. The report contains extensive quotations from the transcript, concluded that no laws were broken and that "further inquiry or investigation would be entirely academic." The results of a separate review of the same issues made public on March 28 of this year characterized the September report as "closed."

Via a letter sent to Albany County Clerk Thomas Clingan, Assistant District Attorney Alison M. Thorne, the District Attorney's FOIL Officer, denied the request in its entirety "pursuant to Public

Officers Law §§87(2)(i), (ii), (iii), (iv)" [sic} "for the reasons articulated in Sanchez by Sanchez v. City of New York (201 AD2d 325 [1st Dept. 1994)" and because disclosure "may constitute '[a]n unwarranted invasion of personal privacy' (Public Officers Law §89[2][b])."

In my opinion, which is based on the language of the Freedom of Information Law and numerous judicial decisions, the denial of the request is inconsistent with law. In this regard, I offer the following comments.

First, the decision cited by the District Attorney, Sanchez, did not involve a request made under the Freedom of Information Law. Rather, it appears to have involved a discovery request in the context of litigation. In citing precedent in a similar context, the Court in Sanchez referred to "the litigant's need for protection", finding that "one seeking disclosure first must demonstrate a compelling and particularized need for access" (id., 326).

In contrast, the Court of Appeals has determined that the "need for production" is irrelevant when determining rights of access to records sought pursuant to the Freedom of Information Law. In a decision focusing on requests made under that statute 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 confers rights of access upon the public generally, while the disclosure 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 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 another decision by the Court of Appeals, it was held that the CPL does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law [Gould v. New York City Police Department, 89 NY2d 267 (1996)].

In short, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the need, status or interest of the person requesting them.

Sanchez also referred to the protection of witness statements by the "public interest privilege" (id.). While the public interest privilege or its equivalent may be pertinent in relation to discovery in litigation, the Court of Appeals has barred the assertion of the privilege when records are requested under the Freedom of Information Law.

By way of background, when the Freedom of Information Law was initially enacted in1974, it required disclosure of specified categories of records. In 1977, that version of the statute was repealed and replaced with the current statute, which became effective in 1978. Although the Freedom of Information Law has been amended since then, its structure has remained intact. 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 view of the change in the law, the Court of Appeals abolished the governmental privilege in the context of requests made under the Freedom of Information Law in 1979, holding that: "[T]he common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed" [Doolan v. BOCES, 48 NY2d 341, 347]. In short, either records or portions thereof fall within the grounds for denial appearing in §87(2) or they do not; if they do not, there would be no basis for denial, notwithstanding a claim based on an assertion of a public interest, executive or governmental privilege.

That conclusion has been confirmed on several occasions by the Court of Appeals, perhaps most notably in Gould, supra, in which it was held 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 those cited in response to Mr. Goodwin's 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 District Attorney has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must necessarily 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 in inconsistent with the direction specified by the Court of Appeals.

Second, the extent to which the exceptions in the Freedom of Information Law to which the District Attorney referred may properly be asserted is, in my opinion, highly questionable in consideration of the District Attorney's own conclusion that the matter was "closed" and the disclosures that have been made and are widely known.

The denial of the request cited "§87(2)(i), (ii), (iii), (iv)" of the Freedom of Information Law. It is assumed that the reference should have been to subparagraphs (i) through (iv) of paragraph (e) of §87(2). That provision permits an agency to withhold records that:

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

Again, the District Attorney's own statement and characterization of the report indicates that reliance on subparagraphs (i) and (ii) is misplaced. If the matter is "closed", I do not believe that disclosure would interfere with an investigation or judicial proceeding or deprive a person of a fair trial. With respect to subparagraph (iii), the "sources", the witnesses interviewed, have all been identified by the District Attorney, upon release of his report.

With respect to subparagraph (iv) pertaining 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 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" (id., 573).

From my perspective, conducting face to face interviews with witnesses could not be characterized as other than "routine." Further, in consideration of the District Attorney's statements and the extensive public disclosure surrounding the matter, I do not believe that disclosure would result in the harmful effect of disclosure sought to be avoided in §87(2)(e)(iv).

The remaining ground for denial offered by the District Attorney concerns the possibility that "revealing portions of the transcripts may constitute [a]n unwarranted invasion of personal privacy."

The reference to "portions" of the transcripts strengthens the contention offered earlier, that the blanket denial of the request is inconsistent with law. Similarly, the suggestion that disclosure "may" result in an unwarranted invasion of personal privacy is apparently inconsistent with an agency's obligation to demonstrate, to prove, that disclosure would indeed result in the harm envisioned in the language of the exception.

That latter principle was expressed in a decision rendered by the Court of Appeals that focused on the exception involving unwarranted invasions of personal privacy, Hanig v. State Department of Motor Vehicles [79 NY2d 106 (1992)]. In brief, the Court found that the exception applies in situations in which records pertaining to an individual include items "that would ordinarily and reasonably be regarded as intimate, private information" (id.,112).

Although I am not familiar with the specific contents of the transcripts at issue, it does not appear that their content would include material that is indeed "intimate" or "personal", but rather that they involve information relating to the functions and activities of the witnesses in their capacities as public officers or employees.

While the standards concerning unwarranted invasions of personal privacy appearing in §89(2)(b) of the Freedom of Information Law are flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear that those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. They have found that, as a general rule, records that relate to the performance of 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 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., Seelig v. Sielaff, 607 NYS2d 300, 201 AD2d 298 (1994); Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In consideration of the functions, the stature, significance, and authority and indeed the power of the witnesses relative to the activities of state government, the extent to which disclosure would constitute an unwarranted invasion of personal privacy is, in my opinion, doubtful. Unless it can be demonstrated that "the materials falls squarely within the ambit" of the exception, the material must be disclosed (Gould, Hanig, Fink, supra). Further, in view of the publicity associated with "Troopergate" and the District Attorney's investigation, it is unlikely that the burden of defending the denial of access can be met.

Lastly, I recently received a letter addressed to you by Bryan M. Clenahan, Chair of the Albany County Legislature's Law Committee. It is my understanding that Mr. Clenahan serves as

the County's Freedom of Information Appeals Officer. In brief, he rejected the District Attorney's blanket denial of the request and reliance on Sanchez, supra and wrote that "the records should be released." However, he indicated that "[a]s FOIL Appeals Officer I do not have authority to enforce compliance" and that "[b]y copy of this letter decision to the DA, it is urged that all appropriate steps be taken by that office consistent with law."

I do not understand Mr. Clenahan's conclusion. Section 89(4)(a) of the Freedom of Information Law concerning the right to appeal a denial of access to records states in relevant part that:

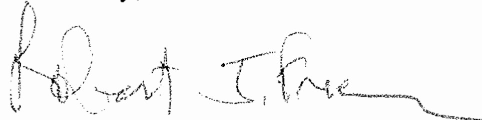
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal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

Based on the foregoing, assuming that the County Legislature, the governing body of Albany County government, has designated Mr. Clenahan as FOIL Appeals Officer, and that he has been granted the authority to "provide access to the record sought." If he does not have such authority, the public would effectively lose its ability to seek meaningful administrative review of an initial denial of access to records. If that is so, in my view, either the County or the District Attorney has eliminated or negated the duty to abide by the Freedom of Information Law.

In an effort to encourage reconsideration of the denial of the request and to avoid the possibility of the initiation of litigation, a copy of this opinion will be sent to the District Attorney.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. David Soares
Michael Goodwin
Bryan M. Clenahan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17182

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May 22, 2008

Mr. Benjamin J. Truncale, Jr.
Spellman Rice Schure Gibbons
McDonough & Polizzi, LLP
P.O. Box 7775
Garden City, NY 11530-7775

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

Dear Mr. Truncale:

I have received your letter in which you requested an advisory opinion on behalf of your client, the Village of Mineola, concerning a denial of access to certain records by Nassau County.

The request, which was made to the Nassau County Police Department, involved "copies of all electronic records indicating Nassau County Police Department sector car locations as recorded by the Global Positioning Satellite ('GPS') system currently in use by your department for the period of July 1, 2006 - August 31, 2007." The Department denied the request pursuant to §87(2)(g) of the Freedom of Information Law, stating that "this information is intra-agency material that is exempt from disclosure..."

While I agree that the information sought consists of intra-agency material, due to the structure of and direction provided in §87(2)(g), I believe that the denial of access is inconsistent with law.

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

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.

In Gould v. New York City Police Department [89 NY2d 267 (1996)], the Court of Appeals dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

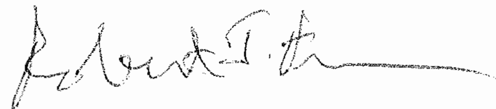
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their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

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld. On the other hand, insofar as they consist of statistical or factual information, I believe that it must be disclosed.

As I understand the nature of the records sought, they consist wholly of factual information. If that is so, I believe that they must be disclosed pursuant to §87(2)(g)(i), unless a different exception to rights of access may properly be asserted.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Commissioner Lawrence W. Mulvey
Karen Taggart

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17183

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

May 23, 2008

E-Mail

TO: Michael Mills, Village Administrator

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Mills:

I have received your letter in which you raised two issues involving the Freedom of Information Law.

You referred to an opinion previously rendered dealing with a situation in which an agency uses a copy machine that is equipped with scanning technology in which it was advised if the effort in scanning is not greater than the effort to prepare photocopies, that an agency must do so on request. In the Village of Elmsford, you indicated that "[e]ach document [you] scan using [y]our copy machine....incurs a charge on [y]our copier lease." You asked whether that cost may be "passed along."

In my opinion, since the Village is charged for making a copy by the lessor of the machine, it may charge an applicant whatever that charge may be. Based on §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, or in situations in which records are reproduced by other means, as in the case that you described, the actual cost of reproduction.

The second issue involves a request for a police report by a person in Hawaii who has identified himself as the father of the subject of the report. The matter remains under investigation, and you so informed the applicant, who questioned how he can know when the investigation will be complete and he might then gain access to the report. You have asked how you can know that the applicant is indeed the father of the subject of the report. In similar situations, those in which records would likely be withheld from the general public on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)], it has been suggested that the agency may require that the applicant must present reasonable proof of his/her identity and/or relationship to a minor as a condition precedent to disclosure.

If that information is provided to the Village, the applicant can be informed that he may make periodic requests, or you may choose to send the report, if and when it becomes accessible under 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 - 17184

Committee Members

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Tedra L. Cobb
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John C. Egan
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Executive Director

Robert J. Freeman

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May 23, 2008

Mr. Isaiah Shannon
07-A-6770
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

Dear Mr. Shannon:

I have received your letter in which you requested your "case paper work" from this office.

In this regard, please be advised that the Committee on Open Government is authorized to provide guidance and opinions pertaining to the Freedom of Information Law. The Committee does not maintain custody or control of records generally, and we have no records pertaining to your case.

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 has possession of the records of your interest, such as a police department or the office of a district attorney. The records access officer has the duty of coordinating an agency's response to requests. Further, when a request is made, the person seeking the records is required by §89(3) of the Freedom of Information Law to "reasonably describe" the records. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records.

Although courts are not subject to the Freedom of Information Law, court records are generally accessible to the public pursuant to other provisions of law (see e.g., Judiciary Law, §255). If a court might serve as a source of records of your interest, a request should be made to the clerk of the proper court, citing an applicable provision of law as the basis for the request.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17185

Committee Members

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May 23, 2008

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 information presented in your correspondence.

Dear Mr. Portee:

I have received your letter in which you indicated that you submitted Freedom of Information Law requests to the Schenectady County Assigned Counsel Plan and the Schenectady County Public Defender's Office 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."

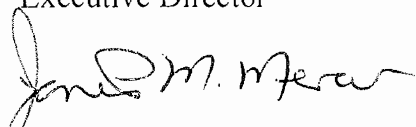
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to the Schenectady County Assigned Counsel Plan and the Schenectady County Public Defender's Office.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Schenectady County Assigned Counsel Plan
Schenectady County Public Defender's Office

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 17186

Committee Members

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May 23, 2008

Mr. William A. Jackson
05-B-1169
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Jackson:

I have received your letter in which you complained that requests for records pertaining to you sent to two programs in which you participated have not been answered.

In this regard, the Freedom of Information Law applies to records maintained by 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."

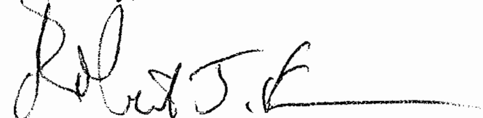
Based on the foregoing, the Freedom of Information Law generally deals with records maintained by entities of state and local government.

In consideration of the names of the programs that you identified, it does not appear that they are government agencies. If that is so, they are not required to comply with the Freedom of Information Law.

If you are seeking medical records, I point out that §18 of the Public Health Law generally provides the subjects of records with rights of access to medical records pertaining to themselves. If either or both of the requests involve medical records, it is suggested that you refer in a request to §18 of the Public Health Law and include reasonable proof of your identity.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-17187

From: Freeman, Robert (DOS)
Sent: Friday, May 23, 2008 2:56 PM
To: Mr. John Ferro, Poughkeepsie Journal
Subject: RE: A question about personnel records

John - -

Although I left a voice mail message, I'd like to briefly reiterate the points offered in the message. First, even though we see and hear the term "personnel" frequently as a basis for silence or withholding records, it appears nowhere in either the Freedom of Information or Open Meetings Laws. In general, there is no law that forbids a government official from discussing or disclosing personnel related information; concurrently, I know of no law that requires government officials to speak. Nevertheless, the Freedom of Information Law requires that agencies respond to requests for records.

There are some elements of "personnel records" that may be withheld and others that must be disclosed. In brief, it has been found in a variety of contexts that those aspects of personnel records that are relevant to a public employee's duties are accessible, for disclosure in those instances would result in a permissible, not an unwarranted invasion of personal privacy [see FOIL, §§87(2)(b) and 89(2)(b)]. Additionally, while some aspects of internal governmental communications may be withheld, the provision dealing with those records requires that final agency determinations be made available [see §87(2)(g)]. Therefore, if there is a record indicating the reason for a suspension or a penalty, or some other sort of determination regarding the employee's behavior or status, based on the language of the law and its interpretation by the courts, I believe that it must be disclosed.

I hope that I have been of assistance.

cc: Dutchess County Human Rights Commission

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave., Suite 650
Albany, NY 12231
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(518) 474-1927 - fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17188

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May 27, 2008

E-Mail

TO: Kit Funderburk

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr./Ms. Funderburk:

As you are aware, I have received your inquiry concerning access to a certain record under the Freedom of Information Law. Please accept my apologies for the delay in response.

You have asked whether §87(2)(c) of that statute permits an agency "to refuse to produce a labor contract after negotiations have been completed but before ratification of the contract by the government entity."

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.

As you know, §87(2)(c) permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in that provision in my opinion is "impair", and the question in the context of the award of contracts or, as in this situation, collective bargaining negotiations, involves whether or the extent to which disclosure would "impair" the process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That a contract has not been signed or ratified, in my view, is not determinative of rights of access or, conversely, an agency's ability to deny access to records. Rather, I believe that consideration of the effects of disclosure is the primary factor in determining the extent to which §87(2)(c) may justifiably be asserted.

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

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

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

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

> "Section 87(2)(c) relates to withholding records whose release could impair contract awards. However, here this was not relevant because there is no bidding process involved where an edge could be unfairly given to one company. Neither is this a situation where the release of

> confidential information as to the value or appraisals of property could lead to the City receiving less favorable price.
>
> "In other words, since the Trump organization is the only party involved in these negotiations, there is no inequality of knowledge between other entities doing business with the City" [Community Board 7 v. Schaffer, 570 NYS 2d 769, 771 (1991); Aff'd 83 AD 2d 422; reversed on other grounds 84 NY 2d 148 (1994)].

Based on the foregoing, assuming that the record at issue was known to both parties to the negotiations and was distributed to the members of the union, the rationale described above and the judicial decisions rendered to date suggest that §87(2)(c) could not justifiably have been asserted to withhold the record.

If indeed the document is disseminated to union members, very simply, I do not believe that it could be characterized as secret or deniable. And finally, as I understand your question, collective bargaining negotiations ended. I recognize that if either side rejects the tentative agreement, the parties might be forced to reopen the negotiations. Nevertheless, in view of the factors described above, even if that occurs, it does not appear that either party to the negotiations would be disadvantaged by such a disclosure vis a vis the other. Again, both parties would be fully aware of the contents of the documentation; there would have been no inequality of knowledge.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-4635
FOIL-AO-17189

ommittee Members

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May 27, 2008

Ms. Bonnie Holmes

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

Dear Ms. Holmes:

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

According to your letter, the president of the Katonah Lewisboro School District Board of Education "is making BOE decisions in private without notifying all BOE trustees" and "[m]inority BOE members are left out of the loop." Additionally, you wrote that you requested a record from the district that you believe exists, that you were told that there is no record, but that you "know for a fact that the document does...exist."

In this regard, I offer the following comments.

First, from my perspective, a public body, such as a board of education, may validly conduct a meeting or carry out its authority only at a meeting during which a majority of its members has physically convened or during which a majority has convened by means of videoconferencing, and even then, only when reasonable notice is given to all of the members.

By way of background, it is emphasized that the definition of "meeting" [Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see <u>Orange County Publications v. Council of the City of Newburgh</u>, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of

discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed, stated that:

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

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

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

Based upon the direction given by the courts, if a majority of the Board members gathers to discuss Board business, collectively as a body and in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

While 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, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting held by means of a telephone conference or series of telephone calls, or a vote taken by mail or e-mail would in my opinion be inconsistent with law.

Based on relatively recent legislation and as suggested earlier, I believe that voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference. It is noted that the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or

> department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

As amended, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

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

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

The amendments to the Open Meetings Law in my view clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone, by mail, or by e-mail, would be inconsistent with law.

As indicated above, 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." 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. Moreover, §41 requires that reasonable notice be given to all the members. If that does not occur, even if a majority is present, I do not believe that a valid meeting could be held or that action could validly be taken.

In short, in a situation in which only the Board is authorized to take action or make a decision, clearly a single member may not validly do so unilaterally. Rather, in that situation, action may be taken only at a meeting preceded by reasonable notice given to all of the members, and by means of an affirmative vote of a majority of the Board's total membership.

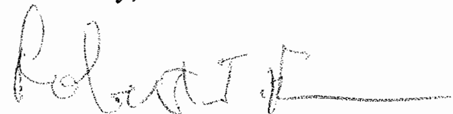
Lastly, although the issue was considered in an earlier opinion addressed to you, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in 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 could seek such a certification. Further, while I am not suggesting that they apply, §89(8) of the Freedom of Information Law and §240.65 of the Penal Law include essentially the same language, and the latter states that:

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education

FOIL-AO-17190

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, May 28, 2008 10:54 AM
To: 'Jacob Resneck'
Subject: RE: Re: FOIL - May 19, 2008 - ACR mediation notes

It is interesting to me, thank you. Will you appeal?

There is a sentence on the last page of our opinion to Monroe: "To the extent that such notes detail factual information, in our opinion, they would be required to be made public." In support, I note that the Court of Appeals, the State's highest court, focused on what constitutes "factual data", stating that:

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, 463 N.Y.S.2d 122, mod on other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182. 417 N.Y.S.2d 142)" [Gould v. New York City Police Department, 89 NY2d 267, 276, 277 (1996)].

I lifted the above language from an advisory opinion on our website (#9984) which can be found under "F" for Factual Data. I hope it is helpful to you.

If you decide to appeal, make sure to do it via hand-delivery or US Post. As of yet, there is no provision in the law that requires an agency to receive and/or respond to an appeal via email.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17191

-----Original Message-----
From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, May 27, 2008 4:38 PM
To: Mr. Bruce Greif
Subject: RE: Parsing Advisoy Opinions 10757 and 16511 - Village Attorney bills

Bruce:

This will confirm receipt of both emails regarding attorneys' bills - I was unexpectedly out of the office on 5/22 and 5/23, and failed to set the computer to send an automatic notification.

Please clarify if I have misunderstood, but what I believe you're asking is how much description is permitted to be redacted from an attorney's bill, and whether a blanket denial, as detailed in the 5/23 email, is permissible. In response to the latter question, a blanket denial is not permitted, as the Court of Appeals articulated in Gould, referenced in both the advisory opinions you cited.

Further, and in general response to the first question, in my opinion, it is possible that not all of the language you provided below would be required to be disclosed pursuant to a FOIL request. Depending on the timing of the request, disclosure of "requirement of complaint being under oath for purposes of Village Code" might disclose information protected by the statutory attorney-client privilege and, again, depending on the circumstances, may jeopardize the village's ability to defend itself or prosecute the complaint. On the other hand, in my opinion, the name of a person with whom an attorney spoke would not necessarily reveal that which is protected by the attorney-client privilege. Accordingly, the redactions you indicated "Mr. ZZZ" and "telephone conversation with YYY" might not be appropriate in every instance.

I hope this is helpful. Should you require a legal advisory opinion, please let me know.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17191

-----Original Message-----
From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, May 27, 2008 4:38 PM
To: Mr. Bruce Greif
Subject: RE: Parsing Advisoy Opinions 10757 and 16511 - Village Attorney bills

Bruce:

This will confirm receipt of both emails regarding attorneys' bills - I was unexpectedly out of the office on 5/22 and 5/23, and failed to set the computer to send an automatic notification.

Please clarify if I have misunderstood, but what I believe you're asking is how much description is permitted to be redacted from an attorney's bill, and whether a blanket denial, as detailed in the 5/23 email, is permissible. In response to the latter question, a blanket denial is not permitted, as the Court of Appeals articulated in Gould, referenced in both the advisory opinions you cited.

Further, and in general response to the first question, in my opinion, it is possible that not all of the language you provided below would be required to be disclosed pursuant to a FOIL request. Depending on the timing of the request, disclosure of "requirement of complaint being under oath for purposes of Village Code" might disclose information protected by the statutory attorney-client privilege and, again, depending on the circumstances, may jeopardize the village's ability to defend itself or prosecute the complaint. On the other hand, in my opinion, the name of a person with whom an attorney spoke would not necessarily reveal that which is protected by the attorney-client privilege. Accordingly, the redactions you indicated "Mr. ZZZ" and "telephone conversation with YYY" might not be appropriate in every instance.

I hope this is helpful. Should you require a legal advisory opinion, please let me know.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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,bruc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17192

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May 28, 2008

Ms. Bridget Wills

The staff of the Committee on 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. Wills:

This is in response to your request for assistance with respect to a request for records you made to the Office of the Onondaga County District Attorney, for records "involving Douglas Robert Hawkins, Esq." As indicated by Senior District Attorney Victoria White's Certificate of Non-Record, the Onondaga County District Attorney's office is not in possession of the records you requested.

This will confirm our telephone discussion that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Accordingly, where the agency has indicated that a diligent search for the requested records "has disclosed no record or entry of the nature requested" we believe the agency has fulfilled its obligations under the law.

We note that in response to a separate request for records, the District Attorney's Office indicated that it would "attempt to respond within the next thirty (30) days, however, because of the demands of such necessary procedures, the number of requests currently pending in this office and the number of documents you have requested, an additional sixty (60) to ninety (90) days may be necessary". In our opinion, this response is not in keeping with the time limits set forth in the law, and 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely

> punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

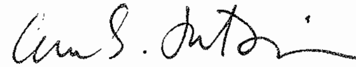
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

Finally, you requested assistance obtaining a copy of a medical record that was to have been maintained by your healthcare provider. Because the Freedom of Information Law pertains only to records maintained by government agencies, we are unable to provide legal advice with respect to this issue.

On behalf of the Committee on Open Government we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17193

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May 28, 2008

Mr. John W. McGuire
Superintendent of Schools
Guilderland Central School District
6076 State Farm Road
Guilderland, NY 12084

The staff of the Committee 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. McGuire:

I have received your letter and the materials attached to it and appreciate your interest in complying with law. You referred to an article published in the Albany *Times Union* that "leads [you] to believe that [I] had not been apprized regarding the existence of [y]our district policies relating to directory information or the notifications provided by the district to parents regarding their rights to opt out of the sharing of this information."

In this regard, the Freedom of Information Law, the statute that generally governs access to school district records, is based upon a presumption of access. Stated differently, all records of an agency are 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 that matter is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, as you are aware, 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 their right to confidentiality, or unless a person eighteen years or over, an "eligible student", similarly waives his or her right to confidentiality.

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."

In short, when a school district adopts a policy on directory information by following the procedures described above, it has the ability to disclose items identified as directory information.

Having reviewed the materials that you forwarded, perhaps most pertinent is Policy 5500 entitled "Student Records", which states in part that:

> "The policy applicable to the release of student directory information may apply to military recruiters, the media, colleges and universities, and prospective employers. Directory information may include the following: the student's name, address, academic interest, participation in officially-recognized activities and sports, terms of school attendance and graduation, awards received, photograph, art work, and future educational plans. Subsequent to the annual notification of parents concerning directory

> information, a reasonable amount of time must be allowed for the parent or student to notify school officials that any or all such information should not be released."

The foregoing does not specify a date by which parents or eligible students may ask that certain items not be released, nor does it indicate that directory information is accessible to the general public.

I also visited the District's website, and under "policies and notifications", found reference to FERPA and two paragraphs describing its policy concerning "Public relations use of student data/photos" and "Release of student information to military recruiters." Neither paragraph identifies the subject matter as directory information, and nowhere was I able to locate a policy that includes each of the elements required by the federal regulations.

Further, at the time that the controversy arose, I was informed that the names and addresses of parents of students were disclosed to the teachers' union prior to a vote on the budget and the election of board members. Parents' names are not among the items indicated in the policy statements in the materials that you enclosed or the information provided on the District's website and, therefore, as I understand the federal regulations, do not fall within the scope of directory information. More importantly, unless an item that is personally identifiable to a student is characterized as directory information or accessible pursuant to consent by a parent, I believe that FERPA forbids disclosure. When discussing the matter with a member of the news media, I was informed that it was contended by the District that disclosure of parents' identities was permissible, because they are not names of students. Nevertheless, 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, students' names or other aspects of records that would make a student's identity easily traceable, including the names of students' parents, must in my view be withheld in order to comply with federal law absent receipt of the appropriate consent.

I note, too, that the term "disclosure" is defined in the regulations to mean:

> "to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information

> contained in those records, to any party, by any means, including oral, written, or electronic means."

In sum, it is my opinion that the District's policy statements concerning directory information are unclear and inadequate, and because parents' names constitute personally identifiable information relating to students and are not included within the District's description of directory information, it was contrary to law to disclose parents' names to the union or any third party absent consent by the parents.

Lastly, because you forwarded your policy regarding access to records and implementation of the Freedom of Information Law, I reviewed it and point out that several aspects of the policies are, in my view, clearly inconsistent with law. For instance, section 1120-E1 includes a heading entitled "Records Not Available for Public Inspection" and lists several categories of records. While some of the records referenced might properly be withheld, others, such as portions of many of those records, such as evaluations, negotiation materials sought after a contract has been signed, employee grievances and disciplinary matters, must be disclosed. Another section of the same policy statement entitled "Records Available to Representatives of the Media" refers to "group information provided, not a response to the salary of a specific individual." The Freedom of Information Law, however, has since 1978 required that a record be maintained and made available by all agencies that includes the name, public office address, title and salary of every public employee officer or employee of the agency [see §87(3)(b)].

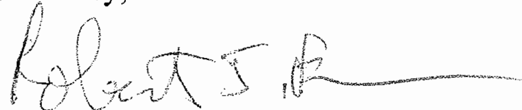
The policy cited above appears under the heading of "subject matter list", a record that must be prepared by every agency pursuant to §87(3)(c) of the Freedom of Information Law. That provision requires that:

> "Each agency shall maintain...a reasonably detailed list by subject matter, of all records in the possession of an agency, whether or not available under this article."

From my perspective, the law, not an agency's policy, determines whether or the extent to which records must be disclosed or may be withheld, and the subject matter list should indicate in reasonable detail, by subject matter, the kinds of records in possession of an agency, without regard to whether records are accessible to the public. In my experience, attempts to identify categories of records as accessible or exempt from disclosure lead to inaccuracies and failures to comply with law. It is suggested the District's policies relating to the Freedom of Information Law be reviewed and reconsidered.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Jay Worona
Scott Waldman
Altamont Enterprise

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17194

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May 29, 2008

Mr. Alvin Ingram
06-A-3247
Wende Correctional Facility
P.O. Box 1187
Alden, NY 14004-1187

Dear Mr. Ingram:

I have received two letters in which you appealed denials of access to records 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 concerning the right to appeal under that statute, §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 note that one of the appeals appears to involve a request made for records maintained by a court. Here I point out that the courts are excluded from the coverage of the Freedom of Information Law. Court records, however, are generally available pursuant to other provisions of law (see e.g., Judiciary Law, §255), and it is suggested that requests for court records should be directed 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 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- 17195

Committee Members

Laura L. Anglin
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May 29, 2008

Mr. Anthony F. Iovino
Bondi & Iovino
The Chancery
190 Willis Avenue
Mineola, NY 11501

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

Dear Mr. Iovino:

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

You wrote that you represent the Oceanside Fire District, that nine firefighters involved in an incident were the subject of charges, and that all were found "guilty of some but not all of the charges" by a hearing board. The board prepared a recommendation based on its findings, which was adopted by the District. Following the adoption of the recommendation, you indicated that the District received:

> "...a request under the Freedom of Information Law for 'copies of the decisions or determinations, by the disciplinary board, relating to the 9 firefighters suspended after a brawl at a block party in August. Those should include name, rank and company affiliation for each of those members as well as details of the specific charges leveled against them and those for which they were found guilty.'
>
> "The Oceanside Fire District initially provided a copy of a one-page document, which was the decision of the Commissioners of the Oceanside Fire District to accept the determination of the hearing board. This document lists the names of each firefighter involved, the finding of 'guilty,' and the term of each firefighter's suspension. The District denied any other disclosure as exempt under the provisions of Public Officers Law Article 6 §87(2), including but not limited to §87(2)(b) and §87(2)(g)."

You have asked whether "the hearing board's recommendation, as well as the document containing the charges, should be released." In this regard, I offer the following comments.

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

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

A fire district is a kind of public corporation [see General Construction Law, §66; Town Law, §174(6)] and, therefore, is an "agency" required to comply with the Freedom of Information Law. Further, the Court of Appeals determined years ago that volunteer fire companies, despite their status as not-for-profit corporations", constitute "agencies" as well [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980). That being so, I believe that volunteer firemen should generally be treated in a manner analogous to public employees for the purpose of applying 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 my view, both of the grounds for denial that you cited are pertinent to an analysis of the matter.

Section 87(2)(g) permits an agency, such as a fire 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.

Although a hearing board's recommendation ordinarily may be withheld, in this instance, the recommendation was apparently adopted in full by the District. Because that is so, the recommendation, in my view, has become the District's final determination. In a case decided by Supreme Court, Nassau County, that involved similar principles, a recommendation concerning employee misconduct was adopted by the superintendent of the school district as his decision and, therefore, was found to constitute a final agency determination accessible under §87(2)(g)(iii) (see Miller v. Hewlett-Woodmere Union Free School District #14, NYLJ, May 16, 1990).

In short, because the recommendation became the District's determination, I believe that it must be disclosed, except to the extent that a different exception might properly be asserted. The 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." 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 they 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 one's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

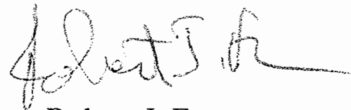
Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when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

With respect to your specific questions, it is my opinion that the hearing board's recommendation is accessible to the public, except to the extent that it includes charges that were dismissed or that could not be substantiated, or information relating to those charges. The other

document to which you referred that "contains the charges" must in my view be disclosed insofar as it details charges that were sustained and resulted in findings of guilt or misconduct. And again, in my opinion, those portions of the document consisting of charges that were dismissed may be withheld.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17196

Committee Members

Laura L. Anglin
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June 2, 2008

Hon. Marc S. Alessi
Member of the Assembly
6144 Route 25A
Building A, Suite 5
Wading River, NY 11792

Dear Assemblyman Alessi:

Your letter addressed to Eamon Moynihan, Deputy Secretary of State for Public Affairs, has been forwarded to the Committee on Open Government. As you may be aware, the Committee, a unit of the Department of State, is authorized to provide advice and opinions pertaining to the Freedom of Information Law. You have sought advice concerning a description by a constituent of the practices and policy of the Town of Brookhaven in implementing the Freedom of Information Law.

Having reviewed the correspondence prepared by your constituent, I offer the following comments.

First, your constituent wrote that all requests, irrespective of how routine they may be, "now require the requestor to file a Freedom of Information Law request (FOIL) with document specificity at the Law Department before permission to even view or look through any files to determine what documents, if any are even needed can be ascertained." In this regard, §89(3)(a) of the Freedom of Information Law permits an agency to require that a request for records be made in writing. However, many agencies waive that requirement when a request involves records that are clearly accessible to the public and readily retrievable. When, on the other hand, a request involves records that warrant view prior to disclosure in order to determine whether portions may properly be withheld, and the request cannot be answered immediately, agencies generally require that a request of that nature be made in writing.

Second, there is no requirement that a request contain "document specificity." By way of background, in the original version of the Freedom of Information Law enacted in 1974, an applicant was required to seek "identifiable" records. Because it was often impossible to meet that standard, the law was amended, and since 1978, it has merely required that an applicant must "reasonably describe" the records sought. Therefore, a request need not specify with particularity the records of interest. On the contrary, a request must merely include sufficient information to enable agency staff to locate the records. Therefore, if, in the example offered by the constituent, an applicant asks to

inspect a Planning Department file, assuming that the content of the file is public, even if it consists of numerous documents, the entire file should be disclosed, and the applicant should not be required to request specific documents within the file.

Third, the constituent wrote that "the Law Department wants to know 'who is asking' before making a determination to release the information." In most instances, the identity of an applicant for records is irrelevant.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 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, the constituent wrote that the Town's new policy "creates a huge back load" and that she is "still waiting for the response from the Law Department..." As you may be aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

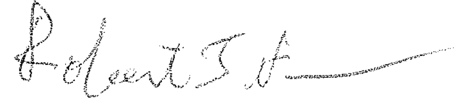
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request 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. Please feel free to share this opinion with your constituent or Town officials as you deem appropriate.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Eamon Moynihan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17197

Committee Members

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

June 3, 2008

Mr. Ray Olsen

Dear Mr. Olsen:

I have received a letter from the Office of the Inspector General concerning your request made under the Freedom of Information Law to the New York State Department of Health for certain regulations. According to that letter, you requested "Title 10, Part 1228 NYCRR" and were informed by the Department's records access officer, Robert LoCicero, that no such regulations are on file.

In this regard, having researched the matter on your behalf, I was unable to locate "Title 10" within the Department's regulations. However, I found Part 128, which deals with the New York City water supply and consists of 80 pages. If those are the provisions that you want, it is suggested that you request Part 128 of the regulations promulgated by the Department of Health from Mr. LoCicero or review or obtain copies from a local law library.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17198

Committee Members

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June 4, 2008

Mr. William Hollis
03-A-3072
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. Hollis:

I have received your letter and the correspondence relating to it. You sought a variety of information from the Inspector General's Narcotics Unit in the Department of Correctional Services and wrote that you received no response to your request. Based on a review of the materials, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3)(a) states in part that an agency is not required to create a record in response to a request for information. Having reviewed your request, I do not believe that it is a request for records; rather, you attempted to obtain information by raising a series of questions. In the future, it is suggested that you seek existing records.

Second, requests should generally be directed to an agency's "records access officer." The records access officer has the duty of coordinating an agency's response to requests.

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

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17199

Committee Members

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June 4, 2008

Mr. Robert L. Pardy

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

Dear Mr. Pardy:

I have received your letter and the material attached to it. You have sought advice concerning a request made under the Freedom of Information Law to the Highland Fire District. Based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3)(a) provides in part that an agency, such as a fire district, is not required to create a record in response to a request. Similarly, because that is so, although an agency may provide information in response to questions, it is not required to do so to comply with the Freedom of Information Law. In the future, rather than seeking information by raising questions, it is suggested that you request existing records.

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

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

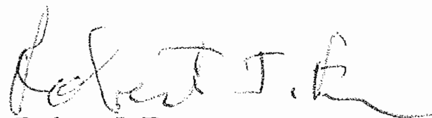
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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:jm

cc: Stephen DiLorenzo

FOIL-AO - 17200

From: Jobin-Davis, Camille (DOS)
Sent: Monday, June 09, 2008 10:23 AM
To: Mr. Dave Penso and Mr. John Giordano
Subject: Freedom of Information Law - minutes

Dear Mr. Penso and Mr. Giordano:

In confirmation of our discussions:

Section 87(3) of the Freedom of Information Law requires, 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;...."

Accordingly, a record of the vote must include an indication of the manner in which each member who voted cast his or her vote. Typically, that information appears in the minutes.

Pursuant to Village Law, the mayor of a village has the responsibility for presiding over meetings of the board of trustees, and "may have a vote upon all matters and questions coming before the board and he shall vote in case of a tie..." (Village Law section 4-400).

In our opinion, the record of votes required to be maintained pursuant to section 87(3)(a) must specify the mayor's vote when he casts a vote. Further, should the mayor abstain from voting, it is our opinion that such abstention must be noted in the record.

I hope this is helpful to you. Please call if you have further questions.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO - 17201

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, June 11, 2008 5:02 PM
To: Don Appel'
Subject: Freedom of Information Law

Don:

Although I was unable to locate an advisory opinion that addresses the issue of charging for redacted copies, I offer the following comments:

The Freedom of Information Law permits an agency to charge $.25 per copy and requires an agency to make certain records available for public inspection and copying. When an agency redacts a record prior to inspection or release, typically, the agency makes a decision to make two copies for its own administrative assurance that the document has been thoroughly redacted. In my opinion, because only one copy is provided to the applicant, the agency can charge only $.25 per page. Were the agency to provide access to both copies, then, I believe, the agency would be permitted to charge twice.

http://www.dos.state.ny.us/coog/ftext/f14075.htm
http://www.dos.state.ny.us/coog/ftext/f12640.htm

I hope that this is helpful.

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-17202

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June 12, 2008

Mr. George G. Washington

<u>The staff of the Committee 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.</u>

Dear Mr. Washington:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Town of Woodstock. Specifically, you requested "to view the Water Supply Emergency Plan (the "plan") for the Woodstock Water District" and that the Town hold a public hearing on the plan. In an email dated April 3, 2008, the Town denied your request to inspect the record based on an opinion from this office advising that "Information may be exempt from public disclosure for public review if it is determined the information will pose a security risk to the operation of the community water system." While we have no authority to provide legal advice with respect to your request for a public hearing, we believe the plan must be disclosed at least in part, and we offer the following comments in that regard.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law. It is emphasized that §87(2) refers to an agency's authority to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report may include portions that must be disclosed, as well as portions that may be withheld. Further, it imposes an obligation on an agency to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

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

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency

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

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

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

In the context of your request, we are not suggesting that the record in question must necessarily be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the plan must be reviewed for the purpose of identifying those portions that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "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).

Further, it is our understanding that provisions of the Public Health Law require the plan to be made available to the public, at least in part. Section 1125 of the Public Health Law requires all water suppliers to prepare a water supply emergency plan for submission to the Commissioner of

Health. Prior to submission, the water supplier is required to solicit public comment on the plan, and to forward all comments to the Commissioner. The statute provides for confidentiality of certain portions of the plan during the comment period and upon final submission, as follows:

> "(3). ...a water supplier shall exempt from public disclosure for public review and comment any information it determines to pose a security risk to operation of the water supply system....
>
> (8). The commissioner shall keep confidential: (a) all vulnerability analysis assessments and all information derived therefrom; and (b) all information determined by a water supplier to pose a security risk to the operation of a water supply system. Such assessments and information shall be exempt from disclosure under article six of the public officers law. A person who, without authorization, discloses any such assessment or information to another person who has not been authorized to receive such assessment or information is guilty of a class A misdemeanor."

In short, the plan is required to be made available to the public prior to submission to the Commissioner, and the Commissioner has authority to deny access to certain portions of the plan, particularly the vulnerability analysis assessments, and those which if disclosed would pose a security risk to the operation of the water supply system.

Additionally, §87(2)(f) of the Freedom of Information Law permits an agency to withhold records or portions therefor which if disclosed "would endanger the life or safety of any person." Although an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more of the grounds for denial [see §89(4)(b)], in the case of the assertion of that provision, the standard developed by the courts is somewhat less stringent. In citing §87(2)(f), it has been found that:

> "This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner's assertion that respondents are required to prove that a danger to a person's life or safety will occur if the information is made public (see, *Matter of Nalo v. Sullivan*, 125 AD2d 311, 312, *lv* denied 69 NY2d 612). Rather, there need only be a *possibility* that such information would endanger the lives or safety of individuals...."[emphasis mine; Stronza v. Hoke, 148 AD2d 900,901 (1989)].

The principle enunciated in Stronza has appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Divsion of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991), Fournier v. Fisk, 83 AD2d 979 (1981) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994], and it was determined in American Broadcasting Companies, Inc. v. Siebert that when

disclosure would "expose applicants and their families to danger to life or safety", §87(2)(f) may properly be asserted [442 NYS2d 855, 859 (1981)]. Also notable is the holding by the Appellate Division in Flowers v. Sullivan [149 AD2d 287, 545 NYS2d 289 (1989)] in which it was held that "the information sought to be disclosed, namely, specifications and other data relating to the electrical and security transmission systems of Sing Sing Correctional Facility, falls within one of the exceptions" (id., 295). In citing §87(2)(f), the Court stated that:

> "It seems clear that disclosure of details regarding the electrical, security and transmission systems of Sing Sing Correctional Facility might impair the effectiveness of these systems and compromise the safe and successful operation of the prison. These risks are magnified when we consider the fact that disclosure is sought by inmates. Suppression of the documentation sought by the petitioners, to the extent that it exists, was, therefore, consonant with the statutory exemption which shelters from disclosure information which could endanger the life or safety of another" (id.).

Again, this is not to suggest that the plan may be withheld in its entirety. It is likely that there are elements of the plan which if disclosed would enhance or improve public safety and diminish danger. For instance, the plan must include a "specific action plan to be followed during a water supply emergency including a phased implementation of the plan". This action plan may indicate that people should follow certain procedures for obtaining water should the source be contaminated, or that tainted water should be boiled prior to consumption. Information of that nature must in our opinion be disclosed. On the other hand, insofar as disclosure of the vulnerability assessment, for example, would enable terrorists or others to evade detection or effective law enforcement or potentially enable them to jeopardize lives and safety, the records may in our view be withheld pursuant to §87(2)(f).

You asked whether Town Board members should be granted access to the plan in whole or in part. In this regard, we note that we do not believe that a board member necessarily has the right to obtain access to all town records.

By way of background, 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, we 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 our 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. On the other hand, should the majority of the total membership of the board approve to disclose to the town board members, in furtherance of their official responsibilities, in our opinion they should be afforded access to the record.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless

it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

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

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

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

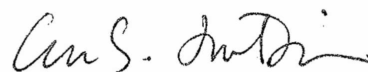
Finally, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(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, because the Supervisor denied access to the record, an appeal should be determined either by the Woodstock Town Board or a person or body designated by the Town Board.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Hon. Jackie Earley, Town Clerk
Jeff Moran, Town Supervisor

FOIL-AO-17203

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, June 12, 2008 10:39 AM
To: Mr. Tim Baroody
Subject: RE: Freedom of Information Law

Tim,

Thank you. I have your opinion drafted, and it should go out today or tomorrow. In the meantime, please note the following, especially the paragraphs towards the end, beginning "If neither a response...":

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

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

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17204

From: Freeman, Robert (DOS)
Sent: Thursday, June 12, 2008 3:19 PM
To: Mr. Jarvis, University of Buffalo

Dear Mr. Jarvis:

I have received your letter in which you referred to the fee permitted by the Freedom of Information Law in relation to a certain request. You wrote that SUNY/Buffalo "recently created an electronic document in response to a FOIL request that required 10 hours of a computer specialist's time."

In this regard, first, §89(3)(a) of the FOIL provides in relevant part that an agency is not required to create a record in response to a request. If indeed the University "created" a new record, I believe that it would have acted in a manner that exceeded its responsibilities imposed by FOIL. For example, if the request involved computing and the creation of information that did not previously exist, the University, in my view, would not have been required to do so. On the other hand, if the request involved the generation of portions of an existing record, i.e., by extracting fields within a database by means of entering queries, it has been held that an exercise of that nature does not involve the creation of a new record, but rather the disclosure of portions of an existing record.

Second, when a request is made for an existing record or records, the only fee that may be assessed involves the actual cost of reproduction. The regulations promulgated by the Committee on Open Government, which have the force of law, specify that no fee may be charged for search or personnel time (see 21 NYCRR §1401.8).

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave., Suite 650
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-17205

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June 12, 2008

Mr. Thomas N. Baroody
Over and Under Piping Contractors
Incorporated
P.O. Box 278
Auburn, NY 13021

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

Dear Mr. Baroody:

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 Syracuse. In our opinion, while most of the records you requested would likely be required to be made available, the method by which the City maintains its records is not likely conducive to the manner in which you articulate your requests. Concurrently, because it is likely that documentation of your interest is maintained and can be identified and provided in a reasonable manner, and in an effort to address the various issues raised in the many pages of correspondence you forwarded, we offer the following comments to you and to the Office of the Corporation Counsel.

First, it is questionable, if not doubtful that the City was unable to locate any records in response to so many of your requests.

Although the Freedom of Information Law as initially enacted required that an applicant must seek "identifiable" records, since 1978 it has required that an applicant "reasonably describe" the records sought. Moreover, it has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While we are unfamiliar with the record keeping systems of the City, to the extent that the records sought can be located with reasonable effort, we believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files 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 City staff can locate the records of your interest with 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 City maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

For example, in response to your request for "the last and latest one hundred [100] applications .... for overtime dispensation", the City indicated that it would require a "significant amount of time and resources" to locate and provide such records, that "Overtime applications of employees of contracting companies are kept by each individual department" and that "the City can recover overtime records from an individual department within a specified timeframe in a more timely fashion." No further response was indicated by the City. In our opinion, your request would

likely require the review of records pertaining to public works projects in all departments, starting with the most recent projects in each department. The manner in which overtime dispensation records are filed within the particular project, in our opinion, would determine whether the request reasonably described the records. In addition, while it may be unreasonable for the City to locate the latest 100 applications, based on the information provided in their responses, it appears that the City could locate applications, by project, in each department submitted within the recent past.

In response to your request for "copies of the last 250 Certified Payrolls submitted to the City of Syracuse engineering department", the City asked that you "Please limit your request to a more specific time frame, rather than a number of payrolls, ... or particular contracts, if known." In our opinion, the City has not indicated sufficient information to conclude that it is not able to respond to your request in the manner in which it was written. Based on the City's response, it appears that the City could commence a search in the engineering department, starting with the year prior to your request. If the City is able to identify ongoing projects and the most recent projects, it may be that your request reasonably describes records. On the other hand, insofar as the records cannot be located with reasonable effort, that standard would not be met.

In response to your request for "copies of the last 250 'Notice to Proceed' letters, for public works projects..." the City responded that it "has no chronological system for the items requested." However, based on the City's previous responses as outlined above, the City's records are filed by department, and by project, chronologically. Again, the issue involves whether, based on its recordkeeping systems, the City can locate the records with reasonable effort.

We note the City's denial of your request for "a listing of the last 250 public works projects awarded" is based on the ground that the City is not required to create a record in response to a request. While we agree with the City's technical response, it appears to be impossible to modify your original requests without information that would identify previous public works projects. In that regard, we recommend to you and to the Office of Corporation Counsel that you engage in a discussion concerning the nature of information maintained by the City that would assist you in identifying records of interest. Perhaps, for example, the City maintains a list of all projects commenced in a particular year, or all ongoing projects.

Additionally, we point out that 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]).

In response to two of your requests, the City informed you that there were no documents responsive to your request. The first request was for "transmittals, letters and notes returned to the City of Syracuse with returned blueprints and specifications" regarding to particular projects, and

the second pertained to records identifying the $500 per day liquidated damages. In our estimation, by indicating that it had no records responsive to your requests, it may be that the City has fully complied with the law; however, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." It is emphasized that when a certification is requested, an agency "shall" prepare the certification; it is obliged to do so.

With respect to requests for which the City indicated "You will receive any information responsive to your request within the specified time frame stated in Public Officer's Law", or "We are in the process of obtaining and reviewing the materials to which you have requested access", and with respect to the requests that the City has not yet answered, we note that a failure to respond, and to respond in a timely fashion, is inconsistent with law. As you may know, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

It is noted that new language was added to that provision in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

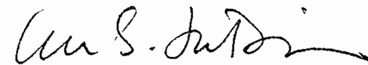
If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request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

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

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

On behalf of the Committee on Open Government, we hope this is helpful of you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17206

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June 13, 2008

Mr. Domingo Espiritu
00-A-6162
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. Forbes:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request to the New York City Department of Correction and that, as of the date of your letter to this office, you had not received a response.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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."

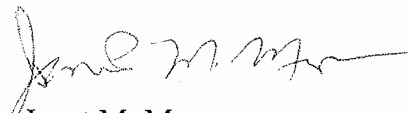
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive 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 the records access officer at the New York City Department of Correction.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17207

Committee Members

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Executive Director

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June 13, 2008

Mr. Roger Forbes
97-A-2325
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 13442

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

Dear Mr. Forbes:

I have received your letter in which you indicated 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, 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."

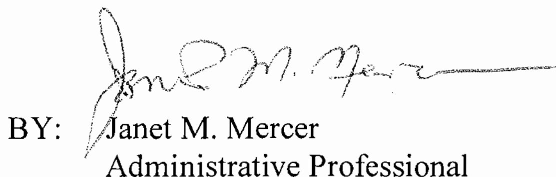
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to Sergeant James Russo.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Sgt. James Russo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17208

Committee Members

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Tedra L. Cobb
Lorraine A. Cortés-Vázquez
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Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

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June 13, 2008

Mr. Ivan Ochoa
06-R-3952
Mohawk Correctional Facility
P.O. Box 8451
Rome, NY 13442

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

Dear Mr. Ochoa:

I have received your letter in which you indicated 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, 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."

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

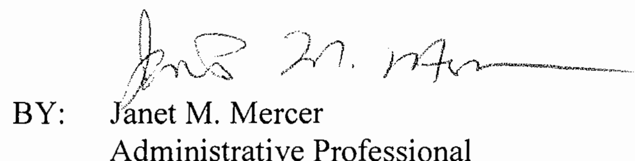
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to Sergeant James Russo.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Sgt. James Russo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17209

Committee Members

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Dominick Tocci

Executive Director

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June 13, 2008

Mr. Damien Lynch
06-A-0454
Eastern NY Correctional Facility
P.O. Box 338
Napanoch, NY 12458

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

Dear Mr. Lynch:

I have received your letter in which you indicated 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, 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."

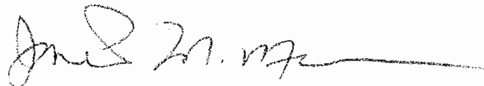
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to Sergeant James Russo.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Sgt. James Russo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17210

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

Executive Director

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June 16, 2008

Ms. Marcie Haskell

The staff of the Committee on 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. Haskell:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

Having requested records pursuant to the Freedom of Information Law from the City of Troy, you were informed that the City's form "must be filled out and signed before we can process your request." You have questioned the propriety of that requirement.

In this regard, first, an agency may, pursuant to §89(3) of the Freedom of Information Law, require that a request be made in writing. The same provision states that an applicant must "reasonably describe" the records sought. Consequently, a request should include sufficient detail to enable agency staff to locate and identify the records.

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

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

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

Third, I do not believe that an agency can require that a request be made on a prescribed form. As indicated previously, §89(3) of the law, as well as the regulations promulgated by the Committee (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Neither the law nor the regulations refers to, requires or authorizes the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

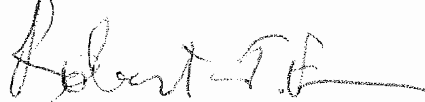
In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 kinds of records that you requested must be disclosed insofar as they exist, for none of the ground for denial of access would apply.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer
Carolin Skriptshak

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17211

Committee Members

Laura L. Anglin
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June 16, 2008

Mr. Anthony S. Fusco, II

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

Dear Mr. Fusco:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Office of the Putnam County Sheriff. Specifically, you requested and were denied access to a copy of a video tape recording of a deputy sheriff stopping your automobile and his issuance of a traffic ticket to you on March 29, 2008.

In response to your appeal, the Sheriff denied access on the grounds that "disclosure under FOIL of any video evidence in these circumstances would impede the proper conduct of judicial proceedings, while withholding such evidence – or even information about whether it even exists — would enhance the proper administration of the proceedings. Accordingly, I find that the exemption set forth at POL §87(2)(e)(i) applies in this case." The Sheriff further indicated that "if law enforcement has a video recording showing a traffic infraction committed by a person, it would be an unwarranted invasion of that person's privacy to publicly disclose the recording." We respectfully disagree with the opinion of the Sheriff, and 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 Court of Appeals confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

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

> exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

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

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

The provision upon which the denial is based, §87(2)(e)(i), authorizes an agency to withhold records that "are compiled for law enforcement purposes and which, if disclosed, would...interfere with law enforcement investigations or judicial proceedings..."

In the Appellate Division decision on which the Sheriff relies, Pittari v. Pirro, [258 AD2d 202 (2nd Dept, 1999)], it was stated that

> "[t]he question is whether the nature of the records sought and the timing of the FOIL request rendered those records exempt from disclosure under FOIL. The Court of Appeals, in *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572, 419 N.Y.S.2d 467, 393 N.E.2d 463 noted:

> '[T]he purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution'" (id., 169).

The "timing" in this instance is clearly different from that in Pittari. As I understand the matter, the defendant in that case sought records under the Freedom of Information Law *prior* to discovery, for the court found that "[i]f a criminal proceeding is pending, mandating FOIL disclosure would interfere with the orderly process of disclosure in the criminal proceeding set forth in CPL article 240" (id., 171). In contrast, you have requested records in a legal proceeding for which no discovery rules apply. Consequently, the harm sought to be avoided by the court in Pittari is not a consideration, and §87(2)(e)(i), in our opinion, cannot validly serve as a basis for a denial of access.

The remaining case law on which the Sheriff relies in our opinion is not relevant. They involve disclosure of records prior to the completion of the law enforcement investigation (DeLuca v. New York City Police Department, 689 NYS2D 487, 261 AD2d 140 [1999]), disclosure of records that were previously provided to a defendant in which the defendant failed to show that they were no longer available (Huston v. Turkel, 236 AD2d 283, 653 NYS2d 584 [1997]), and disclosure of records or information obtained from confidential witnesses (Hawkins v. Kurlander, 98 AD2D 14, 469 NYS2d 820 [1983]).

Further, although this office has no jurisdiction over the interpretation of the Criminal Procedure Law, we note that the definition of "Brady material" in our copy of Black's Law Dictionary (1990) indicates in part:

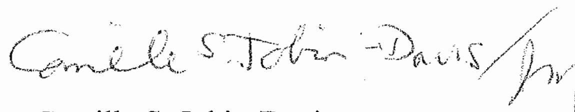
> "*Brady* material" is exculpatory information, material to a defendant's guilt or punishment, which government knew about but failed to disclose to defendant in time for trial. Defendant is denied due process if government suppresses such material...."

Accordingly, in our opinion, it is likely that your situation could be compared to that in which a person is charged with criminal behavior, in which the Sheriff would be required to disclose the video to you prior to trial so as to afford you due process of the law.

Lastly, according to the Freedom of Information Law, an individual cannot engage in an unwarranted invasion of his or her own privacy. Section 89(2)(c) of the Law states that, unless records can otherwise be withheld [i.e., pursuant to §87(2)(e)], "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...ii.when the person to whom a record pertains consents in writing to disclosure; [or] iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him." Therefore, an agency would not in our opinion have the ability to withhold any portion of the video pertaining to you on the ground that disclosure would result in an unwarranted invasion of personal privacy.

On behalf of the Committee on Open Government, we hope this is helpful of you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Donald B. Smith, Sheriff
Peter H. Convery, Undersheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OOPL - AO - 348
FOIL - AO - 17212

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea
Clifford Richner
Dominick Tocci

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June 16, 2008

Mr. William Murray

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

Dear Mr. Murray:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

As I understand the matter, you submitted several requests to the Department of Correctional Services, and in some instances, none of the records were made available, and in others, records were disclosed, but apparently not those that you requested. In an effort to provide general guidance, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3)(a) states in part that an agency, such as the Department, is not required to create a record in response to a request. Therefore, insofar as your requests involve records that do not exist, or that do not exist in the form of your interest, Department staff would not be obliged to create new records on your behalf.

Second, 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.

Of potential 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 §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. It has been found that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers,

to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY 2d 652, 568 (1986)].

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

Due to the shield provided by §50-a, any personnel records that are use to evaluate performance toward the continued employment or promotion of correction officers are confidential.

If records involved individuals other than correction officers, §87(2)(b) of the Freedom of Information Law may be pertinent. That provision authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy."

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 it has been found that disclosure would result in an unwarranted invasion of personal privacy [see e.g., Prisoners' Legal Services, supra; also Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Therefore, to the extent that charges are dismissed or allegations are found to be without merit, I believe that the records related to and including such charges or allegations may be withheld.

Third, since some aspects of your requests involve records pertaining to yourself, also relevant may be the Personal Privacy Protection Law (Public Officers Law, Article 6-A). I note that rights conferred by the Freedom of Information Law may differ from those accorded by the Personal Privacy Protection Law. The former deals with rights of access conferred upon the public generally; the latter deals with rights of access conferred upon an individual, a "data subject", to records pertaining to him or her.

Under §95(1) of the Personal Privacy Protection Law, a state agency is required to disclose records pertaining to a data subject to that person, unless the records can be withheld pursuant to §95(5), or if rights conferred by §95(1) do not apply due to the operation of 95(7). Section 95(5)(a) authorizes an agency to withhold information compiled for law enforcement purposes when disclosure would:

> "(i) interfere with law enforcement investigations or judicial proceedings;
>
> (ii) deprive a person of a right to a fair trial or impartial adjudication;
>
> (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or

> (iv) reveal criminal investigative techniques or procedures except routine techniques and procedures."

From my perspective, since the events leading to your discipline occurred long ago, it is doubtful that §95(5)(a) would serve as a valid basis for denial.

Section 95(7) states that "[t]his section shall not apply to public safety agency records." Stated differently, rights or access conferred upon a data subject by §95(1) do not apply to public safety agency records. The phrase "public safety agency record" is defined to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty seven-a, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

Based on the foregoing, if the record is maintained by an "agency or component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation," the Personal Privacy Protection Law would not grant rights of access.

Lastly, in most instances, policies adopted by an agency or "directives" issued by an agency are accessible to the public. Significant is one of the grounds for denial of access, which, due to its structure, often requires disclosure. Specifically, §87(2)(g) permits an agency to withhold records that:

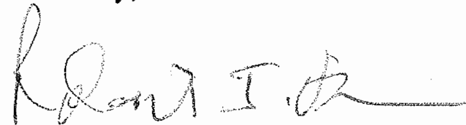
> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller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

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

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

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: Chad Powell

FOIL-AO-17213

From: Freeman, Robert (DOS)
Sent: Tuesday, June 17, 2008 12:30 PM
To: MULLEN, VICTORIA, Town of Oswego
Subject: RE:

The only exception that might be pertinent is §87(2)(c) of the FOIL, which permits an agency to deny access insofar as disclosure "would impair present or imminent contract awards..." That provision has been properly cited when premature disclosure would preclude an agency from reaching an optimal agreement for taxpayers or provide an unfair advantage to a party or potential party to a transaction. However, it has been held that when there are only two parties to a negotiation, and both have copies of the same records, §87(2)(c) does not apply. In that kind of situation, there is no "inequality of knowledge" on the part of the parties to the negotiations, and disclosure would not in any way provide an indication of bargaining strategy or create an unfair advantage or disadvantage.

In short, assuming that both the City and the State University have copies of the unsigned agreement, I do not believe that there is a valid basis for denying access.

I hope that I have been of assistance.

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

FOIL-AO-17214

Committee Members

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June 17, 2008

Mr. Robert W. Burns
Accident Investigation/Reconstruction
48 Harper Drive
Pittsford, NY 14534-3104

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

Dear Mr. Burns:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response.

You referred to a request made to the Cattaraugus County Sheriff's Department for an accident reconstruction report and diagram, and its response indicating that the fee would be one hundred dollars. When you questioned the basis of the fee, you were informed that it was set by the County Legislature.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3)(a) states in part that an agency is not required to create a record in response to a request. Therefore, if you asked that an accident reconstruction report and diagram be prepared for you, the Freedom of Information Law would not apply. In that situation, I know of no restriction on the amount of the fee.

Second, however, if your request involved existing records, those that had already been prepared, the fee of one hundred dollars would have been inconsistent with law.

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

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

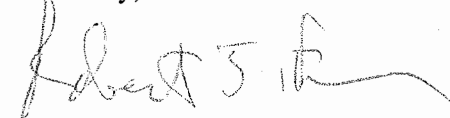
Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Gandin, Schotsky & Rappaport v. Suffolk County, 226 AD2d 399 (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)], and that a statute is an enactment of the State Legislature, and not a local law, charter provision, policy or regulation.

I note, too, that the regulations promulgated by the Committee on Open Government, which have the force of law, specify that an agency may not charge a fee for inspection of or search for records, or fixed costs of the agency, such as employee salaries or overhead (21 NYCRR §1401.8).

In sum, assuming that the request involved existing records, I believe that the County may charge no more than twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing other records, such as those that may be larger than that size.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Undersheriff Timothy S. Whitcomb
County Legislature
Dennis V. Tobolski, County Attorney

FOIL-AO - 17215

From: Freeman, Robert (DOS)
Sent: Tuesday, June 17, 2008 2:30 PM
To: Hon. Mary Bossart, Mayor, Village of Rockville Centre
Subject: RE: FOIL request involving "comprehnsive agreement" or settlement negotiations

Thank you. I believe that your description of my comments is accurate. I note that there is a distinction between disclosure and the ability to deny access under FOIL and disclosure or the capacity to withhold in relation to discovery in a litigation context. I am familiar also with the CPLR provision involving the inadmissibility of settlement documents in litigation, and I do not believe that it can be considered as a statute that exempts records from disclosure under FOIL.

Although some records may not be discoverable in the context of litigation or admissible as evidence is irrelevant when considering rights of access under FOIL. It has been held by the Court of Appeals that FOIL and discovery are separate and distinct, that any person may seek records under FOIL, including a litigant, and that when such a request is made, the applicant is treated as a member of the public; that he/she may be a litigant neither enhances nor diminishes his/her rights as a member of the public [Farbman v. New York City, 62 NY2d 75 (1984). The Court of Appeals also held that records that are exempt from being used in discovery or in a litigation context and that are inadmissible in evidence are nonetheless subject to rights conferred by FOIL [Newsday v. State Dept. of Transportation, 5 NY3d 84 (2005)].

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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FOIL-AO-17216

From: Freeman, Robert (DOS)
Sent: Wednesday, June 18, 2008 2:37 PM
To: Alan Isselhard
Subject: RE: FOIL request denied

Section 89(4)(b) of the Freedom of Information Law states in relevant part that "...a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice and rules." That provision also states that an agency has the burden of proving that the denial was proper, and paragraph (c) provides a court with the authority to award attorney's fees when certain conditions are met.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17217

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June 19, 2008

Mr. Joseph Mastropietro
88-B-0811
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

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

Dear Mr. Mastropietro:

I have received your letter concerning rights of access to a contract between the Department of Correctional Services and Direct TV, as well the time within which an agency must respond to a request for a record.

In this regard, first, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. In most instances, contracts entered into by an agency and a private entity are accessible, for none of the grounds for denial would apply.

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

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

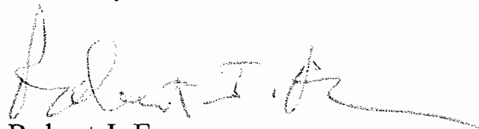
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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 - 17218

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June 19, 2008

Mr. Khalid Awan
#50959-054
FCI
P.O. Box 33
Terre Haute, IN 47808

Dear Mr. Awan:

I have received your letter and believe that you misunderstand the functions of this office. The primary duties of the Committee on Open Government involve providing advice and opinions concerning public rights of access to government information under the state's Freedom of Information Law. The Committee does not have general custody or control of records, and we have no information concerning the issues that you raised. Nevertheless, in an effort to provide guidance, I offer the following.

First, the Freedom of Information Law pertains to existing records, and §89(3)(a) states in part that a government agency is not required to create a record in response to a request. In your letter, you requested information by asking questions, i.e., "how many" people died in traffic accidents since 2002. If there is no record indicating a total, an agency would not be required to prepare a new record containing a total on your behalf. Rather than seeking information by asking questions, it is suggested that you request existing records, i.e., records indicating the number of traffic deaths during a certain period.

Second, 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. For instance, to obtain records involving traffic deaths, it is likely that a request would properly be made to the records access officer at the Department of Motor Vehicles.

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-17219

Committee Members

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June 19, 2008

E-Mail

TO: Ms. Karen Miller, County of Schoharie

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Miller:

I have received your letter in which you asked whether you are required to release the name of a person who "called and initiated the Schoharie County DPW to send an engineer to investigate work being done at his property having to do with driveway access."

If I understand the matter, the caller essentially made a complaint, and the County responded by sending its employee to investigate. If that is so, in my opinion, the identity of the person who made the complaint need not be disclosed.

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. 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.

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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17220

Committee Members

Laura L. Anglin
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June 24, 2008

Ms. Nadine J. McIntyre

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

Dear Trustee McIntyre:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. In brief, you have asked whether, as an elected Trustee of the Village of Boonville, you have the right "to view the payroll records, including any records relating to time and attendance, of any Village employees, including those employed in departments other than those that [you were] appointed to oversee." You also referred to a letter prepared by the Village Attorney indicating that you do not have "the right to review a Village employee's personnel file, including performance evaluations, without either the entire Village Board approval or a court order."

In my opinion, which is based on judicial interpretations of the Freedom of Information Law, particularly a decision rendered by the Court of Appeals, the state's highest court, it is clear that attendance and payroll records must be made available to you, as a Trustee, or to any member of the public.

By way of background, 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.

With respect to time and attendance records, as well as payroll records, pertinent is §87(2)(b), which permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." The courts have found that those kinds of records are relevant to the performance of one's official duties and that, therefore, disclosure would constitute a permissible, rather than an unwarranted invasion of personal privacy. Consequently, such records have been found to available to any person.

Also significant to an analysis of rights of access is §87(2)(g), which permits an agency to withhold records that:

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

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

Attendance records could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning the use of leave time or absences or the time that employees arrive at or leave work would constitute "statistical or factual" information accessible under §87(2)(g)(i).

In a decision affirmed by the Court of Appeals dealing with attendance records, specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found, in essence, that disclosure would result in a permissible, not an unwarranted invasion of personal privacy. In that case, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus

> it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Based on the foregoing, it is clear that time and attendance records, including references to the use or accrual of personal, sick or vacation leave must be disclosed.

With regard to payroll information, one of the few instances in the Freedom of Information Law in which an agency is required to maintain a particular record involves §87(3)(b), which states that "Each agency shall maintain...a records setting forth the name, public office address, title and salary of every officer or employee of the agency..." As such, salary records pertaining to public employees are clearly available. Further, it has been determined that those aspects of employee records indicating gross wages, as on a W-2 form, must be disclosed (Day v. Town Board of Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

In short, the statistical and factual information at issue, based on the language of the Freedom of Information Law and its judicial interpretation, time and attendance records, as well as payroll records, must be disclosed to you or any person.

The two exceptions discussed above are also pertinent in considering rights of access to performance evaluations. 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.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Tod M. Lascurettes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17221

Committee Members

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June 24, 2008

Mr. John D. Berry

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

Dear Mr. Berry:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response.

You indicated that your request made pursuant to the Freedom of Information Law to the Town of Mamakating for records relating to the "Sullivan Street Paving Job" was not answered. The request involved:

> "1. Copy of 'notice to bidders' that was published in the local newspaper or any other public notification.
>
> 2. Copy of bid package 'scope of work' that was given to contractors that were pricing paving job.
>
> 3. Copies of bids from contractors.
>
> 4. Copy of signed contract from contractor who was awarded the job."

From my perspective, to the extent that records exist that fall within the scope of your request, the Town is required to disclose them. 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 Court of Appeals expressed and confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

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

The only provision of significance under the circumstances, §87(2)(c), permits an agency to deny access to records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in that provision in my opinion is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers.

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

However, in a decision rendered nearly thirty 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, a contract has been awarded and executed. That being so, I believe that the records sought, including the successful and unsuccessful bids, must be disclosed 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 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 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."

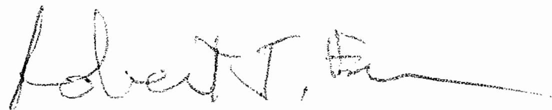
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance,

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 legislation enacted in 2006 broadened 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Jean M. Dougherty, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4651
FOIL-AO-17222

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June 25, 2008

E-Mail

TO: Richard Sullivan, Chair, Town of Highlands Planning Board

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Sullivan:

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

You wrote that you serve as Chairman of the Planning Board in the Town of Highlands, and you raised a series of issues relating to the use of a television camera at meetings, access to a recording of a meeting, as on a DVD, the content of minutes, and the ability of the public to speak during meetings. In this regard, I offer the following comments.

First, you are correct in your view that minutes of meetings need not be verbatim. On the contrary, the Open Meetings Law provides what might be characterized as minimum requirements concerning the content of minutes. Specifically, §106(1) of that statute pertains to minutes of open meetings and states that:

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

Second, neither the Open Meetings Law nor another statute contain provisions concerning the public's right to speak at meetings or the right to record meetings. However, the courts have held in a variety of contexts that a public body, such as a town board or a planning board, is authorized to adopt reasonable rules to govern its proceedings. Therefore while public bodies are not required to permit the public to speak during meetings, many do so, and when they choose to do so, it has been advised that they adopt reasonable rules that treat those who wish to speak equally.

Similarly, in Mitchell v. Board of Education of Garden City Union Free School District, the Appellate Division unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board. 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" [113 AD2d 924, 925 (1985)].

Further, the court in Mitchell indicated that the comments of members of the public, as well as public officials, may be recorded. As stated by the court:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In view of the judicial determination rendered by the Appellate Division, I believe that a member of the public may tape record open meetings of public bodies, so long as the tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process. I point that essentially the same conclusion was reached with regard to the use of video recording devices in Peloquin v. Arsenault, 616 NYS2d 716 (1994), and later by the Appellate Division in Csorny v. Shoreham-Wading River Central School District [759 NYS2d 513, 305 AD2d 83 (2003)].

Third, in my view, a recording, whether audio or video, of a meeting clearly falls within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

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

Based on the foregoing, when a town maintains a recording of a meeting, the tape, DVD or film 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, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

Lastly, the 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 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.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17223

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June 25, 2008

E-Mail

TO: Mr. Robert Harding

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. Harding:

I have received your letter and hope that you will accept my apologies for the delay in response.

You indicated that you submitted the following request to the Village of Medina under the Freedom of Information Law:

> "The shift schedule of officers who were on duty with the Medina Police Department on February 14, 2008 and February 15, 2008. In addition, I would like the police report from the incident that occurred lat on Feb. 14, 2008 and in the early hours of Feb. 15, 2008 involving five vandals who broke windows and stole goods from downtown Medina businesses. Lastly, I would like to know the officer or officers who were called to the crime scene. I would kindly note that none of these requests would be covered under Civil Rights Law Section 50-a which covers only personnel records."

In response to the request, the Village Attorney recommended as followings:

> "...I am advising not to release the duty roster for the evening in question. There are two basis for this. One is under FOIL section 87 which does not require disclosure of inter-agency materials. Second, both Chief Avila and myself see this as a safety issue for the police and if this information is disclosable, would pose a safety issue for

> the policeman on patrol. This is also protected under the FOIL Further, I believe release of this information would be an unwarranted invasion of the officer's personal privacy under FOIL..."

I respectfully disagree with the Attorney's advice, and in this regard, I offer the following comments.

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

Although I agree that the records at issue constitute "intra-agency materials", the exception dealing with those records, due to its structure, often requires disclosure, and I believe that to be so in this instance. Specifically, §87(2)(g) of the Freedom of Information Law enables an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. While the records sought constitute "intra-agency" materials, they consist of statistical or factual information that must be disclosed under §87(2)(g)(i), unless a different ground for denial could be asserted. As such, §87(2)(g) does not, in my opinion, constitute a valid basis for denial.

Also potentially relevant is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". While that standard is flexible and may often necessitate the making of subjective judgments, 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); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 109 AD 2d 292, 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].

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 available, for they are relevant to the performance of public employees' official duties.

Based on the precedent offered by the state's highest court, I believe that records identifying the officers that worked during particular shifts must be disclosed.

Lastly, with respect to the "safety issue", it has been suggested that records indicating where and when police officers *will be working* may be withheld under §87(2)(f). That provision authorizes an agency to deny access insofar as disclosure "could endanger the life or safety of any person." However, when the request involves records indicating the times that officers worked *in the past*, must, as indicated in Capital Newspapers, be disclosed.

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

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees
Peggy Crowley, Village Clerk
Lance Mark, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17224

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June 25, 2008

E-Mail

TO: Ms. Annie Cappeller

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. Cappeller:

I have received your letter and hope that you will accept my apologies for the delay in response.

According to your letter, you requested an "investigative report" prepared for your board of education, and the request was denied for two reasons. First, although the investigator is an attorney, you wrote that "He was paid as an investigator." Nevertheless, the school district cited "attorney-client work product" as a basis for denial of access. Second, §87(2)(g) of the Freedom of Information Law was cited on the ground that the report "was predecisional intra-agency communication" that would be withheld.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 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, it is questionable whether 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)]. If 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, if that is so, I do not believe that the report constitutes an attorney-client communication that falls within the scope of the privilege.

With respect to the other exception to which the district referred, due to its structure, that provision often requires substantial disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

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.

Lastly, 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)."

While I am not familiar with the content of the report, insofar as it consists of factual information, I believe that it must be disclosed, unless a different exception [i.e., §87(2)(b) concerning unwarranted invasions of personal privacy or §3101(c) of the Civil Practice Law and Rules concerning attorney work product] may properly be asserted.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17225

Committee Members

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June 25, 2008

Mr. Gregg Warner

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

Dear Mr. Warner:

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 for records pertaining to yourself made to the Clinton County Veterans Service Agency, including notes prepared by the Director of the Agency. The County Administrator denied the request, indicating that I advised that the records at issue were not "foilable" and "not releasable.

While I do not recall the specifics of any conversation with a Clinton County official concerning your request, I doubt that the terms attributable to me were expressed. 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. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

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

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

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

Based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by an 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).

Notes prepared by the Director of the Veterans Service Agency, as well as communications between or among employees of state or local government wold fall within one of the exceptions to rights of access, §87(2)(g). However, due to the structure of that provision, significant portions of those kinds of communications must often be disclosed. Specifically §87(2)(g) authorizes an agency to withhold records that:

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

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

The Court of Appeals in Gould, supra, analyzed the provision quoted above and found that:

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

In short, only to the extent that inter-agency or intra-agency materials consist of advice, opinions, recommendations and the like may the records at issue by withheld by the County under §87(2)(g). The statistical or factual information contained within those materials must be disclosed, except to the extent that a different exception may properly be asserted.

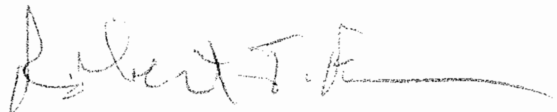
The only other exception that appears to be pertinent is §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy. Since the records in question pertain to you, I do not believe that you can invade your own privacy. Further, §89(2)(c) states that disclosure would not constitute an unwarranted invasion of personal privacy when a person requests records pertaining to him/herself.

In sum, as I understand the matter, the records pertaining to you, other than portions consisting of opinions, advice or recommendations that are deniable under §87(2)(g), must be disclosed, unless disclosure would result in an unwarranted invasion of personal privacy involving a person other than yourself.

Lastly, I note that the Freedom of Information Law is permissive. Even when an agency has the authority to deny access to records or portions of records, as in the case of §87(2)(g), it is not required to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Michael E. Zurlo
Steven W. Brown

FOIL-AO-17226

-----Original Message-----
From: Jobin-Davis, Camille (DOS)
Sent: Thursday, June 26, 2008 2:39 PM
To: Mr. Jacob Resneck, WNBZ Radio
Subject: RE: FW: RE: FOIL - 5/27/08 **DENIED**

Jacob:

Thank you for forwarding the agency's response to your appeal. In my opinion, the agency has done a textbook job of fully explaining its reasons for non disclosure. An advisory opinion from my office would confirm the agency's analysis of the provisions on which it relies.

I guess I'm surprised that there are only three documents that are responsive to your request. If I haven't mentioned it already, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." It is emphasized that when a certification is requested, an agency "shall" prepare the certification; it is obliged to do so. If you think this would be helpful, you could request such a certification.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

-----Original Message-----

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17227

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June 26, 2008

Mr. Shawn Cornwall
97-A-7632
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. Cornwall:

I have received your letter in which you requested current information concerning the Freedom of Information Law and asked how you can obtain records with no funds or assets.

In this regard, attached is "Your Right to Know", a guide to the Freedom of Information Law.

With respect to rights of access, when records are available in their entirety and are accessible for inspection, no fee can be charged to inspect the records. However, under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy. I point out that there is nothing in that statute pertains to the waiver of fees. Further, in a decision involving a request for a waiver of fees by an inmate who sought records from an office of a district attorney, it was held that an agency may assess a fee in accordance with the Freedom of Information Law, notwithstanding the inmate's status as an indigent person [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)]. Therefore, irrespective of one's status, i.e., as a litigant or a poor person, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with its rules promulgated under §87(1)(b)(iii) of that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17228

Committee Members

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June 26, 2008

Mr. Matthew Marcelle

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

Dear Mr. Marcelle:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Office of the Dutchess County Probation Department. Specifically, the County Attorney has affirmed the Department's denial of your request to review records pertaining to yourself, relying on §390.50 of the Criminal Procedure Law and §87(2) of the Freedom of Information Law. In our opinion, while these provisions would limit access to materials gathered prior to and in conjunction with sentencing, and perhaps portions of other records maintained by the Department, they would not necessarily permit denial of access to all of the requested records. In this regard, we offer the following comments.

First, 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, as indicated by the County Attorney, is §390.50 of the Criminal Procedure Law, entitled "Confidentiality of pre-sentence reports and memoranda". Subdivision (1) states in relevant part that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article...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 this statute or upon specific authorization of the court."

In order to obtain an expert opinion concerning application of the language quoted above, this office contacted Counsel to the State Division of Probation and Correctional Alternatives in 1998. In short, we were informed that this provision does not apply to records that are unrelated to "the question of sentence".

Assuming that §390.50 does not apply to post-sentence materials, we believe the Freedom of Information Law would govern rights of access. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Although the provision cited by the County Attorney 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 disclosure of portions of records. The cited provision permits an agency to withhold records that:

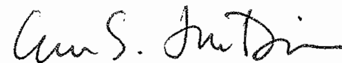
> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller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

In sum, to the extent that the records sought exist, it is possible that portions of the records should be made available pursuant to §87(2)(g)(i).

On behalf of the Committee on Open Government, we hope this is helpful of you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Ronald Wozniak

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17229

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June 27, 2008

Mr. Charles Wright
80-A-2724
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. Wright:

I have received your letter in which you complained that your request made to the Division of Parole for your pre-sentence report had not been answered.

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."

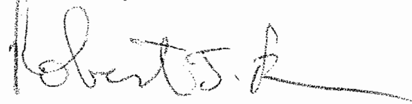
In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

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 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 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 - 17230

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June 27, 2008

Mr. Louis Glover
88-T-2422
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. Glover:

I have received your letter in which you indicated that you requested records from the mental health unit at your facility but that you received no response.

In this regard, first, §33.13 of the Mental Hygiene Law generally confers rights of access to mental health records to 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.

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

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

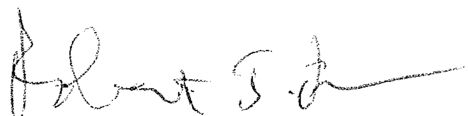
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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-17231

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June 27, 2008

Mr. Sidney Butler
91-A-2844
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

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

Dear Mr. Butler:

I have received your letter in which you sought an advisory opinion concerning rights of access to the policies and procedures of the Yonkers Police Department concerning the "handling, storing and preserving evidence."

In this regard, I offer the following comments.

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

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

A second provision of potential significance is §87(2)(e), which permits an agency to withhold records that:

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

Under the circumstances, most pertinent is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body

> charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

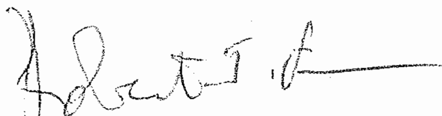
> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The

> information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

While I am unfamiliar with the records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection or effective law enforcement could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

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-17232

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June 27, 2008

Mr. William Powell
07-A-4547
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

Dear Mr. Powell:

I have received your letter in which you appealed a denial of access to records by the New York City 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. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records.

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

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

For your information, the person designated by the New York City Police Department is Mr. Jonathan David, the records access appeals officer.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17233

Committee Members

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June 27, 2008

Mr. Alan Hurley

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

Dear Mr. Hurley:

I have received your letter and the materials attached to it concerning your request made under the Freedom of Information Law to Ms. Helen Baxter, Town Clerk of the Town of Tyrone. The request involved records authorizing the establishment of the position of deputy supervisor by the Town Board.

The Town Clerk contacted me concerning the matter, and I offer the following comments in confirmation of the discussions with her.

In brief, the Clerk indicated that she had no personal knowledge or recollection concerning the Board's authorization or creation of the position, and that the Board's action to do so might have occurred decades ago. As she informed you, the position might have been created "many years ago, at least 40 to 50 years." When I asked whether the minutes of Town Board meetings include a subject or topical index, she informed me that there is no subject matter index to the minutes, and that they are kept chronologically.

The issue that arises under the Freedom of Information Law pertains to the requirement that an applicant must "reasonably describe" the records sought as required by §89(3) of that law. It has been held that a request reasonably describes the records when the agency can locate and identify the records with reasonable effort based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

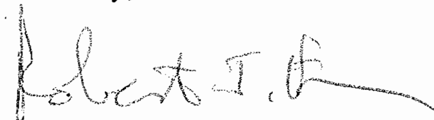
> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal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

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

In this instance, according the Clerk, there is no subject matter or other index by which she, or anyone, can locate the item of your interest with reasonable effort. Rather, as I understand the matter, she would be required to read each page of each and every set of minutes covering a period of several decades in an attempt to locate the entry of your interest. Based on the decision referenced earlier, which was rendered by the state's highest court, government agency personnel are not required to engage in an effort of that nature to comply with the Freedom of Information Law. As you know, however, minutes of meetings are accessible to the public, and you would have the right to review the minutes on your own in order to find the information of your interest.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Helen Baxter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17234

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June 30, 2008

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 you request for an advisory opinion concerning the ability of a school district to disclose charges filed pursuant to §3020-a of the Education Law against an employee who demanded a public hearing in accordance with subdivision (3)(c)(i) of that statute. You added that the hearing had commenced and "the charges were already received into evidence prior to the time when they were released in response to a FOIL request for them by the local media."

From my perspective, a school district would have not only the ability to disclose the charges, but in addition, the obligation to do so to comply with the Freedom of Information Law.

In this regard, first, §3020-a(3)(c)(i) of the Education Law states in relevant part that hearings conducted pursuant to that statute "shall be public or private at the discretion of the employee", and that a "competent stenographer...shall keep and transcribe a record of the proceedings at each such hearing."

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. I note that the Court of Appeals has held that the Freedom of Information Law is permissive: although an agency *may* withhold records or portions of records in accordance with the exceptions to rights of access, it is not required to do so and may choose to disclose [see Capital Newspapers v. Burns, 67 NY2d 562 (1986)]. Therefore, a school district, in my opinion, has the authority to disclose charges initiated against a tenured person, even when it is not required to do so.

Third, in my view, when a person charged chooses to require that hearing be public, he/she has effectively waived the district's authority to withhold records that were received in evidence or otherwise disclosed during the course of the hearing. In short, by opting to have a public hearing, the person charged has effectively permitted any person to be present to observe the proceeding, and to be aware of any information disclosed during the course of the proceeding. That being so, records received into evidence, other information disclosed during a public hearing, and any transcript of a public hearing must be disclosed. 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 records in open court, a public disclosure would have already been made. Once that occurs, nothing in the Freedom of Information Law would serve to enable an agency to deny access to that record.

The same principle was confirmed in a decision rendered by the Court of Appeals, Herald Company v. Weisenberg [58 NY2d 378 (1983)] relating to an administrative hearing. As indicated above, §3020-a of the Education Law provides a person charged with the option of having a public or private hearing. In other circumstances, those in which there is no statutory direction concerning whether a hearing is to be conducted in public or private, the Court determined that administrative and quasi-judicial proceedings are presumptively open to the press and the public. Based on its finding that a particular hearing was improperly closed, the court directed, with certain conditions pertinent the facts, that a transcript of the proceeding must be disclosed.

For the reasons expressed in the preceding commentary, I believe that a school district is required to disclose records received in evidence, including the charges and a transcript, in a §3020-a proceeding conducted open to the public at the direction of the subject of the proceeding.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-17235

From: Freeman, Robert (DOS)
Sent: Monday, June 30, 2008 2:22 PM
To: Spizowski, Lynn (DOB)
Subject: RE: FOIL Assistance

Hi again - -

The exception at issue, §87(2)(h) of FOIL, authorizes an agency to withhold records "or portions thereof" that "are examination questions or answers which are requested prior to the final administration of such questions."

Should you appeal the denial, it is suggested that several points be offered. First, if the basis for the denial was as you described it, that prior exams are used in creating new exams, it is likely that the Department skirted its obligation to focus particular exam questions and answers. Although prior exams might be used in developing new ones, there is no indication in the response that particular questions will be used in the future. Second, and this relates to the first, I would conjecture (surmise or guess) that analyses and validity studies are conducted with respect to questions used on exams. If that is so, it is likely that it is often known which questions will be used in the future or eliminated. A question that is eliminated would, in my view, be accessible under FOIL, even if it is used, perhaps as a means of recognizing a problem or deficiency. And third, the Court of Appeals, the state's highest court, has rankled against the "blanket denial" of access in which an agency withholds the entirety of the content of the records sought categorically. Rather, the Court has directed that agencies must review the records, page by page and line by line, to determine which portions, if any, may justifiably be withheld. Therefore, in the context of your request, I believe that the Department is required to review the exams in their entirety to attempt to determine which questions are likely to be included in future exams.

I look forward to seeing your request and the Department's response.

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

FOIL-AO-17236

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July 3, 2008

Mr. Charles B. Smith

The staff of the Committee on Open 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:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Town of North Greenbush. Specifically, the Town denied your request for "a computer record which identifies the IP Address of the computers in the town clerk's office" on the ground that disclosure "can compromise the security of the computer system in the Town Clerk's Office and possibly the Town Offices and cannot be revealed." In support of its denial of access, the Town Clerk forwarded a written opinion obtained from an information security professional. Although we understand that you have no malicious intent, we agree with the Town's assertion that disclosure could jeopardize the security of the Town's computer system, and we offer the following comments.

First, because we have very little experience involving Internet Protocol("IP") addresses, we consulted with professionals at the NYS Office of Cyber-Security and Critical Infrastructure Coordination to learn the difference between "public" IP addresses, which are assigned to a website, for example, and "private" IP addresses which are assigned to individual desktop computers and network devices. We were informed that knowing an organization's internal or "private" IP addresses would increase the speed at which a person with malicious intent could attack and disable an entire computer system. Disclosure of an IP addressing scheme would also indicate the most critical systems within the scheme, enabling a targeted attack.

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.

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 that does not apply here.

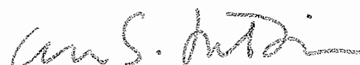
The pertinent exception with respect to IP addresses, in our view, is §87(2)(i), which permits an agency to deny access to records that "if disclosed, would jeopardize the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." Unlike security codes or passwords utilized to gain access to a particular database, it is our understanding that disclosure of IP addresses would permit a person to implement an attack on agency's computers with precision and accuracy. Accordingly, it is our opinion that the Town could justifiably rely on this exception to withhold the requested record.

In your correspondence, you describe your effort "to eliminate the Town Clerk's computers as the source of legally libelous postings to public web domains which are routinely accomplished during daytime business hours." While your intent may not be designed to maliciously disable operation of the Town's computer system, because the Freedom of Information Law permits an agency to deny access when disclosure would jeopardize the security of the Town's computers, in this instance, we believe that it has the ability to do so.

Because you allege illegal activity, we recommend that you might consult with the local district attorney.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Hon. Kathryn A. Connolly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17237

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Executive Director

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July 7, 2008

E-Mail

TO: Mr. Shawn Beresford

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. Beresford:

I have received your correspondence in which you asked whether "a municipal employee's time sheet" is accessible under the Freedom of Information Law.

From my perspective, time sheets pertaining to public employees must be disclosed. In this regard, I offer the following comments.

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

Although two of the grounds for denial relate to attendance records or time sheets, neither in my opinion would justify a denial of access.

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

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

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

Time sheets could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning 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 sheets 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 sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates and times of attendance or absence, would not in my view represent a personal detail of an individual's life and would be relevant to the performance of one's official duties. Therefore, I do not believe that §87(2)(b) could be asserted to withhold that kind of information contained in an attendance record.

In sum, I believe that time sheets, 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17238

Committee Members

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July 7, 2008

Mr. William Powell
07-A-4547
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

Dear Mr. Powell:

I have received your letter in which you request various records pertaining to the investigation that apparently led to your conviction.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office does not have possession or control of records generally, 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 you believe would maintain the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

Since you suggested that your request was made in the "public interest" and asked that no fee be charged for copies, I point out that although the federal Freedom of Information Act includes provisions concerning fee waivers, the New York Freedom of Information Law does not. Further, it has been held that an agency may charge its established fee for copies, even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that 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-17239

Committee Members

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July 7, 2008

Ms. Tureen Brooker

The staff of the Committee 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. Brooker:

I have received your letter and a variety of material relating to it concerning a request made under the Freedom of Information Law to the Higher Education Services Corporation. Please accept my apologies for the delay in response.

As I understand the matter, one element of your request involved the names and titles of temporary employees. Although you were informed at a labor-management meeting that a record containing the information sought is maintained by the Corporation, the response to your request did not include a copy of any such record. The other issue involved the format of the Corporation's employee roster. You indicated that you were informed that the roster could not be made available in an Excel format, even though the roster had previously been disclosed in that format.

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

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

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

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

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disc.

Questions and issues have arisen in relation to information maintained electronically concerning the creation of records, and often information stored electronically can be extracted by means of keystrokes or queries entered on a keyboard or transferred from one format to another. While some have contended that those kinds of steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, I believe that an agency must follow the more reasonable and less costly and labor intensive course of action. Similarly, if an agency has the ability to produce records in a particular format with reasonable effort, in my opinion, it must do so to comply with the Freedom of Information Law.

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)].

Also pertinent is a decision concerning a request for records, data and reports maintained by the New York City Department of Health regarding "childhood blood-level screening levels" (New York Public Interest Research Group v. Cohen and the New York City Department of Health, Supreme Court, New York County, July 16, 2001; hereafter "NYPIRG"). The agency maintained much of the information in its "LeadQuest" database. In that case, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'
>
> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access

> to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

When requests involve similar considerations, in my opinion, responses to them based on the precedent offered in NYPIRG must involve the disclosure of data stored electronically for which there is no basis for a denial of access.

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.

There is nothing in the Freedom of Information Law that deals specifically with personnel records or files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Two of the grounds for denial are relevant to an analysis of the matter; neither, however, could in my view serve to justify a denial of access.

Pertinent is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear that those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. 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 the performance of one's duties (i.e., one's social security number, garnishments or alimony paid, etc.), it has been advised that disclosure would indeed constitute an unwarranted invasion of personal privacy.

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.

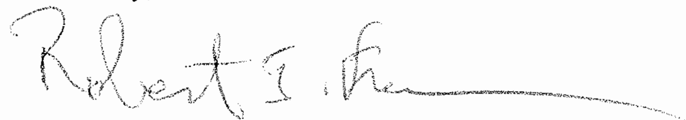
\ Based on the preceding analysis, if a document exists that includes the names and titles of temporary employees of the Corporation, factual information that relates to their duties, I believe that it must be disclosed. Although you did not specifically request it, I point out that §87(3)(b) has long

required that each agency must maintain and make available "...a record setting forth the name, public office address, title and salary..." 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."

Lastly, if the Corporation has the ability to make the employee roster available in the format of your choice with reasonable effort, and you are willing to pay the appropriate fee, judicial precedent indicates that it is required to do so.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Corinne Biviano
Cheryl B. Fisher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17240

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July 8, 2008

Mr. Charles Bell
Consumers Union
1010 Truman Avenue
Yonkers, NY 10703-1057

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

Dear Mr. Bell:

I have received your note and the material relating to it and hope that you will accept my apologies for the delay in response.

You referred to an entry in the agenda of the NYS Commission to Modernize the Regulation of Financial Services concerning the possibility of creating an exemption from the Freedom of Information Law regarding records acquired by the Attorney General in the course of a Martin Act investigation. As I understand the matter, those investigations may move quickly, and voluminous documents may be acquired. The concern is that "documents will ultimately be available to the public through FOIL and the attendant need to review documents meticulously for confidential material can slow production." You have questioned the need for a broad exemption excluding the documentation acquired during an investigation from disclosure.

In this regard, first, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. Most of the exceptions to rights of access include a standard relating the possibility or likelihood that disclosure would result in some sort of harm.

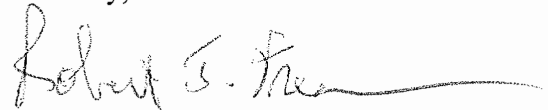
As suggested in the material, §87(2)(e) of that statute currently provides that records compiled for law enforcement purposes may be withheld, but only in certain circumstances, i.e., when disclosure would "interfere" with an investigation, "deprive" a person of a right to a fair trial, "identify" a confidential source, or "reveal" non-routine criminal investigative techniques or procedures. In each instance, the language includes a verb that describes the potentially harmful effect of disclosure. Similarly, §87(2)(d) authorizes an agency to withhold records to the extent that disclosure "would cause substantial injury to the competitive position" of a commercial enterprise.

Again, there is a standard based on harm that would arise by means of disclosure. Further, there are often situations in which records might properly be withheld under the provisions cited above, but only for a time. Disclosure of records relating to an ongoing investigation might interfere with the investigation, but when the case is closed, no longer would that be so; disclosure of current, detailed financial information relating to a particular firm might be damaging to the firm, but disclosure of the same information three years from now may have little effect. Additionally, §89(3)(a) of the Freedom of Information Law offers agencies the flexibility to deal with requests, even voluminous requests, in a manner that is reasonable in terms of the time of their responses.

In short, in my opinion, first, the Freedom of Information Law currently provides agencies with the ability to reach reasoned decisions concerning requests for records that involve the effects of disclosure. When disclosure would be damaging, agencies clearly have the ability to deny access. And second, for that reason, a new exemption providing an agency with the ability to engage in blanket denials of access would, in my view, be inappropriate and inconsistent with the thrust of the Freedom of Information Law and the principles that serve as its foundation.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Commission to Modernize the Regulation of Financial Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17241

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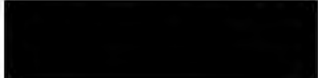
July 8, 2008

Ms. Kristine F. O'Grady



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

Dear Ms. O'Grady:

We are in receipt of your request for an advisory opinion regarding an application form promulgated by the Niagara County Legislature for public access to records pursuant to the Freedom of Information Law. Specifically, you ask whether naming every department head as a records access officer or having one unnamed records access officer is appropriate; whether an indication that the request is for inspection, not copying, is appropriate; and whether "confidential disclosure" or "part of investigatory files" are grounds for denying access to records, as indicated on the form. In an effort to provide guidance with respect to these issues, we offer the following comments.

First, and by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

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

Based on the foregoing, we believe that the County has the authority to designate one or more records access officers and the responsibility to assign such duties so as to ensure lawful coordination of responses to requests. In large agencies, there may be records access officers in each department or regional office; in others, there may be only one records access officer.

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

> "The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
>
> (2) Assist 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.
>
> (6) Upon request, certify that a record is a true copy.
>
> (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."

Based on the foregoing, each records access officer must "coordinate" an agency's response to requests. Therefore, we believe that requests may be made to named employees or records access officers. In our opinion when a County official or employee receives a request, s/he, in accordance

with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law, or forward the request to the records access officer to ensure a timely response.

Second, an agency may, pursuant to §89(3)(a) of the Freedom of Information Law require that a request be made in writing. We do not believe that an agency can require that a request be made on a prescribed form. That provision, as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, more than five business days may have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in our opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the law does not preclude an agency from developing a standard form, as suggested earlier, we do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form, in our opinion, may be designed in a way to streamline the agency's response and utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

It is not necessary, in our opinion, to provide the name of a records access officer on a form or in regulations promulgated by an agency. To do so would be to require the agency to amend and adopt new forms and/or regulations whenever there is a change in personnel.

Third, 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, or obtain a copy of such record upon payment of the established fee. While it may be misleading to the public for a form to indicate that the request is to inspect records only, that does not preclude an applicant from requesting a copy, and may often provide the most cost effective manner of accessing public records. This is not so in your

case, and in our opinion, when you provided additional information, the County responded in an appropriate manner.

We note that the Freedom of Information Law does not require that an agency transmit records via fax. A recent change in the law, however, requires agencies to make records available via email when they have the ability to do so. In our view, an agency may choose to make records available via facsimile transmission, but there is no obligation to do so.

With respect to your questions concerning appropriate grounds for denial of access to records, we note that as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy

of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

While we are not suggesting that the County has inappropriately engaged in blanket denials of access, in our opinion, it would be more appropriate for the form to recognize occasions when partial disclosure is required.

In order for records or portions of records to be confidential under the Freedom of Information Law, we believe that they must be "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a).

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

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

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

Accordingly, it is our opinion that the County's list of reasons for denying access to records includes duplicate items: one for "Confidential disclosure" and one for "Exempted by statute other than the Freedom of Information Law".

Listed as another ground for denial on the County's form is "Part of investigatory files." That language was part of the Freedom of Information Law as originally enacted in 1974 and was replaced in 1978 with §87(2)(e) of the Freedom of Information Law, which states that an agency may withhold records that:

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

Based on these provisions, an agency must first determine that the records are "compiled for law enforcement purposes" and then, as is so in conjunction with other exceptions to rights of access, that disclosure would result in some sort of harm or impediment to a law enforcement function.

Accordingly, if asked to redesign the County's form, rather than listing each of the ten grounds for denial of access, space for a description of the reason for a denial of access would be included.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Records Access Officer
Niagara County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17242

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July 10, 2008

Mr. John R. Frase
07-B-1644
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

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

Dear Mr. Frase:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request, with a money order for $5.00, to the Onondaga County Sheriff's Department. 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."

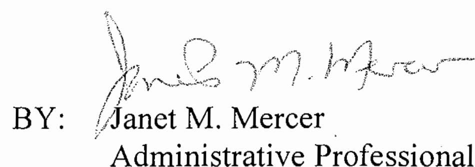
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

In an effort to enhance compliance with and understanding of the law, a copy of this opinion will be forwarded to the Records Access Officer at the Onondaga County Sheriff's Department.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17243

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July 10, 2008

Mr. Stephan D. Poole
94-A-2007
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. Poole:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request to the Chairman of the Board of Parole and, that as of the date of your letter to this office, you had not received a response.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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."

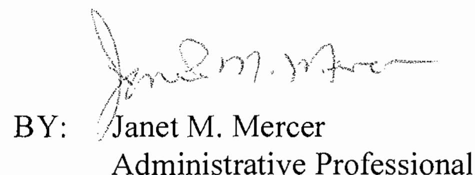
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive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

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 - 17244

From: Jobin-Davis, Camille (DOS)
Sent: Friday, July 11, 2008 1:11 PM
To: Christian Vischi, Village of Earlville'
Subject: RE: Freedom of Information Law

Christian:

Although I cannot help you with whether the COE report must be "approved" by the board, it is definitely a FOIL-able document. A record of the CEO's work for the month would be an intra-agency communication reflecting factual information – see section 87(2)(g). While there may be portions that are not required to be released.... probably very little....the report itself would be a record subject to FOIL.

As far as "approval" goes, pleased note that there is no legal requirement that minutes be approved by the board. As a matter of practice, I believe most board approve minutes on a regular basis, but that would not change whether or not they were available under FOIL.

Hope this helps. Sorry for the delay!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17245

From: Jobin-Davis, Camille (DOS)
Sent: Friday, July 11, 2008 1:14 PM
To: Christian Vischi, Village of Earlville
Subject: RE: Freedom of Information Law Question

And I should have read this email before responding to your first one!!

You are correct; this report is an intra-agency communication and would not be required to be released to the extent that it contained opinions or advice. Be aware, if parts of the report are highlighted at the board meeting, those parts, because they are shared during the course of a public meeting, would essentially lose their protection, and in my opinion the village would have to release those parts in addition to any other parts that are required to be released.

Again, I hope this is helpful.

Have a great weekend.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17246

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July 11, 2008

Mr. Rashad Scott
99-A-1636
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. Scott:

I have received your letter in which you asked how long a person may serve as grand jury foreman, how long a grand jury may be empaneled, and whether grand jury minutes are subject to the Freedom of Information Law.

In this regard, the issues that you raised concerning the terms of a grand jury or its foreman are beyond the knowledge or expertise of this office, since they involve questions that are unrelated to access to government records.

With respect to disclosure of grand jury minutes, the first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17247

Committee Members

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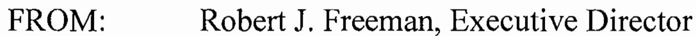
July 14, 2008

E-Mail

TO: Ms. Isabelle Lent

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. Lent:

I have received your letter concerning your ability to gain access to an autopsy report pertaining to your brother, who died in 1965. You indicated that you were informed that the report cannot be released. From my perspective, that is not so, and in this regard, I offer the following comments.

The provision pertaining to access to autopsy reports is §677(3)(b) of the County Law, which states that:

> "Such records shall be open to inspection by the district attorney of the county. Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Based upon the foregoing, 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. If you are the next of kin, it is suggested that you specify that to be so and assert your right to gain access pursuant to §677 of the County Law. Others would be required to obtain a court order based on demonstration of substantial interest in the records to gain a right of access.

Even if you are not the next of kin, 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.

I hope that I have been of assistance.

RJF:sc

FOIL-AO-17248

From: Freeman, Robert (DOS)
Sent: Monday, July 14, 2008 12:09 PM
To: Joseph M. Belth

Dear Mr. Belth:

I have received your inquiry concerning the status of advice sought by the Governor from an agency concerning the approval or veto of legislation.

In short, the Executive Chamber is an "agency" as defined by §86(3) of the Freedom of Information Law and, therefore, a written opinion or advice sought by the Governor and transmitted to him by an agency would constitute "inter-agency material" falling within the scope of §87(2)(g) of that statute. Under that provision, those portions of inter-agency or intra-agency materials consisting of advice, opinion, recommendation and the like may be withheld.

It is noted that, following the end of a legislative session, recommendations sent to a governor concerning legislation have historically been included in "bill jackets" that are available to the public from the State Library.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
Website: www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17249

From: Jobin-Davis, Camille (DOS)
Sent: Monday, July 21, 2008 2:33 PM
To: Kathryn Barber
Subject: Freedom of Information Law - police documents

Kate:

This is in response to your email request through the website of the Committee on Open Government.

In my opinion, if a report was read at a public meeting in its entirety, it should be made available, in its entirety, to the public, upon request. If the names of persons mentioned in the report were not read out loud at the meeting, it may be that those names can be withheld upon request for a copy of the written report. Essentially, I believe that if a record is read at a public meeting, the agency has waived its authority to later deny access to the record.

The Committee issues written advisory opinions and posts them on its website. For advisory opinions related to your question, I searched the Freedom of Information Law advisory index using the word "waived" and located the following opinion that may be helpful to you:
http://www.dos.state.ny.us/coog/ftext/f8161.htm

You may also want to consider the following advisory opinion:
http://www.dos.state.ny.us/coog/ftext/f12186.htm

Although you did not mention what grounds the City relied on to refuse access to the names of persons mentioned in the report, I note that Civil Rights Law section 50-a(1) protects access to personnel records pertaining to police and correction officers and states that: "All personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department....shall be considered confidential and not subject to review without the express written consent of such police officer....except as may be mandated by lawful court order."

Furthermore, while you could not invade your own privacy, the City would, in my opinion, not be required to release records of allegations made against a public officials or employees, for disclosure would cause an unwarranted invasion of personal privacy. Advisory opinions regarding that issue can be found under "P" for "Privacy – Public Employee" at the following webpage: http://www.dos.state.ny.us/coog/findex.html

I hope these are helpful to you.

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17250

From: Jobin-Davis, Camille (DOS)
Sent: Monday, July 21, 2008 3:20 PM
To: Gene DiMarco, Town of Richmondville
Subject: Freedom of Information Law - inspection of records

Dear Gene:

This is in response to the request you sent through the website of the Committee on Open Government.

In general, I believe that your hours are not relevant to the regular business hours of the town, and that arrangements should be made with the town clerk or other town personnel for the inspection of public records. Relevant written advisory opinions can be found on our FOIL Advisory Opinion Index webpage (http://www.dos.state.ny.us/coog/findex.html) under "I" for "Inspection and Copying".

I hope that this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO - 17251

From: Jobin-Davis, Camille (DOS)
Sent: Monday, July 21, 2008 3:34 PM
To: Ann Garris, Town of Carmel
Subject: Freedom of Information Law - parking permits

Dear Ann Garris:

This is in response to the request you made through the website of the Committee on Open Government.

I do not believe that handicap parking permit applications would be required to be provided to the public in response to a request made pursuant to the Freedom of Information Law. It is likely that you will find the following advisory opinion helpful:
http://www.dos.state.ny.us/coog/ftext/f10587.htm

If the applications are maintained by a state agency, my answer would be somewhat different: in that case the state agency would be prohibited from disclosing records that would cause an unwarranted invasion of personal privacy. This is different from the discretionary authority of a municipality.

I hope that this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17252

Committee Members

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July 22, 2008

Mr. Michael Connor
Executive Editor
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.

Dear Mr. Connor:

As you are aware, I have received your letter and a variety of material relating to a request made by a reporter for the *Post-Standard* pursuant to the Freedom of Information Law for records relating to two arrests pertaining to Robert Washington, 40, of Philadelphia that were made on the property of Syracuse University. While some elements of the records sought were made available, others were withheld.

Based on a review of the material, I offer the following comments.

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

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

According to the definition, as a general matter, an "agency" is an entity of state or local government. In my view, Syracuse University, a private institution, cannot be characterized as an "agency." However, as suggested by the University's attorney in response to the request, judicial decisions indicate that "an otherwise private entity will be found to have engaged in state action only where its activities are 'fairly attributable' to the state, such as where the private entity willingly engages

in joint activity with the government [or] is engaged in a traditionally exclusive public function...." [see e.g., Brentwood Academy v. Tennessee Secondary Schools Athletic Association, 121 S.Ct 924 (2001); Logan v. Bennington College, 72 F3d 1017 (2nd Cir. 1995), *cert. den.*, 117 S. Ct.79 (1996)]. As you are likely aware, the Court of Appeals has considered the status of Cornell University, a so-called "hybrid" institution, in that it includes four "statutory colleges" that are in some respects under the control of the State University, as well as purely private aspects of the University, and the Court reached a somewhat similar conclusion [see Alderson v. NYS College of Life Sciences at Cornell University, 4 NY3d 225 (2003); Stoll v. NYS College of Veterinary Medicine at Cornell University, 94 NY2d 162 (1999)].

The activities of Syracuse University that potentially bring certain areas of its functions within the scope of the Freedom of Information Law relate to its law enforcement authority. The University's response to your requests suggests a belief on its part that records involving its law enforcement functions are subject to rights conferred by that statute.

Viewing the status of the records from a different perspective, again, the Freedom of Information Law pertains to all agency records, and §86(4) defines "record" to include:

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

In consideration of the 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. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as

information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

As the foregoing relates to the request, I point out that the University employs individuals who are characterized as and have the powers of peace officers. Further, they carry out their duties essentially as agents of the government of the City of Syracuse. Section 2.10(77)(b) of the Criminal Procedure Law states in relevant part that:

> "For the protection of the grounds, buildings and property of Syracuse University, the prevention of crime and the enforcement of law and order, and for the enforcement of such rules and regulations as Syracuse University shall from time to time establish, the chief law enforcement officer of the city of Syracuse may appoint and remove, following consultations with Syracuse University; such number of Syracuse University peace officers as is determined by the chief law enforcement officer of the city of Syracuse to be necessary for the maintenance of public order at such university, such appointments to be made from persons nominated by the chancellor of Syracuse University. Such peace officers shall comply with such requirements as shall be established by the chief law enforcement officer of the city of Syracuse...Such Syracuse University peace officers shall have the power of peace officers within the geographical area of employment of the grounds or premises owned, controlled or administrated by Syracuse University within the county of Onondaga, except in those situations when requested by the chief law enforcement officer of the city of Syracuse..."

Paragraph of §2.10(77) specifies that Syracuse University peace officers "shall, before entering up the duties of his or her office, take and subscribe the oath of office prescribed by article thirteen of the state constitution, which oath shall be filed in the office of the county clerk..."

In consideration of §2.10(77) of the Criminal Procedure Law, it might be contended that records of the University's peace officers, as agents of the "chief law enforcement officer of the city of Syracuse", are City records, for in the words of the definition of "record", they are "kept, held, filed [and] produced" for an agency, the City of Syracuse. Therefore, irrespective of whether the University is obliged to give effect to the Freedom of Information Law, I believe that the records involving the functions of the University's peace officers are City records subject to rights conferred by that statute.

If the records are City records, it is suggested that a second request could be made to the City's records access officer. The regulations promulgated by the Committee on Open Government, which have the force of law, state that the records access officer has the duty of coordinating an agency's response to requests (21 NYCRR §1401.2). In this instance, the records access officer

could direct the University to disclose City records to the extent required by the Freedom of Information Law, or acquire the records to determine rights of access.

Second, based on the assumption that the records fall in some manner within its scope, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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)(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.

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..." (34 CFR §99.3).

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, insofar as the records in question could be characterized as those of a law enforcement unit, FERPA in my opinion 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.

With respect to the other exceptions to rights of access cited by the University, relevant is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." It has been advised that portions of records identifying witnesses or others interviewed by a law enforcement agency in relation to an incident may be withheld, unless their identities have been disclosed, i.e., by means of statements made or evidence received by a court in a judicial proceeding. Often statements that have not become available via judicial proceedings are accessible following the deletions of names or other details identifiable to witnesses.

I disagree with the University's contention that disclosure of addresses where arrests occurred may be withheld on the ground that disclosure would result in an unwarranted invasion of the privacy "of those persons who reside at such addresses." Historically, a booking record, the record of arrest by the arresting agency, has always been public and includes the location of an arrest. Further, the location of an event in which law enforcement personnel are involved generally is recorded in a police blotter or equivalent record, which has been found to be accessible under the Freedom of Information Law [see e.g., Sheehan v. City of Binghamton, 59 AD2d 808 (1977). Perhaps most importantly, when a police vehicle arrives at a particular location in response to an event, its presence is not secret; the vehicle and the officers are in plain sight and can be seen by any person in the vicinity. For those reasons, I do not believe that portions of records indicating the addresses of arrests can justifiably be withheld.

Section 87(2)(e) may also be pertinent. That provision authorizes an agency to withhold records that:

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

In my opinion, only to the extent that the harmful effects described in subparagraphs (i) of §87(2)(e) would there be justification for a denial of access.

Records prepared by University peace officers would also fall within §87(2)(g), which enables an agency to withhold records that:

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

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

Lastly, reference was made to your reporter's assertion that "redaction of criminal complaints, or so-called 'felony complaints,' is impermissible because 'Court documents may not be redacted.'" In short, as I understand its response, the University contended that records of a private institution need not be disclosed, even if they may be "otherwise available from courts or governmental agencies." Again, if the records are maintained by the University's law enforcement unit, for reasons described earlier, I believe that they are subject to the Freedom of Information Law. Further, although the courts fall beyond that coverage of that law, the Court of Appeals has determined that records emanating from a court that come into the custody of an agency, i.e., the City of Syracuse, constitute "agency records" that fall within its requirements [Newsday v. Empire State Development Corp., 98 NY2d 746 (2002)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eleanor Ware
Records Access Officer, City of Syracuse

FOIL-AO-17253

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, July 22, 2008 10:33 AM
To: Michael Burke
Subject: Freedom of Information Law - probation restrictions

Dear Michael Burke:

This is in response to the request that you submitted through the website of the Committee on Open Government.

It is my understanding that terms of probation are set by the courts. If that is correct, there would be a court order setting forth the terms of a particular person's probation. Although court records are not subject to the FOIL, unless they have been sealed, they are generally available pursuant to Judiciary Law section 255 and the Uniform Justice Court Act section 2019-a.

Further, if a record is public, and it is transmitted to an agency that is subject to FOIL, the record should be made available upon request.

For further clarification, I was able to locate related advisory opinions on our FOIL Advisory Opinion index website (http://www.dos.state.ny.us/coog/findex.html), under "C" for "Court Records" and under "P" for "Probation Records", as follows:

http://www.dos.state.ny.us/coog/ftext/f16547.htm

http://www.dos.state.ny.us/coog/ftext/f7611.htm

I hope that these are helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

, m

FOIL-AO-17254

From: Freeman, Robert (DOS)
Sent: Wednesday, July 23, 2008 2:59 PM
To: Martha Conway, Eagle Newspapers
Subject: RE: Sir, I think I need a ruling

Hi - -

There is a statute, §308(4) of the County Law, that specifies that records of emergency calls on a county's E-911 system (the electronic system) are confidential. That provision pertains only to the actual record of the call, i.e., a tape recording or transcript of the conversation between the caller and the recipient. Records relating to ensuing calls or actions taken, i.e., the dispatcher's call to a police or fire department, are not subject to §308(4) and fall within the scope of rights conferred by the Freedom of Information Law.

I hope that this will be of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
Website: www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17255

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, July 24, 2008 11:00 AM
To: Tom
Subject: Freedom of Information Law - privacy concerns

Dear Tom:

This is in response to the request you made through the website of the Department of State.

You asked: "Why is it okay to make available a public employee's name and salary, but not okay to list people or persons who receive public subsidies from the state? Are not the two both receiving the public's money? Are some citizen's rights more private than others?"

Depending on the type of public assistance, and whether information is protected by federal law (Medicaid), our analysis varies, but in short, disclosure of the names of recipients of public assistance in the form of subsidized housing, for example, would constitute an unwarranted invasion of personal privacy. On the other hand, there is a statutory requirement that public employee names, titles, salaries and public office addresses be made available upon request (FOIL section 87[3][b]). For our supporting legal analysis, please see advisory opinions on our website of FOIL opinions (http://www.dos.state.ny.us/coog/findex.html) under "P" for "Payroll Information" and for "Public Assistance, Recipients of".

And, if you have further questions, please feel free to call or write back. I hope that this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17256

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, July 24, 2008 10:34 AM
To: Sally Geisel, NYS Insurance Department
Subject: Freedom of Information Law - date certain

Dear Sally Geisel:

This is in response to the request you made through the website of the Committee on Open Government.

In direct response to your question, "Is NY Pub Off Law S. 89(3) applicable when NY Pub Off Law S. 89(5) is involved?", my answer is Yes, section 89(3) applies even when section 89(5) is utilized..... but this may be more helpful:

If it is necessary to change a "date certain" by which the agency will provide a completed response to the request, the agency can do so by sending written correspondence indicating the grounds for further delay, one of which could clearly be the process of communicating with a submitting entity outlined in section 89(5).

If you still have questions, please call, I may be able to help navigate the requirements.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

OML-AO - 4658
FOIL-AO - 17257

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, July 24, 2008 10:28 AM
To: Mary Maitino
Subject: Open Meetings Law and Freedom of Information Law

Dear Mary Maitino:

This is in response to the request you made through the website of the Committee on Open Government.

I've read your correspondence with the International Charter School of Schenectady, and can confirm your opinion that meeting notices must be posted in a designated location. The following is an advisory opinion to that effect, that I believe you will find helpful: http://www.dos.state.ny.us/coog/otext/o4127.htm You may find it helpful to peruse other advisory opinions on our website of OML opinions (http://www.dos.state.ny.us/coog/oindex.html) under "N" for "Notice".

I also note that your request for a financial report was denied because it had not yet been presented to the Board of Trustees. Although they are in draft form, and may misrepresent the financial status of the school, in my opinion they are records subject to the FOIL, and upon request, must be disclosed in a timely manner. See: http://www.dos.state.ny.us/coog/ftext/f15359.htm

Finally, the following will confirm your opinion that no fee can be required for records that can be transmitted electronically: http://www.dos.state.ny.us/coog/ftext/f15854.htm Additional advisory opinions regarding fees can be found on our website of FOIL opinions (http://www.dos.state.ny.us/coog/findex.html) under "F" for "Fees".

I hope this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17258

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July 24, 2008

Mr. Sidney Butler
91-A-2844
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

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

Dear Mr. Butler:

I have received your letter in which you referred to a request for a log book maintained by the Yonkers Police Department that is allegedly missing. You sought information concerning "case law relating to destruction of evidence and documents lost or not on record..."

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sc

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17259

ommittee Members

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July 25, 2008

Ms. Rhonda J. Mangus

The staff of the Committee on 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. Mangus:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the North Tonawanda Police Department. Specifically, you requested copies of records pertaining to bomb threats occurring at North Tonawanda High School during the 2005-2006 school year. After contacting the City Attorney and receiving copies of incident reports and related records without explanation, you informed the Town that you believed its response to be incomplete. Subsequently, you were informed, in writing, that recordings of telephone calls are routinely destroyed after 30 days, and that the Department confirmed "that there are no photos that correspond with your request". You were charged $11.25 for 11 pages of records, and informed that a copy of the Department's Standard Operating Procedures would be made available to you at a cost of $85.75. At your request, and in an effort to provide guidance with respect to these issues, we offer the following comments.

First, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather it is a statute that may require agencies to disclose existing records or portions thereof.

It is emphasized government agencies and their employees cannot destroy records at will. The "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals

with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

In the context of your correspondence, it appears that recordings of telephone calls may have been destroyed in accordance with a schedule established by the Commissioner of

Education that permitted the disposal of those kinds of records after a particular period of time. If that assumption is accurate, the destruction of records would have been carried out in accordance with law.

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

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.

Although it is not apparent whether records other than those made available that are responsive to your requests exist, it may be that access to portions of the records that you have requested could be denied based on paragraphs (e) and/or (f). Section 87(2)(e) permits an agency to deny access to records that "are compiled for law enforcement purposes and which, if disclosed, would:

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

Section 87(2)(f) permits an agency to deny access to records that "if disclosed could endanger the life or safety of any person".

Also 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

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.

Finally, with respect to fees, this will confirm your opinion that an agency is not permitted to charge an excessive amount for paper copies. The specific language of the FOI Law

and the regulations promulgated by the COG indicate that, absent statutory authority, an agency may change fees only for the reproduction of records. Section 87(1)9(b) of the Freedom of Information Law states:

> "(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."

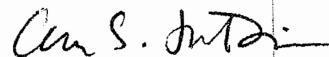
The regulations promulgated by the Committee state in relevant part that:

> "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)."

On the other hand, if 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, based on amendments to the law in 2006 (Freedom of Information Law §89[3][b]). Because sending a record electronically does not involve reproducing a record, in our opinion, no fee can be charged. E-mailing a copy of the standard operating procedures, which may be maintained electronically might involve only the transmittal of a record, not the photocopying thereof.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:sc

cc: Randy Szukala, Chief of Police
Shawn Nickerson, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17260

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July 25, 2008

Ms. Rhonda J. Mangus

The staff of the Committee on 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. Mangus:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Office of the State Comptroller. Specifically, you requested audit results relating to the City of North Tonawanda School District. In response, by correspondence dated January 18, 2008, the Office of the Comptroller responded that you would be contacted within the next twenty business days regarding its determination. Subsequently, by correspondence dated February 15, 2008, the Office of the Comptroller advised that the "audit you seek has not been completed yet. We will notify you when the audit is released." It is not clear from the correspondence you submitted whether the Office of the Comptroller has initiated a new audit in addition to the audit conducted in October of 2007. In an effort to provide clarification and guidance with respect to the time frame offered in the response you were provided, 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such

> objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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

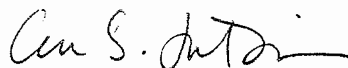
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

Finally, although you indicated that your search was unsuccessful, our search of the Comptroller's website revealed an executive summary and a 23 page audit of the City of North Tonawanda School District. We have enclosed a paper copy of these documents for your records.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:sc

cc: Shelly Brown

Enc.

FOIL-AO - 17261

From: Jobin-Davis, Camille (DOS)
Sent: Monday, July 28, 2008 12:32 PM
To: Sally Geisel, NYS Insurance Department
Subject: RE: Additional inquiry

Sally:

The date certain that the agency must articulate is the projected outside date by which the agency has reason to believe it will be able to respond to the request in its entirety, either denying or granting access. An agency's date certain should include consideration of the time limits set forth in section 89(5), and those articulated by the Linz court. If necessary, it can be amended, with written correspondence to the applicant.

Application of section 89(5) necessitates that the agency refrain from indicating whether the records are going to be made available until after the time limits of section 89(5) have passed. Because of the rights articulated in section 89(5), the agency must allow for resolution of these issues before granting or denying access.

Accordingly, we recommend that an agency refrain from indicating whether the agency will grant or deny access until after the time frames required by section 89(5) have passed and the issues are resolved.

I hope this helps.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17262

From: Jobin-Davis, Camille (DOS)
Sent: Monday, July 28, 2008 1:41 PM
To: 'Charlotte Cowan, Canaan Town Clerk'
Subject: RE: Freedom of Information Law - various issues

Charlotte:

The advice I would give for this question is very similar to my response to your first question: if the historical association is performing a governmental function, and it is an agency, then its financial records would be subject to FOIL. Additionally, if the town requires the historical association to provide records to the town, then those records would be subject to FOIL from the town.

Off the top of my head, I can think of no legal grounds that would permit an agency to deny access to financial records, minus the bank account numbers and/or any passwords, of course.

I hope that this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17263

From: Jobin-Davis, Camille (DOS)
Sent: Monday, July 28, 2008 1:47 PM
To: Joyce Grazioplene, Village of Rochester
Subject: RE: Freedom of Information Law - identity of complainant

Joyce:

If the applicant doesn't like the answer you give, the law permits the applicant to appeal to the Village Mayor or whoever has been designated the FOIL appeals officer, if someone has. If the applicant still doesn't like the answer, the law permits the applicant to then bring a legal action against the Village, under Article 78 of the Civil Practice Law and Rules. If a court rules that the Village violated the FOIL, it could, in its discretion, order the Village to pay attorney's fees to the applicant.

In my experience, because our opinions are generally respected, when an agency relies on an advisory opinion in making a decision to deny access, the courts are unlikely to award attorney's fees to the prevailing party.

I hope that this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17264

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July 28, 2008

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

I have received your letter in which you inquired with respect to the "time line for a FOIL request" made to a medical department or courts.

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

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

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 applies to records of state and local governments in New York, but it excludes the courts from its coverage. Further, if the medical department to which you referred is a private facility, the Freedom of Information Law would not apply.

If the medical department in question is part of an agency as that term is defined in §86(3), it would be required to comply with the Freedom of Information Law. If that is so, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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."

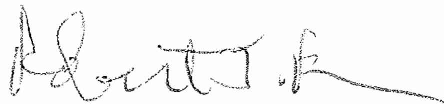
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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-17265

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

July 28, 2008

Mr. Charles Wright
80-A-2724
Elmira Correctional Services
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. Wright:

I have received your letter concerning difficulty in obtaining a copy of a pre-sentence report and a copy of a court order prepared in 1994 granting a motion to direct the Board of Parole to release the report.

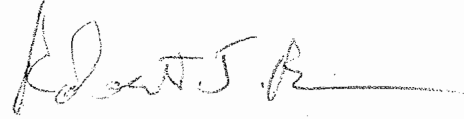
In this regard, I am unaware of whether the report was made available to you or your attorney soon after the order was made, or whether it remains valid. Assuming that the order continues to be valid and your request made under the Freedom of Information Law was rejected by a parole officer, it is suggested that appeal the denial of your request. Section 89(4)(a) of the Freedom of Information Law pertains to the right to appeal and states in relevant part that:

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

For your information, Terrence X. Tracy, Counsel to the Division of Parole, has been designated to determine appeals made pursuant to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17266

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July 28, 2008

Mr. John Blanding
07-A-0935
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508

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

Dear Mr. Blanding:

I have received your letter in which you asked how you might obtain a transcript of your judicial proceeding.

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

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

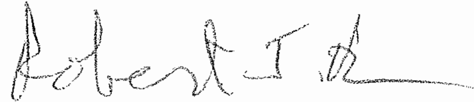
In turn, §86(1) defines "judiciary" to mean:

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

Based on the foregoing, the courts fall outside the scope of the Freedom of Information Law. Similarly, records maintained by private attorneys fall beyond the coverage of that law. Nevertheless, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). To seek records from a court, it is suggested that request be made 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 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-17267

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July 28, 2008

E-Mail

TO: Mr. Andrew Steinberg

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Steinberg:

I have received your letter in which you referred to a request for records made to the Division of State Police. You indicated that you were informed that eleven pages were found that were responsive to your request. However, when you asked for the location where they could be inspected, the person with whom you spoke "refused to give [you] the information."

In this regard, when records are accessible under the Freedom of Information Law, §87(2) states that they are available for inspection and copying. Further, by way of background, §89(1) of that statute requires the Committee on Open Government to promulgate general rules and regulations concerning the procedural implementation of the law (see 21 NYCRR Part 1401). In turn, §87(1) requires each agency to promulgate its own regulations consistent the regulations adopted by the Committee and the Freedom of Information Law. The regulations promulgated by the Committee, which have the force and effect of law, state that "Each agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3) Therefore, the Division of State Police is required to identify in its regulations the locations where records may be inspected.

In an effort to enhance compliance, a copy of this response will be sent to Captain Laurie Wagner, the Division's records access officer.

I hope that I have been of assistance.

RJF:jm

cc: Captain Laurie Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17268

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July 28, 2008

Mr. Jeremy S. Edsall
05-B-2145
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

Dear Mr. Edsall:

I have received your correspondence, and this is to inform you that this office has a substantial backlog of requests for advisory opinions. It likely that an opinion responsive to the issues that you raised cannot be prepared for several months.

It is noted that you referred to an appeal made under the Freedom of Information Law in May that had not been determined. In this regard, §89(4)(a) of that statute requires that an appeal be determined within ten business days of its receipt. Further, paragraph (b) of §89(4) states in part that "Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial." That being so, if an appeal is not determined within ten business days of its receipt, the person seeking the record may consider the appeal to have been denied and has the ability to seek judicial review of the denial pursuant to Article 78 of the Civil Practice Law and Rules.

I hope that the foregoing may be of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. John Tunney, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17269

Committee Members

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July 28, 2008

Mr. Frank J. Povoski
05-B-2531
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. Povoski:

I have received your letter concerning your right to gain access to records that had been previously provided.

In this regard, it has been 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"[Moore v. Santucci, 151 AD2d 677, 678 (1989)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-17270

From: Freeman, Robert (DOS)
Sent: Tuesday, July 29, 2008 8:48 AM
To: Robert Andres, Jr.
Subject:

Dear Mr. Andres:

I have received your communication, and it appears that you may misunderstand the FOIL. There is no particular exemption regarding police reports. On the contrary, all such reports are subject to rights of access, and the extent to which they are accessible to the public or deniable is dependent on the contents of reports and the effects of disclosure. In some instances, those reports may be accessible in their entirety, while in others, portions may be withheld, i.e., those portions which if disclosed would interfere with an investigation, identify a confidential source, etc.

For more detail on the subject, to our website and click onto "advisory opinions" on the left side. When you do, the page to the right will change and you will see reference to an index to advisory opinions. In that paragraph, click onto "Freedom of Information Law", and you will then see the alphabet. Click onto "I" and scroll down to "Incident reports, law enforcement". Several lengthy advisory opinions will be available in full text for your review.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
Website: **www.dos.state.ny.us/coog/coogwww.html**

FOIL-AO - 17271

From: Freeman, Robert (DOS)
Sent: Tuesday, July 29, 2008 10:42 AM
To: Karen Miller, County of Schoharie
Subject: FOIL request

Dear Ms. Miller:

I have received your inquiry concerning the ability of the client of an attorney to review records sought by the attorney on behalf of the client.

In short, it was held years ago that records accessible under the Freedom of Information Law are equally available to any person, irrespective of one's status or interest. That being so, the client would clearly have the same rights of access as the attorney acting on the client's behalf. Based on that principle, I know of no reason why the client should not be able to review the records.

If you have questions concerning the foregoing, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
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Albany, NY 12231
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FOIL-AO - 17272

From: Freeman, Robert (DOS)
Sent: Tuesday, July 29, 2008 11:13 AM
To: Jim Welsh
Subject: Archived prison records

Dear Mr. Welsh:

I have received your letter in which you sought guidance concerning your ability to gain access to records pertaining to your grandfather, who was sentenced for committing a crime in the 1920's. Specifically, you wrote that you are interested in gaining access to records relating to the crime, arrest, trial, conviction, sentence, etc.

In this regard, there may be several sources of information. First, I note that the Freedom of Information Law does not include the courts within its coverage, but that court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). If you know or can determine the court in which the proceeding was conducted, the records maintained by the court clerk, which would likely include the items to which you referred, would be accessible. Second, if you do not know where the proceeding was conducted, it is suggested that you contact the records access officer at the Department of Correctional Services. The records access officer, Mr. Chad Powell, has the duty of coordinating an agency's response to requests made under the Freedom of Information Law. Mr. Powell can be reached at (518) 457-9771 or cepowell@docs.state.ny.us. If the Department no longer has the records, I would conjecture that you could be directed to the entity that now has custody of the records, and further, that the entity would be the State Archives. A review of those records would include information regarding the crime and sentence and identify the court in which the proceeding was conducted.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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FOIL-AO-17273

From: Freeman, Robert (DOS)
Sent: Tuesday, July 29, 2008 4:58 PM
To: Jordan Wishy, Ph.D., Rockefeller College of Public Affairs and Policy University at Albany

Dear Dr. Wishy:

I have received your communication and apologize for the delay in response.

You referred to a request for the Saratoga County budget and a response indicating that the budget is not available electronically. You expressed the view that it is "inconceivable given the reliance we all have on computers" that the budget would be prepared "the old-fashioned way." If indeed the budget was prepared and is stored electronically, you asked whether the County's denial of your request is "consistent with the letter and spirit of FOIL."

In this regard, first, the Freedom of Information Law pertains to all government agency records, and §86(4) defines the term record to include any information "in any physical form whatsoever" kept or produced by, with or for an agency. Therefore, if the budget was prepared or is maintained electronically, the electronic record falls within the scope of that statute.

Second, legislation that will become effective on August 7 essentially codifies principles expressed in judicial decisions and the advice offered by this office in relation to information maintained electronically. It has been held, and the specific language of the law will soon state, that "An agency shall provide records in the medium requested…if the agency can reasonably make such copy", and that "When an agency has the ability to retrieve or extract a record or data contained in a computer storage system with reasonable effort, it shall be required to do so."

In short, I believe that an agency is now and will soon clearly be statutorily required to make records available in electronic form when it has the ability to do so with reasonable effort.

I hope that I have been of assistance.

cc: Barbara Plummer, Records Access Officer

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927

OML-AO - 4654
FOIL-AO - 17274

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, July 30, 2008 1:18 PM
To: Hon. Helen T. Rose, Herkimer County Legislator
Subject: RE: Open Meeting Law

Dear Helen:

In response to your first question, in general, when moving to enter into executive session, a public body must be more articulate than the statutory language of section 105 of the Open Meetings Law. It has been held judicially that :

"...the public body must identify the subject matter to be discussed (See, Public Officers Law §105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305)." Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra.

With specific respect to a motion to enter into executive session to discuss litigation, I believe you will find the following advisory opinion directly on point:
http://www.dos.state.ny.us/coog/otext/o3654.htm

With respect to your second question, a tape recording of an executive session, made by a public official, would be a record of the agency, subject to FOIL. Although there is no statute or case law that prohibits it, I recommend against it for that very reason. Once the agency receives a FOIL request (recording are required to be kept for a certain period of time), it would be required to obtain the copy from you, and determine which portions were required to be made available.

And third, even when the public is not present at a meeting, I strongly recommend that you formalize your motion to enter into executive session and take the vote to enter into executive session. This will assist in the preparation of minutes, preserve the record in the event that you are challenged, and will, as you said, notify the members that the discussion is sensitive.

I have refrained from using the word "confidential" in my advice to you. That is because only an act of law can make something "confidential" which essentially means that a person is prohibited from disclosing it to others. Example: mental health records are confidential pursuant to the Mental Hygiene Law. Open Meetings Law permits a public body to choose to enter into executive session but does not require it, so. And, in fact, the OML would not apply to a discussion that is made "confidential" by state or federal law – see section 108. Example: attorney-client privileged discussions.

You may want to review advisory opinions under "E" for "Executive session, claim of confidentiality regarding" at the following website: http://www.dos.state.ny.us/coog/oindex.html. Again, although I know of no law that would prohibit someone from disclosing what was said at an executive session, and presumably the First Amendment would protect that ability, whether it

is wise or a good thing to do is another question.

I hope that this is helpful to you. I will be out for the remainder of the day, but will return to the office on Thursday.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17275

Committee Members

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July 31, 2008

Hon. P. David Soares
District Attorney
Albany County Judicial Center
6 Lodge Street
Albany, NY 12207

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

Dear District Attorney Soares:

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

You wrote that you have received requests pursuant to that statute relating to your "Investigation D", and your "Inquiry into the Alleged Misuse of New York State Resources by the Office of Governor Eliot Spitzer and the Division of State Police." As part of Investigation D, the Commission on Public Integrity ("the Commission") made available to you a copy of Darren Dopp's testimony before the Commission. Although the records of testimony in the possession of the Commission are excluded from the coverage of the Freedom of Information Law pursuant to §94(17) of the Executive Law, it is your view that duplicates of those records in the possession of your office fall within the scope of the Freedom of Information Law. You have asked "whether the Executive Law exclusion applies in this situation."

Reference was also made to a report prepared by your office "based on testimony and evidence gathered pursuant to limited waiver agreements." You indicated that requests have been made pursuant to the Freedom of Information Law for "the unredacted version of this report", but that "[v]arious attorneys have raised concerns about [y]our authority to release a report of this type, citing among other things, CPL 190.85." You pointed out, however, that "the original report was not created using any information garnered through a grand jury subpoena", and asked whether "there is an exemption under the Freedom of Information Law that pertains to this type of report."

From my perspective, your conclusion concerning the authority to disclose records obtained from the Commission is accurate. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the definition, when documentary materials, regardless of their physical form (i.e., paper or electronic storage media), come into the possession of an agency, they constitute agency "records" that fall within the requirements of the Freedom of Information Law.

When an agency prepares a record and copies are transmitted or acquired to one or more other agencies, any of those agencies in receipt of a FOIL request would be obliged to respond [see e.g., Muniz v. Roth, 620 NYS 700 (1994)]. Perhaps most significant for purposes of illustration is a decision rendered by the Court of Appeals involving a request made to a state agency for copies of subpoenas issued by a court for that agency's records. To put the matter in perspective, while the Freedom of Information Law includes all state and municipal agencies within its scope, the courts are excluded from the coverage of that law. That being so, the agency denied access, contending that court records in its possession were not covered by the Freedom of Information Law. In Newsday v. Empire State Development Corporation [98 NY2d 359 (2002)], the Court of Appeals unanimously disagreed, stating that the records were subject to the Freedom of Information Law, "irrespective of whether they are deemed to have been a mandate of a court and issued for a court." The Court found further that "ESDC, a state public corporation, is undeniably an agency under FOIL. It presently has physical possession of the subpoenas. Thus, in the hands of ESDC, the subpoenas constitute agency records: 'information kept [or] held * * * by * * * agency [i.e., ESDC] * * * in any physical form whatsoever."

In like manner, I believe that copies of the records made available by the Commission in your possession are records of the Office of the Albany County District Attorney for the purpose of consideration of a request made under the Freedom of Information Law.

Second, records in possession of the Commission fall outside the requirements of the Freedom of Information Law. Section 94(17)(a) of the Executive Law states that:

> "Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection and copying are:
>
> (1) the information set forth in an annual statement of financial disclosure filed pursuant to section seventy-three-a of the public officers law except the categories of value or amount, which shall

> remain confidential, and any other item of information deleted pursuant to paragraph (h) of subdivision nine of this section;
>
> (2) notices of delinquency sent under subdivision eleven of this section;
>
> (3) notice of reasonable cause sent under paragraph (b) of subdivision twelve of this section;
>
> (4) notices of civil assessments imposed under this section which shall include a description of the nature of the alleged wrongdoing, the procedural history of the complaints, the findings and determinations made by the commission, and any sanction imposed;
>
> (5) the terms of any settlement or compromise of a complaint or referral which includes a fine, penalty or other remedy; and
>
> (6) those required to be held or maintained publicly available pursuant to article one-A of the legislative law."

Article Six of the Public Officers Law is the Freedom of Information Law, and based on the foregoing, the only records required to be disclosed by the Commission are those identified in subparagraphs (1) through (6) of paragraph (a) of §94(17). That being so, other records, including the records at issue, in possession of the Commission are beyond the coverage of the Freedom of Information Law.

Third, that the records are exempt from disclosure to the public when in possession of the Commission does not, in my opinion, render them exempt in like manner when duplicates are in possession of another agency. There are a variety of instances in which records sought from one agency are exempt from disclosure, but in which the same records in possession of a different agency are accessible. For instance, in a case involving a request for W-2 forms maintained by a town pertaining to its employees, it was 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 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 and 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. 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 issue was raised and answered in the same manner by the State Department of Taxation and Finance with respect to its records pertaining to taxpayers. Based on that information and an opinion prepared by this office, it was held in Day v. Town Board of Town of Milton (Supreme Court, Saratoga County, April 27, 1992) that W-2 forms in possession of a town are subject to rights of access conferred by the Freedom of Information Law. More recently, in a case

involving data maintained by a state agency "derived from tax forms or may be compiled in the same manner as tax forms does not place such data within the protection of the confidentiality provisions of the Tax Law (*see* Tax Law §202, §697[e]; 26 USC 6103)" (The Herald Company v. New York State Department of Economic Development, Supreme Court, Albany County, February 8, 2007).

In short, although records may be exempt from disclosure when in possession of an agency that is the subject of a specific statute that confers confidentiality, that restriction does not render duplicate records maintained by other agencies confidential, unless there is statutory direction to do so. An example of a statute that requires confidentiality on the part of recipients of information, §33.13 of the Mental Hygiene Law, states that clinical records pertaining to patients or clients maintained by a mental health facility are confidential, and subdivision (f) states that information disclosed to third parties "shall be kept confidential by the party receiving such information and the limitations on disclosure in this section shall apply to such party." Section 94(17)(a) of the Executive Law contains no such direction. Therefore, in my opinion, §94(17)(a) is inapplicable to records in your possession, and there is no statutory prohibition regarding disclosure by your office. Rather, I believe that the records in your possession fall within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, all agency records are accessible to the public, except those records portions thereof that may be withheld in accordance with exceptions to rights of access appearing in paragraphs (a) through (j) of §87(2). It is emphasized that the language of §87(2) indicates that an agency "may" withhold records or portions of records in certain circumstances; it does not require that records falling within the exceptions must be withheld. 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 permissible rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

The only instance in which an agency must withhold records would involve a situation in which a statute prohibits disclosure, and I do not believe that any statute serves to do so in the context of your inquiry relating to the records obtained from the Commission.

In sum and in response to your question involving materials acquired from the Commission, in my view, §94(17)(a) of the Executive Law does not apply to the records of testimony to which you referred; rather, the governing statute is the Freedom of Information Law, which authorizes you to disclose the entirety of the testimony.

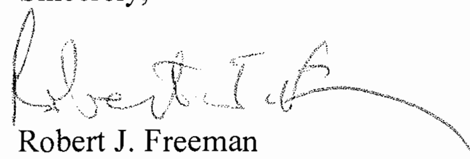
With respect to your remaining question, the first ground for denial of access in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §190.85 of the CPL, which when applicable, creates a temporary exemption from disclosure. However, based on the facts that you provided, I do not believe that it applies in this case or that it serves as a bar to disclosure.

Subdivision (1) of §190.85 states that a grand jury may submit a report to the court by which it was empaneled concerning "misconduct, non-feasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action." Subdivision (2) requires the court to which the report is submitted to "make an order accepting and filing such report as a public record" if certain conditions are met. Subdivision (3) states that the "order accepting a report....and the report itself, must be sealed by the court and may not be filed as a public record, or be subject to subpoena or otherwise be made public until at least thirty-one days after a copy of the order and the report are served upon each public servant named therein" or following an appeal if an appeal is taken. Subdivision (4) states that if a court finds that the filing of a report "may prejudice fair consideration of a pending criminal matter, it must order such report sealed...during the pendency of such criminal matter..."

It is my understanding that the testimony acquired by your office was not obtained under oath or pursuant to a grand jury subpoena, that the subject of the investigation never was presented before a grand jury, and consequently, that no grand jury submitted a report falling within the coverage of §190.85 to a court. If that is so, again, in my opinion, §190.85 has no application, and there is no relevance to the provisions in that statute dealing with the sealing of the report at issue. From my perspective, the report is subject to rights of access conferred by the Freedom of Information Law, and it is reiterated that the Freedom of Information Law is permissive. Only in situations in which a separate statute forbids disclosure is an agency, such as your office, prohibited from disclosing records in its possession. In this instance, I know of no statute that would prohibit disclosure.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 17276

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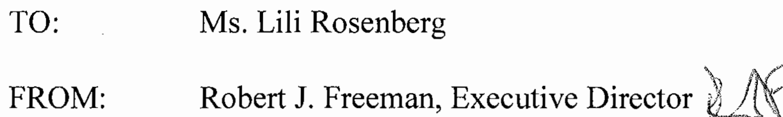
July 31, 2008

E-Mail



TO: Ms. Lili Rosenberg

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Ms. Rosenberg:

As you are aware, I have received your correspondence concerning a request for records made to the Village of Hempstead. Please accept my apologies for the delay in response. The issues, as I understand them, involve the payment for photocopies of records that you requested, and the obligation of the Village to transmit records via fax.

In this regard, to learn more of the matter, I have contacted the Village and spoken with Mr. Herbert Tamres, Deputy Village Attorney. As I understand the situation, a request was made in late May for all records pertaining to a particular project. In response, the Village Clerk indicated that approximately 590 pages had been located and that the fee for copies at the rate of twenty-five cents per photocopy would be $148. You then asked and the Village agreed to permit your representative to inspect the records before preparing copies. He did so and apparently left instructions to have 240 pages copied and sent to you. After the copies were prepared, you asked that the records be sent to you via fax. From my perspective, because copies were requested and prepared, the Village is owed the fee, $60, for doing what it was asked to do.

With respect to faxing records sought pursuant to the Freedom of Information Law, there is nothing in that statute that addresses the issue. That being so, this office has advised that a standard based on reasonableness in consideration of the facts and circumstances is most appropriate. As you know, when a fax machine is used either to accept or transmit material, the machine cannot be used for any other function. Because that is so, it has been advised, for example, that when a fax machine is used for a dedicated purpose, as in the case of a law enforcement agency using its fax machine only for specific or emergency purposes, that the agency is not required to accept or transmit requests through use of that machine. In the context of the situation that you described, it would be

unreasonable in my opinion, even if photocopies had not already been made, to fax as many as 240 pages. In short, the process of feeding paper into the machine is labor intensive, and the machine would be disabled for any other use, including the receipt of records that may be important, for an extended period of time.

I hope that foregoing serves to clarify the matter and that I have been of assistance.

RJF:jm

cc: Herbert J. Tamres, Deputy Village Attorney
Tanya L. Ford, Village Clerk

FOIL-AO - 17277

From: Freeman, Robert (DOS)
Sent: Friday, August 01, 2008 10:09 AM
To: Jim Folts, NYS Archives
Subject: RE: MORE Re: FOIL sect. 89.2(b)(iii)

Hi Jim - -

I agree with your conclusion that the amendment to FOIL relating to real property records would not affect requirements concerning the confidentiality of mental health records.

As you are likely aware, subdivision (f) of §33.13 of the Mental Hygiene Law states in part that: "Any disclosure made pursuant to this section shall be limited to that information necessary in light of the reason for disclosure. Information so disclosed shall be kept confidential by the party receiving such information and the limitations on disclosure in this section shall apply to such party." Based on the quoted language, I believe that mental health records identifiable to a patient or client remain confidential in accordance with §87(2)(a) of FOIL concerning records that are "specifically exempted from disclosure by state or federal statute, irrespective of the amendment.

I, too, look forward to positive as a result of other amendments to FOIL.

All the best.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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FOIL-AO-17278

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August 1, 2008

Ms. Belinda Winterbottom
Mr. John Welsh

The staff of the Committee on 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. Winterbottom and Mr. Welch:

I have received your letter and the correspondence relating to it. In short, having requested records from the Office of the Clinton County District Attorney, you were informed by the District Attorney that "[c]riminal records and court documents are unavailable under FOIL requests." The District Attorney cited a judicial decision rendered in 1998 and an opinion of this office as the basis of his response.

In this regard, materials that he cited involve a conclusion that has since been reversed by the Court of Appeals, the state's highest court.

By way of background, 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 an office of a district attorney 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.

Assuming that they have not been sealed, it has been determined by the Court of Appeals that court records that come into the possession of an agency are agency records that fall within the scope of the Freedom of Information Law [Newsday v. Empire State Development Corporation, 98 NY2d 746 (2002)]. Therefore, copies of records filed with or maintained by a court that are or that come into possession of the District Attorney constitute agency records that fall within the coverage of the Freedom of Information Law.

Further, 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)].

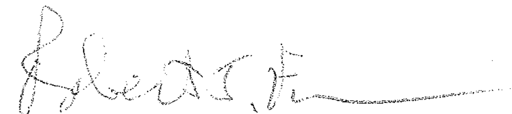
In short, when a record is made available through a public judicial proceeding, unless it is later sealed, in my opinion, nothing in the Freedom of Information Law would serve to enable an agency to deny access to that record.

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.

A copy of this opinion will be sent to the District Attorney.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Andrew J. Wylie, District Attorney

FOIL-AO-17279

From: Freeman, Robert (DOS)
Sent: Friday, August 01, 2008 12:26 PM
To: Rick Georgeson, NYS DEC Region 4

Dear Mr. Georgeson:

I have received your letter concerning "an attendance sheet from one of your public meetings" and whether you "have to redact the home addresses of the people attending" the meeting.

Assuming that those in attendance did not verbally identify themselves by name and address during the meeting, their home addresses could, in my view, be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

If you would like to discuss the matter, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
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Department of State
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FOIL-AO-17280

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August 1, 2008

E-Mail

TO: Ms. Susan Hellsten

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Hellsten:

I have received your letter concerning your ability to gain access to police records relating to an incident involving your thirteen year old son. You referred specifically to your "right to know what neighbor told police about [your] son."

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.

Likely relevant in this instance is the first ground for denial of access, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is found in provisions of the Family Court Act relating to juveniles, §381.3, which states that:

> "1. All police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection.
>
> 2. Notwithstanding the provisions of subdivision one, the family court in the county in which the petition was adjudicated may, upon motion and for good cause shown, order such records open:
> (a) to the respondent or his parent or person responsible for his care; or

(b) if the respondent is subsequently convicted of a crime, to a judge of the court in which he was convicted, unless such record has been sealed pursuant to section 375.1.

3. An order issued under subdivision two must be in writing."

Based on the foregoing, I believe that the records at issue may be disclosed only upon written order of a court.

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-17281

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August 4, 2008

Ms. Bonnie Barkley

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.</u>

Dear Ms. Barkley:

I have received your correspondence and hope that you will accept my apologies for the delay in response.

You have sought an opinion relating to a request for records involving any complaints that might have been made concerning a Penn Yan Police Officer.

In this regard, 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.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that §50-a exempts records from disclosure when a request is made in a context relating to litigation. More specifically, in a case brought by a newspaper, it was found that:

> "Given this history, the Appellate Division correctly determined that the legislative intent underlying the enactment of Civil Rights Law section 50-a was narrowly specific, 'to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action' (<u>Matter of Capital Newspapers Div. of Hearst Corp. v. Burns</u>, 109 AD 2d 92, 96). In view of the FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50-a

> should not be construed to exempt intervener's 'Lost Time Record' from disclosure by the Police Department in a non-litigation context under Public Officers section 87(2)(a)" [Capital Newspapers v. Burns, 67 NY 2d 562, 569 (1986)].

It was also found that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568).

In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

From my perspective, based on the contents of the materials that you forwarded, insofar as they exist, it appears that the records in question would be exempt from disclosure under §50-a of the Civil Rights Law and, therefore, §87(2)(a) of the Freedom of Information Law.

Lastly, the Yates County Sheriff indicated that no records could be found that fell within the scope of your request. Here I note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ronald G. Spike, Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17282

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August 4, 2008

E-Mail

TO: Ms. Meghan Summers

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Summers:

I have received your letter concerning the status of the New York Automobile Insurance Plan ("the Plan") under the Freedom of Information Law.

That statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law is applicable to entities of state and local government in New York.

Having contacted the State Insurance Department, I was informed that the Plan is run by private insurance companies, and not the government or any government agency. That being so, I do not believe that it is an "agency" required to comply with the Freedom of Information Law. However, I was also informed that records relating to the actions of the Plan must often be filed with the Insurance Department. Any records submitted to or filed with the Department are, therefore, agency records that may be requested pursuant to the Freedom of Information Law from the Department.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17283

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August 4, 2008

Mr. Timothy Makas
MHPC Ward 45
P.O. Box 158
New Hampton, NY 10958

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Makas:

I have received your letter concerning your efforts in obtaining records under the Freedom of Information Law from the Town of Hurley Justice 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 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Justice Court, Town of Hurley

FOIL-AO-17284

From: Freeman, Robert (DOS)
Sent: Monday, August 04, 2008 11:58 AM
To: MULLEN, VICTORIA, Town of Oswego
Subject: RE: FOIL

Yes. FOIL, §89(3)(a), requires that an applicant must "reasonably describe" the records sought. Further, the courts have held that an agency's filing or recordkeeping system is often critical in determining whether or the extent to which a request meets that standard. It is recommended that you generally indicate to the applicant the kinds of records maintained by town that fall within the scope of his request, that the request as it is likely involves thousands of pages, that you charge a fee for copies and require payment before copies will be made. After so doing, it is suggested that you ask that he focus on the records of particular interest as a means of narrowing the request.

I hope that this will be helpful to you.

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17285

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August 5, 2008

Ms. Pat White

The staff of the Committee 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. White:

I have received your letter concerning the status of the Village of Valatie Local Development Corporation ("the Corporation") under the Freedom of Information Law. Having reviewed the materials relating to the issue, the status of the Corporation is not entirely clear. Although the Freedom of Information Law generally applies to governmental entities, judicial decisions indicate that a not-for-profit corporation may be subject to the Freedom of Information Law if the corporation is under substantial government control.

In this regard, the Freedom of Information Law pertains to agencies, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" [§86(3)].

Specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations. The cited provision describes the purpose of those corporations and states in part that:

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

Therefore, due to its status as a not-for-profit corporation, it is not clear in every instance that a local development corporation is a governmental entity; however, it is clear that such a corporation performs a governmental function.

Relevant to your inquiry is a decision rendered by the Court of Appeals, the state's highest court, to which the Village Attorney alluded, in which it was held that a particular not-for-profit corporation, also a local development corporation, is an "agency" required to comply with the Freedom of Information Law [Buffalo News v. Buffalo Enterprise Development Corporation, 84 NY 2d 488 (1994)]. In so holding, the Court found that:

> "The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's counterpart, the Freedom of Information Act (5 U.S.C. §552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus the BEDC is a 'governmental entity' performing a governmental function of the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

Based on the foregoing, if the relationship between the Corporation and the Village of Valatie is analogous to that of the BEDC and the City of Buffalo, the LDC would constitute an "agency" required to comply with the Freedom of Information Law. Stated differently, if there is significant government control, i.e., if a majority of the Corporation's board of directors consists of or is designated by government or carries out its functions for a unit of government, the Corporation, based on a decision by the state's highest court, would be required to comply with the Freedom of Information Law, notwithstanding its status as a not-for-profit corporation.

The extent to which there is governmental control over the Corporation is, in my view, questionable. Paragraph fourteen of the Certificate of Incorporation indicates that its membership "shall be composed of the persons who are designated initial directors....and of such other persons

as shall from time to time be elected to membership in accordance with the By-Laws of the Corporation." It is my understanding that two of the five initial directors were members of the Village Board of Trustees. Those two constitute less than a majority of the directors, and it might be concluded that the Corporation is not under the control of the Village and, therefore, is not an "agency" required to comply with the Freedom of Information Law. On the other hand, information produced by the Division of Corporations at the Department of State indicates that the address to which there can be service of process on the Corporation is the Village office, which might suggest that the Corporation operates out of that office and is an extension of Village government, in which case its records would fall within the coverage of the Freedom of Information Law.

In addition to the foregoing, but viewing the matter from different vantage points, I note that the Freedom of Information Law defines the term "record" expansively in §86(4) to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the definition, if a Village official acting in his or her capacity as a Village official serves as a director of the Corporation or receives written materials from the Corporation in his or her governmental capacity, I believe that those materials would be Village records subject to rights conferred by the Freedom of Information Law.

The term "record" may be pertinent in another context as well. One of the items that you sent is an agreement between the Village and the Corporation. The Village is characterized as the "Recipient" of a federal Community Development Block Grant (CDBG), and the Corporation is characterized as the "Subrecipient" and, according to the agreement, "has the responsibility for administering the subject CDBG assisted project or activity." If this or a similar agreement remains in effect, it would appear that the Corporation would maintain records for the Village. If that is so, they would constitute Village records subject to rights conferred by the Freedom of Information Law, irrespective of their physical location [see e.g., Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University, 87 NY2d 410 (1995)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Gary D. Strevell, Mayor
Valatie Local Development Corporation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17286

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August 5, 2008

E-Mail

TO: Ms. Barbara Elmore

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. Elmore:

I have received your letter in which you indicated that your town operates a food bank. The facility is owned and maintained by the town, and you asked whether a log identifying those who request food is subject to 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.

Of relevance under the circumstances is §87(2)(b), which enables an agency to withhold records or portions of records the disclosure of which would result in "an unwarranted invasion of personal privacy." While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view enable government to prevent disclosures concerning the personal or intimate details of individuals' lives. If, for example, applicants for food must meet an income requirement, it is likely, in my opinion, that a court would determine the names of applicants could be withheld. From my perspective, a disclosure that permits the public to determine the general income level of persons who apply would constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Further, by means of analogy, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., §697, Tax Law).

In short, if indeed there is an income qualification and only those persons whose income is below is certain level can apply, I believe that disclosure would constitute an unwarranted invasion of personal privacy and that the log may be withheld.

I hope that the foregoing enhances your understanding of the matter and that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4665
FOIL-AO- 17287

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August 5, 2008

Mr. Kenneth Walter

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Walter:

I have received your letter and the materials relating to it, and I hope that you will accept my apologies for the delay in response. You raised a variety of issues relating to your efforts in obtaining records, specifically, minutes of meetings of the Sullivan County Community College, via email. Based on a review of the materials, I offer the following comments.

First, §87(4)(c) of the Freedom of Information Law requires that "[e]ach state agency that maintains a website" is required to post certain information and provide a link to the website of this office (emphasis added). A community college is typically a county agency, rather than a state agency. That being so, the requirements imposed by the cited provision do not apply to a community college.

Second, in October of 2006, the Freedom of Information Law was amended to require all agencies, when they have "reasonable means" to do so, to "accept requests in the form of electronic mail and shall respond to such requests by electronic mail..." Therefore, if the Community College has the ability to accept requests made via email and to transmit records through the use of email with reasonable effort, it is required to do so.

Third, reference was made to minutes that had not been approved. In this regard, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

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 in 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.

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:

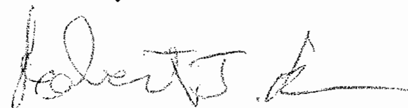
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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 legislation enacted in 2006 broadened 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Kathleen Ambrosino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17288

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August 5, 2008

Mr. Dan Kuchta

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kuchta:

This is in response to your correspondence of March 19, 2008. Please accept our apology for responding to a portion of your previous request. Specifically, you asked whether you are permitted to receive a list of the names of all of the employees of the Town of Patterson, their job descriptions or titles, the amounts they were paid in 2007, their town of residence, and copies of W-2 forms issued by the Town. Further, you asked whether you may submit an appeal via email.

From our perspective, with minor exceptions, the records you have requested must be made available to you. In general, records pertaining to public employees, including name, title, job description and pay are, in our view, clearly available. In this regard, we offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law. While two of the grounds for denial are relevant to an analysis of rights of access, neither in my opinion could validly be asserted to withhold most of the information in which you are interested.

Of significance is §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The records in question would constitute "intra-agency materials." However, they would appear to consist solely of statistical or factual information that must be disclosed under §87(2)(g)(i), unless a different ground for denial could properly be asserted.

We point out that, with certain exceptions, the Freedom of Information Law is does not require an agency to create records, however, §89(3) of the law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law.

Of primary relevance is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372

NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

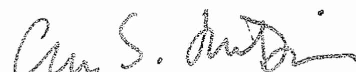
In short, a record identifying agency employees by name, public office address, title and salary must in our view be maintained and made available upon request.

Based upon the direction provided by the Freedom of Information Law and the courts, we believe that records reflective of other payments made to public employees are also available. For instance, insofar as W-2 forms of public employees indicate gross wages, in our opinion, they must be disclosed. In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, we believe that portions of W-2 forms could be withheld, such as social security numbers and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in our view be disclosed. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992). We point out, too, that §89(7) of the Freedom of Information Law specifies that home addresses of current or former public officers and employees need not be disclosed.

Finally, with respect to your question regarding whether you may submit an appeal via email, we note that the Freedom of Information Law was amended in 2006 to require that agencies must receive and respond to requests via email, when able. Accordingly we advise that unless the agency indicates that it will also accept appeals via email, you should make your appeal via US mail or hand-delivery.

On behalf of the Committee on Open Government we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Hon. Antoinette Kopeck

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17289

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August 5, 2008

Hon. Kareen Tyler
Town Clerk
Town of Saranac Lake
3 Main Street
Saranac Lake, NY 12983

The staff of the Committee on 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. Tyler:

We are in receipt of your request for an advisory opinion in an effort to resolve issues with respect to recordings of meetings of the Village of Saranac Lake. Specifically, you indicated that one of the Village Trustees videotapes and televises Village Board meetings with his personal video recording equipment, and makes audio recordings utilizing his personal hand held tape voice recorder. We believe that the recordings are records of the Village subject to the Freedom of Information Law. In this regard, we offer the following comments.

First and most significantly, the scope of the Freedom of Information Law is expansive, for it encompasses all government agency records within its coverage. Section 86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documentary materials need not be in the physical possession of an agency, such as a village clerk, 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.

Relevant is a decision rendered by the Court of Appeals in which the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Any "prescreening" of records to determine whether they fall within the coverage of the Freedom of Information Law, in our view, would conflict with the clear direction provided by the Court of Appeals and the language of the law itself.

In a decision involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Similar in some respects to the matter at hand is Kerr v. Koch (Supreme Court, New York County, NYLJ, February 1, 1988). Kerr involved a request by a reporter for the *Daily News* for the public and private appointment calendars of then Mayor Koch. Although it was contended by the City that various materials were not subject to the Freedom of Information Law or could be withheld under that statute, the Court disagreed, citing Capital Newspapers and an opinion rendered by this office and stated that:

> "...respondents base petitioner's exclusion from certain materials by saying that some of the appointment books contain both personal and business appointments created for the Mayor's convenience. That contention, of course, has little probative meaning here:
>
> '*** personal or unofficial documents which are intermingled with official government files and are being 'kept' or 'held' by a governmental entity are 'records' maintained by an 'agency' under Public Officers Law §86 (3), (4). Such records are, therefore, subject to disclosure under FOIL absent a specific statutory exemption' (Capital Newspapers v. Whalen, 69 N.Y. 2d 246, 248).

> "At the Appellate Division level of Capital Newspapers, it was ruled that papers of a personal nature were protected from disclosure under the FOIL and that the law was intended by the Legislature to subject to disclosure only those records that revealed the workings of government and that disclosure of private papers of a public office holder would not further the purpose of FOIL (113 App. Div. 2d 217, 220). It is that ratio decidend that the Court of Appeals rejected in its unanimous ruling.
>
> "The Court then went on to re-state the appellate conclusion that FOIL 'is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government' (citing Matter of Washington Post Co. v. New York State Ins. Dept., 61 N.Y. 2d 557, 564). Any narrow construction of FOIL, it was added, 'is contrary to these decisions and antagonistic to the important policy underlying FOIL' (p. 52 of Capital Newspapers, supra)."

Accordingly, in our opinion, any recordings of public meetings created by a Village Trustee with the Trustee's personal equipment, much like the creation of handwritten notes during the course of a public meeting, are records subject to the Freedom of Information Law.

Next, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law. Because the recordings consist of information expressed during open meetings, in our opinion, none of the exceptions to rights of access would apply, and the records would be required to be disclosed upon request.

Further, it is emphasized government agencies and their employees cannot destroy records at will. The "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

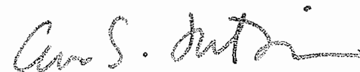
With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

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. It is our understanding, based on the applicable retention schedule, that the minimum retention period for such recordings is four months.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17290

Committee Members

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August 5, 2008

Mr. Charles Bianculli

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bianculli:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Deer Park School District. Specifically, the District denied your request for "records or portions thereof pertaining to a 'subject matter list.' (A list you must maintain!)" on the ground that your request was "too vague and is not for a specific document that I can identify." In conjunction with your request, and on appeal, you submitted a copy of regulations promulgated by this office pertaining to the agency's responsibility to maintain a subject matter list.

In our opinion, your request reasonably described a record of the District, and it should have been provided to you in a timely fashion. In this regard, we offer the following comments.

First, as a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to a list maintained by an agency. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in 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.

We recommend that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list.

Second, had the District denied access to the subject matter list rather than indicate its inability to understand the request, this will confirm that the provision dealing with the right to appeal a denial of access to records is found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

In sum, when an agency denies access to a requested record, it is required to inform an applicant of the person to whom an appeal should be directed. 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)].

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17291

Committee Members

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Tedra L. Cobb
Lorraine A. Cortés-Vázquez
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August 6, 2008

Ms. Leslie Greenough

The staff of the Committee on 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. Greenough:

This is in response to your request for a written opinion concerning a series of communications and events between you and certain officers and commissioners of the East Glenville Fire District. Please note that this office is authorized to give legal advice with respect to application of the Freedom of Information and Open Meetings Laws. To the extent that we believe we can be helpful and have the authority to advise, we offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law. One of the exceptions appears to be particularly relevant. Due to its structure, however, it often requires disclosure.

Specifically, §87(2)(g) states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Accordingly, it is our opinion that the District's policy on sexual and non-sexual harassment, as well as any other policy pertaining to the District's responsibility and authority for responding to harassment complaints must be made available to the public upon request.

When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." It is emphasized that when a certification is requested, an agency "shall" prepare the certification; it is obliged to do so.

We note that in response to your requests, when it forwarded copies of the harassment policy, the District indicated that "this document constitutes our complete policy on Harassment", "I believe the harassment policy provides the guidelines that you are looking for", and that "the Harassment Policy states the method of complaint". Based on these explanations, it appears that the District has provided all documents that are responsive to your request.

We note that an agency need not create a record in response to a request, for the Freedom of Information Law pertains to existing records (see §89(3)). Therefore, if the District does not maintain a written policy such as the one you describe, it would not be required to create one.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Suzanne L. Pohl, Chairwoman
William Young, Counsel

FOIL-AO - 17292

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, August 07, 2008 12:08 PM
To: 'jmiller@bsk.com'
Subject: FOIL and Open Meetings Law

John:

Although I was looking for something a little more directly responsive to your question, attached is a copy of the recent opinion I had in mind when you called, Bianculli. In this case the school claimed the applicant's request failed to reasonably describe records. Because Bianculli was asking about why they hadn't provided the name of the appeal officer, I wrote "Second, had the District denied access to the subject matter list rather than indicate its inability to understand the request, this will confirm that the provision dealing with the right to appeal a denial of access to records is found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that...". In sum, when an a request does not reasonably describe records in the agency's possession, in our opinion the agency is under no obligation to provide appeal officer information.

The following is a link to the Open Meetings Law legislation that was signed last night:
http://www.assembly.state.ny.us/leg/?bn=A01033&sh=t

And, attached is text regarding the changes to FOIL that went into effect today.

I hope these are helpful... and that you're able to enjoy some of this swiftly fleeting summer.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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FOIL AO 17293

VIA EMAIL
From: Freeman, Robert (DOS)
Sent: Friday, August 08, 2008 8:18 AM
To: Kicinski Christine J, NYC Department of Education
Subject: RE: another Q

If there is no determination indicating or admission of misconduct, and no settlement agreement or its equivalent, it has been advised that unproven charges or allegations pertaining to a public employee may be withheld on the ground that disclosure would constitute an unwarranted invasion of privacy. It has also been advised that unproven or unadmitted charges constitute intra-agency material may be withheld, even after redaction of identifying details.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17294

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August 8, 2008

E-Mail

TO: Ms. Ruth Murray

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Murray:

I have received your inquiry "as a taxpayer, and a board member", and that you indicated that you have received no response to a request for "a breakdown of the $260,000 legal fees" that have been charged to the entity in which you reside and that you serve. You added that the "budget was for $40,000" and you asked "how did they get the extra money, who was it paid to and for what?"

In this regard, the advisory jurisdiction of the Committee on Open Government relates to matters involving the Freedom of Information Law. Therefore, the following comments will be limited to issues concerning that law.

First, the Freedom of Information Law pertains to existing records and states in §89(3)(a) that an agency, i.e., a municipality or a school district, is not required to create a record in response to a request. Consequently, if no "breakdown" exists, an agency would not be required to create a new record in response to request made pursuant to that law.

Second, assuming that records exist, such as an attorney's or a law firm's bills or invoices, they fall within the coverage of the Freedom of Information Law. That law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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.

Most pertinent in my view would be the first ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared or imparted pursuant to an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with such an attorney-client relationship may be considered privileged under §4503 of the CPLR. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.)...
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters being communicated and, consequently, was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service

> rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)"

In short, in Knapp, even though portions of the records containing the time billed and the amount paid for the time, it was determined that other aspects of billing statements indicating "the general nature of legal services performed", as well as certain others, did not fall within the attorney client privilege and were available.

In the other decision dealing with the issue under the Freedom of Information Law, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], the matter involved a request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). While monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.).

Although the County argued that the "description material" is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the CPLR, the court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determines the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications...
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

In my view, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, I agree that references identifiable to students may properly be deleted. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

Third, in my view, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. It has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a board rule or policy to the contrary, I believe that a member of a governing 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, one of the functions of a public body involves acting collectively, as an entity. A municipal generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17295

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August 11, 2008

E-Mail

TO: Ms. Deborah M. Glover

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Glover:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to a town zoning board. Specifically, verbal requests were made for records discussed at a public hearing, and written requests were made afterward. You indicated that applicants were directed not to file written requests for records until after the public hearing, but that the town did not provide complete records in response to written requests. In an effort to provide guidance with respect to these matters, we offer the following comments.

First, a key provision in an analysis of those issues is §86(4) of the Freedom of Information Law, which defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

The Court of Appeals has construed the definition as broadly as its specific language suggests. In the first decision focusing on the definition of "record", the Court emphasized that the Freedom of Information Law must be construed broadly in order to achieve the goal of government accountability, for the court found that:

> "Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems

> become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (Westchester Rockland Newspapers v. Kimball, 50 NY2d 575, 579 (1980)].

In short, based on the language of the definition of "record", it is clear in our view that existing materials falling with the scope of a request are "records" subject to rights conferred by the Freedom of Information Law as soon as they come into the possession of a municipality.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law. From our perspective, it is unlikely that any of the grounds for denial could be asserted to withhold the kinds of records that you described.

It is noted the fact that the records are "predecisional"is not relevant. Such a consideration may be pertinent in the context of §87(2)(g), which enables an agency to withhold portions of "inter-agency and intra-agency materials." However, property owners and developers are neither agency officials nor 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."

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 records at issue consist of records sent to municipalities by members of the public or entities that are not governmental, they

would not constitute inter-agency or intra-agency materials, and the exception typically cited to withhold predecisional materials would not apply.

Further, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of

Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance,

the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17296

ommittee Members

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Tedra L. Cobb
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August 11, 2008

E-Mail

TO: Mr. Chip Nanko

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 information presented in your correspondence.

Dear Mr. Nanko:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to a fire district. Specifically, you requested "invoices from a Fire District attorney to the District." In response, you received copies of invoices, including summaries of charges, "but all other pages that included the breakdown of the charges" were redacted. In our opinion, it is likely that a greater portion of the records is required to be provided to you, and in this regard, we offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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, 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, it may be that portions of the redacted pages should be made available to you, depending on their content. Clearly, the Freedom of Information Law does not serve as a vehicle for enabling the public 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, time and duration of services rendered ordinarily would be beyond the coverage of the attorney-client privilege. 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 the deletions would have been proper.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

CSJ:jm

FOIL-AO-17297

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, August 13, 2008 2:33 PM
To: 'Harry Levine'
Subject: RE: Right to Know

Mr. Levine:

Thank you for your patience.

I will keep my answers brief, sometimes referring you to advisory opinions that provide legal analysis, but before I do, this is a reminder that the Freedom of Information Law only requires an agency to provide access to public records or portions thereof upon receipt of a written request – there is no requirement that it make records available at another location, so the advice that follows only pertains to an obligation to respond to a written request.

With that said, and with respect to your first and fourth questions, inter and intra-agency records are required to be disclosed in part or in whole, depending on their content. Please see the advisory opinion at the following link: http://www.dos.state.ny.us/coog/ftext/13441.htm

Communications with professionals hired by a municipality for consulting purposes are treated much the same as inter and intra-agency communications. Please see: http://www.dos.state.ny.us/coog/ftext/f12641.htm

Attorney-client privileged communications are confidential under state law. Please see: http://www.dos.state.ny.us/coog/ftext/f16204.htm

In our opinion, Draft Environmental Impact Statements are "records" subject to the FOIL, and would be required to be made accessible to the public upon receipt of a written request. Please see: http://www.dos.state.ny.us/coog/ftext/f15297.htm

Time limits for responding to requests can be reviewed at the following site: http://www.dos.state.ny.us/coog/explaination05.htm

I hope that this is helpful to you and that I haven't overwhelmed you!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17298

From: Jobin-Davis, Camille (DOS)
Sent: Friday, August 15, 2008 10:57 AM
To: Donna Curry, Town Clerk, Town of Parm
Subject: RE: Request for Opinion

Dear Donna:

In follow up to our telephone conversation, this will confirm that you, as Town Clerk, are legal custodian of Town records. Please note our legal analysis in the following advisory opinion: http://www.dos.state.ny.us/coog/ftext/f14883.htm

Your Town Attorney would be best able to advise you with respect to enforcement of Town Law cited in the above advisory opinion.

With respect to your question regarding redaction of records, this will confirm that under the Freedom of Information Law, in response to a request for records the Town has an obligation to set forth the provision(s) of law relied upon to deny access to records or portions thereof. 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. 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, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, 89 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).

Finally, Section 89(8) of the Freedom of Information Law and §240.65 of the Penal Law include essentially the same language prohibiting the concealment or destruction of a record in an effort to prevent inspection pursuant to the Freedom of Information Law. Please note our legal analysis in the following advisory opinion: http://www.dos.state.ny.us/coog/ftext/f14047.htm (See paragraph beginning "Next, you asked...".)

I hope that this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17299

From: Freeman, Robert (DOS)
Sent: Monday, August 18, 2008 8:40 AM
To: Fisher,Janon, New York Post
Subject: RE: Photos

I know of no statute that prohibits disclosure of photos of defendants awaiting trial. On the contrary, it is has been held that mugshots of defendants are and remain accessible to the public unless and until charges are dismissed in favor of an accused. If and when that occurs, the records pertaining to the charges, including photos, are supposed to be sealed pursuant to §160.50 of the Criminal Procedure Law.

For more detail, go to our FOIL index to advisory opinions, click on to "M", and scroll down to "Mugshots."

Robert J. Freeman
Executive Director
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FOIL-AO - 17300

From: Freeman, Robert (DOS)
Sent: Monday, August 18, 2008 8:34 AM
To: Kicinski Christine J., NYC Department of Education
Subject: RE: for next week
Attachments: F10903.wpd

Hi –

I agree that notes kept solely by the maker and disclosed to nobody other than a substitute would not be subject to FERPA. However, I believe that that they constitute "records" falling within the scope of FOIL. In my view, they are "intra-agency" materials that would be accessible or deniable, in whole or in part depending on their content. Expressions of opinion, for example, could be withheld. Factual information, however, would likely be available to the parent of the student.

Attached is an opinion that deals with the issue in detail.

Robert J. Freeman
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FOIL-AO - 17301

From: Freeman, Robert (DOS)
Sent: Monday, August 18, 2008 8:24 AM
To: Semira Ansari, School District Attorney
Subject: RE: Question re: sexual harassment

Hi Semira - -

Hope this isn't too late - - I just returned from a week's vacation.

Our opinion concerning a report indicating that allegations of sexual harassment could not be substantiated is that such a record may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. If I understand the situation that you described correctly, the person who is the subject of the allegations wants to read the report aloud at an open meeting. From my perspective, there may be privacy considerations pertinent not only to the subject of the report, but the person who made the allegations as well. If it is believed that disclosure of the accuser's identity would constitute an unwarranted invasion of his/her privacy, it is suggested that any public reading of the report be preceded by redaction of that person's identity.

Viewing the matter from a different perspective, I believe that it would be board's decision to have the report read aloud, or to reject the subject's request to do so, rather than that of the subject of the report.

I hope that this will be of assistance. If you would like to discuss the matter, please feel free to call.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17302

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August 18, 2008

Ms. Rita Palma

The staff of the Committee on 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. Palma:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Bayport-Blue Point School District. In response to your request for copies of invoices from the District's legal counsel for a certain period of years, redacted versions were provided to you, ostensibly to protect attorney-client privileged material. You indicated that the extent of the redactions caused you concern, and in this regard, we offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 here 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).

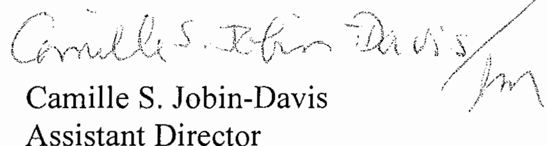
In our view, the key word in the foregoing is "detailed." Certainly we would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, we 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" would ordinarily would be beyond the coverage of the privilege.

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", ordinarily would be beyond the coverage of the privilege. In the context of your request, the District specifically blacked-out all description of approximately 15 hours worth of work regarding one particular case, and one-half of an hour regarding another. While this material may be protected by the attorney-client privilege, we reiterate that in our opinion the Freedom of Information Law would require disclosure of the general nature of services rendered.

Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, we believe that references identifiable to students may properly be deleted. In the context of your request, it may be that redactions of the name(s) of person who have filed legal action against the District are protected under this Act, in which case the deletions would be proper. However, based on its response to your appeal, the District did not rely on this provision to deny access.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Anthony J. Annunziato, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-4666
FOIL-AO-17303

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August 18, 2008

Mr. Edward G. Schneider III

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Schneider:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to gatherings of the members of the Evans Town Board. Specifically, you inquired about gatherings of Board members in the Supervisor's office prior to regular board meetings, "informal" or "unofficial" meetings, and the lack of debate or discussion before voting on issues at town board meetings. You further inquired about the content and availability of minutes in a particular format. In this regard, we offer the following comments.

First, from our perspective, there is no legal distinction between an "informal" meeting, an "unofficial" meeting, a work session, or a regular meeting.

By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official

> document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in our opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Since an "informal" meeting or a "work session" held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to notice and the taking of minutes as in the case of a formal meeting, as well as the same ability to enter into executive sessions.

Second, with respect to your frustration with the lack of public debate, we note an amendment to §107(1) of the Open Meetings Law recently approved, that is intended to improve compliance and to ensure that public business is discussed in public as required by that law. Effective August 5, 2008, the new provision states that when it is found by a court that a public body voted in private "in material violation" of the law "or that substantial deliberations occurred in private" that should have occurred in public, the court "shall award costs and reasonable attorney's fees" to the person or entity that initiated the lawsuit.

The intent of this amendment, in our opinion, is not to encourage litigation, but to enhance compliance and to encourage members of public bodies and those who serve them to be more knowledgeable regarding their duty to abide by the Open Meetings Law.

Third, with respect to minutes of "work sessions", as well as other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear in our view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during workshops, technically we do not believe that minutes must be prepared.

Next, although they were previously provided to you, you indicated that now the Town denied access to electronic copies of minutes in the format that you request (WordPerfect), and that the Town Clerk indicated she spoke with the executive director of the Committee, as follows: "Mr. Freeman advised me that as long as the minutes are provided on the Town's website and you have access to the internet that is sufficient and compliant with Freedom of Information and Open Government Laws." In an effort to assist in reaching an amicable resolution of the matter, we offer the following comments.

In our view, the Freedom of Information Law, in terms of its intent and its judicial interpretation, has and should be construed to require agencies to produce accessible information in the format of the applicant's choice, so long as the agency is able to do so with reasonable effort.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

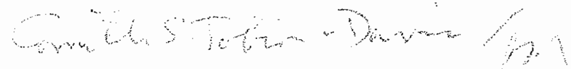
Further, in a decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

Consistent with those decisions, earlier this month, the Freedom of Information Law was amended to require that "an agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service" (§87[5][a]).

In short, assuming that the minutes can be provided in the format you requested, as demonstrated by the Town's previous production of minutes in that format, we believe that the Town is under a continuing obligation to do so.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Hon. Carol A. Meissner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17304

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

One Commerce Plaza, 99 Washington Ave., Suite 650, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2008

Ms. Mary Lou Cotton

Dear Ms. Cotton:

I have received your letter in which you requested from this office records pertaining to your complaint concerning personal property at a nursing home made to the State Department of Health. In this regard, the Committee on Open Government is authorized to provide advice and opinions relating to public access to government records. The Committee does not have general custody or control of records. In short, we do not maintain the records of your interest.

When seeking records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that possesses the records of interest. The records access officer has the duty of coordinating an agency's response to requests. I note that the law requires that a request must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records. In your situation, it is suggested that you might include with your request a copy of the letter sent to you by the Department on July 30, and/or that you refer to the "Complaint ID#."

A request may be addressed to Robert LoCicero, Records Access Officer, NYS Department of Health, Corning Tower, Empire State Plaza, Albany, NY 12237.

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-17305

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2008

Mr. Jose Gonzalez
07-R-2265
Mohawk Correctional Facility
6100 School Road
P.O. Box 8451
Rome, NY 13442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gonzalez:

I have received your letter in which indicated that you have encountered difficulty in obtaining records from the New York City Police Department.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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."

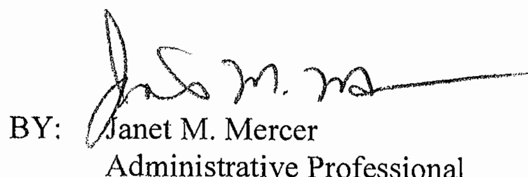
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

For your information, the persons designated at the Department to determine appeals is Jonathan David0, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17306

ommittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

One Commerce Plaza, 99 Washington Ave., Suite 650, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2008

Mr. Howard J. Harris
92-A-0992
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. Harris:

I have received your letter in which indicated that you have encountered difficulty in obtaining records from the NYS Division of Parole.

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."

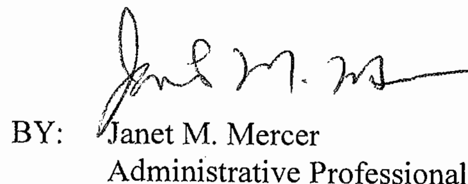
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

For your information, the persons designated at the Division to determine appeals is Terrence X. Tracy, Counsel to the Division.

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-17307

(nmittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2008

Mr. Karsem Williams
95-A-6745
P.O. Box 4000
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Williams:

I have received your letter in which indicated that you have encountered difficulty in obtaining records from a district attorney's office.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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:

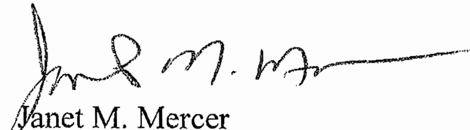
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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 - 17308

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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August 19, 2008

Mr. William Hollis
02-A-3072
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. Hollis:

I have received your letter in which indicated that you have encountered difficulty in obtaining records from your correctional facility.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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."

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> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

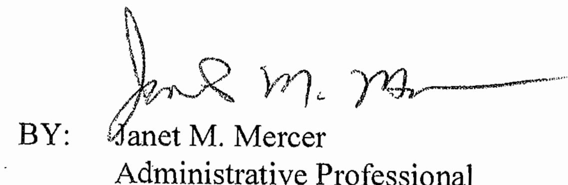
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

For your information, the person designated at the Department to determine appeals is George A. Glassanos, Deputy 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 - 17309

(nmittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2008

Mr. Samuel White
89-B-1850
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. White:

I have received your letter in which indicated that you have encountered difficulty in obtaining records from Erie County District Attorney's Office.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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:

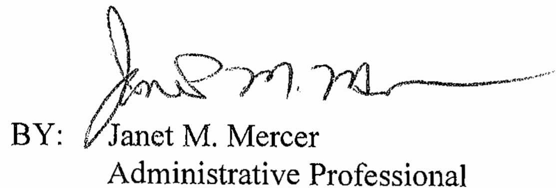
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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-17310

ommittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

One Commerce Plaza, 99 Washington Ave., Suite 650, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2008

Mr. Derek Perkins
89-T-0166
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. Perkins:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request to the Queens County Supreme Court for a copy of your sentencing minutes but, that as of the date of your letter to this office, you had not received a response.

In this regard, 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."

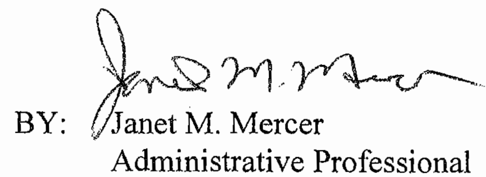
Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law may grant broad public access to those records (see e.g., §255, Judiciary Law). Even though 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 as the basis for your request.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17311

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

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(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2008

Mr. David Riley
94-A-2728
Attica Correctional Facility
Box 149
Attica, NY 14011

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Riley:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request to the Orange County Supreme Court for a copy of your sentencing minutes but, that as of the date of your letter to this office, you had not received a response.

In this regard, 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."

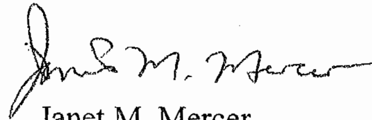
Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law may grant broad public access to those records (see e.g., §255, Judiciary Law). Even though 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 as the basis for you request.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17312

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2008

Mr. Domingo Espiritu
00-A-6162
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Espiritu:

I have received your letter in which you appealed to this office following requests for records apparently made to the New York City Department of Correction that were not answered.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have custody or control of records generally, and we have no records pertaining to you.

When seeking records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests, and the person so designated at the Department of Correction is Mr. Steve Morello.

Once in receipt of 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 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:

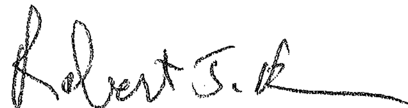
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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 Correction to determine appeals is Ms. Florence A. Hutner.

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-17313

ommittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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August 19, 2008

Mr. Mark Scott
06-A-5263
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

Dear Mr. Scott:

I have received your letter in which you requested your "inmate record", as well as a variety of related materials, from this office. You indicated that you requested those documents from your corrections counselor, but that they were not made available.

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 general custody or control of records, and we maintain no records falling within the scope of your request.

A request should be made to the agency that maintains possession of the records of interest, and I note that the regulations promulgated by the Department of Correctional Services indicate in 7 NYCRR §5.20 that "A present inmate shall direct his request to the facility superintendent or his designee." It is suggested that you do so.

When an agency receives a request, the Freedom of Information Law as amended in 2005 provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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:

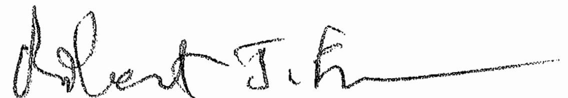
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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 to determine appeals is George A. Glassanos, Deputy Counsel.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17314

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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August 19, 2008

Mr. Jon Sumpter
00-A-4110
Adirondack Correctional Facility
P.O. Box 110
Raybrook, NY 12977-0110

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sumpter:

I have received your letter in which indicated that you have encountered difficulty in obtaining records from 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."

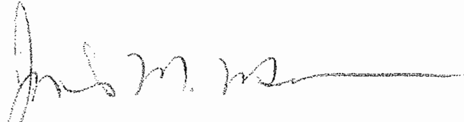
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to George Glassanos, Deputy Counsel at 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: George Glassanos

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17315

C ommittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2008

Mr. Richard Wallace
97-B-2448
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wallace:

I have received your letter in which indicated that you have encountered difficulty in obtaining records from the County of Monroe.

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."

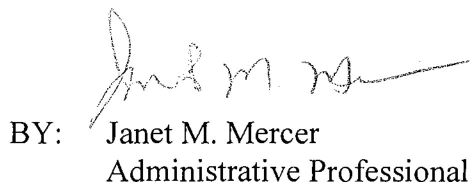
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive 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 John R. Durso, Jr, Records Access Officer and James Smith, FOIL 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

cc: John R. Durso, Jr.
James Smith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17316

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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Fax (518) 474-1927
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August 19, 2008

Mr. Marcus Telesford
02-A-0506
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Telesford:

I have received your letter in which indicated that you have encountered difficulty in obtaining records from Bronx County District Attorney's Office.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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."

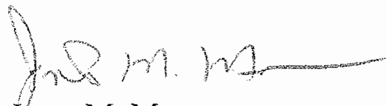
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive 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 K.M. Mendez, Records Access Officer.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: K.M. Mendez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17317

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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August 19, 2008

Mr. William Graham
84-A-6009
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070

Dear Mr. Graham:

I have received your letter in which you sought assistance in obtaining a particular record from the Department of Correctional Services, or that this office "send [you] a copy of same."

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning the Freedom of Information Law. The Committee does not have general custody or control of records, and we do not possess the record of your interest.

According to your letter, the record at issue is the "Limits of Confidentiality, Partial Waiver of Confidentiality and Acknowledgment" form that inmates must sign in order to participate in a particular program. You wrote that facility staff denied your request for the form because "you have not participated in the program or ever signed the form..."

Assuming that you requested a blank form, I believe that it should have been made available. Soon after its enactment, it was held 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:

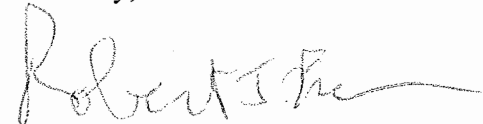
> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland 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)].

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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, since the form is distributed to and completed by inmates who participate in the program to which the form relates, none of the grounds for denial of access could properly be asserted to withhold a blank form.

A copy of this opinion will be forwarded to Mr. George Glassanos, the Department attorney who is designated to determine appeals made pursuant to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: George Glassanos

FOIL-AO-17318

From: Mercer, Janet (DOS)
Sent: Wednesday, August 20, 2008 11:16 AM
To: 'A. Jane Johnston'
Cc: 'lvitek@cityofnewburgh-ny.gov'
Subject: RE: what to do about a FOIL request that's been ignored

Dear Ms. Johnston:

I have received your inquiry concerning your inability to obtain a response to your Freedom of Information Law request directed to the City of Newburgh.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, (89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law

states that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state(s highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open

Government, the agency charged with issuing advisory opinions on FOIL" (Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see (89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I point out that the person designated to determine appeals by the City of Newburgh is Geoffrey E. Chanin, Corporation Counsel.

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to the City Clerk.

I hope that I have been of assistance.

Janet Mercer
Committee on Open Government
One Commerce Plaza
99 Washington Ave., Suite 650
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - Fax
Website: http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17319

From: Mercer, Janet (DOS)
Sent: Wednesday, August 20, 2008 1:17 PM
To: 'A. Jane Johnston'
Subject: RE: Question about privacy/disclosure of person filing a FOIL request

Dear Ms. Johnston:

I have received your inquiry concerning whether there is "any provision protecting the privacy of someone making a FOIL request."

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law. From my perspective, with the exception of portions of certain kinds of requests, the records sought are accessible under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a public body, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

In short, except in the situation in which a request includes intimate personal information, in which case identifying details may be withheld, I believe that requests made under the Freedom of Information Law should generally be disclosed.

I hope that I have been of assistance.

Janet Mercer
Committee on Open Government
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OML-AO-4668
FOIL-AO-17320

From: Freeman, Robert (DOS)
Sent: Wednesday, August 20, 2008 3:40 PM
To: [redacted]

Dear Ms. Emmerling:

I have received your inquiry in which you asked whether a town board must "make a motion and take a roll call vote" in relation to certain actions.

In my view, the issue in great measure involves the powers and duties of a town board and whether certain action can only be taken by such a board. That issue does is not dealt with in or answered by the Open Meetings Law. However, in my experience, which includes the entire period in which the Open Meetings Law has been in effect, determinations to reprimand, suspend an employee with twenty years of service, or to initiate a proceeding under §75 of the Civil Service Law involve actions that can only be taken by a board during a meeting held in accordance with the Open Meetings Law. Releasing records contained within a personnel file, in my view, do not require board action.

When a board does take action, it is not required to do so by roll call vote. However, §87(3)(a) of the Freedom of Information Law has long required that a record be prepared that indicates the manner in which each member voted when action is taken by a public body, such as a town board. In most instances, the record of votes by members appears in the minutes of a meeting.

I hope that I have been of assistance.

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STATE OF NEW YORK
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FOIL-AO - 17321

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August 21, 2008

E-Mail

TO: Mr. Jeff Lovell

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lovell:

I have received your letter in which you asked: "Who is defined as a government body under FOIL?" You referred in particular to entities, "such as hospitals and universities," that receive government funding.

In this regard, the Freedom of Information Law applies 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, in general, an "agency" for purposes of the New York Freedom of Information Law is an entity of state or local government. The fact that an entity outside of government receives government funding does not transform that entity into a government agency, and the Freedom of Information Law would not apply to its records.

However, I point out that §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations,

> memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Due to the breadth of the definition, any information "in any physical form whatsoever" that comes into the possession of or is produced for a government agency would constitute a "record" subject to rights of access conferred by the Freedom of Information Law.

When an entity outside of government receives funding from the government, the agency having a relationship with that entity must, of necessity, maintain records concerning the funding and the relationship. Although those records may not be accessible from those entities that are not government, they may be requested from the agency that provided the funding, for that agency clearly is 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.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO - 4671
FOIL-AO - 17322

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August 21, 2008

E-Mail

TO: Mr. Michael Kaiser

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kaiser:

I have received your letter in which you questioned the propriety of a denial of your request for a copy of a tentative collective bargaining agreement. You wrote that the agreement was ratified by the members of the City of Oneida firefighters union and placed on the Common Council's agenda. You requested the document prior to action taken by the Council and were told that it could be withheld, in your words, "because it was an agreement negotiated in executive session dealing with collective bargaining negotiations."

In this regard, the grounds for entry into executive session appearing in the Open Meetings Law in many instances differ with respect to disclosure from the exceptions to rights of access to records appearing in the Freedom of Information Law. Although it is true that discussions involving collective bargaining negotiations may be conducted in executive session pursuant to §105(1)(e) of the Open Meetings Law, I do not believe that the record at issue could properly be withheld under the Freedom of Information Law.

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.

From my perspective, only one of the grounds for denial, §87(2)(c), is pertinent to an analysis of rights of access to a tentative agreement in the circumstances described. That provision permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in that provision in my opinion is "impair", and the question in the context of the award of contracts or, as in this situation, collective

bargaining negotiations, involves whether or the extent to which disclosure would "impair" the process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That a contract has not been signed or ratified, in my view, is not determinative of rights of access or, conversely, an agency's ability to deny access to records. Rather, I believe that consideration of the effects of disclosure is the primary factor in determining the extent to which §87(2)(c) may justifiably be asserted.

As I understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Similarly, if an agency is involved in collective bargaining negotiations with a public employee union, and the union requests records reflective of the agency's strategy, the items that it considers to be important or otherwise, its estimates and projections, it is likely that disclosure to the union would place the agency at an unfair disadvantage at the bargaining table and, therefore, that disclosure would "impair" negotiating the process.

I point out that the Court of Appeals sustained the assertion of §87(2)(c) in a case that did not clearly involve "contract awards" or collective bargaining negotiations. In Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In each of the kinds of the situations described above, there is an inequality of knowledge. In the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the context of collective bargaining, the union would not have all of the agency's records relevant to the negotiations; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an records regarding collective bargaining strategy or appraisals would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

In a case involving negotiations between a New York City agency and the Trump organization, the court referred to an opinion that I prepared and adopted the reasoning offered therein, stating that:

> "Section 87(2)(c) relates to withholding records whose release could impair contract awards. However, here this was not relevant because there is no bidding process involved where an edge could be unfairly given to one company. Neither is this a situation where the release of confidential information as to the value or appraisals of property could lead to the City receiving less favorable price.
>
> "In other words, since the Trump organization is the only party involved in these negotiations, there is no inequality of knowledge between other entities doing business with the City" [Community Board 7 v. Schaffer, 570 NYS 2d 769, 771 (1991); Aff'd 83 AD 2d 422; reversed on other grounds 84 NY 2d 148 (1994)].

Based on the foregoing, because the record at issue was known to both parties to the negotiations and in fact had been distributed to members of the union, the rationale described above and the judicial decisions rendered to date suggest that §87(2)(c) could not justifiably have been asserted to withhold the record.

Finally, as I understand the matter, collective bargaining negotiations had ended. I recognize that if either side rejected the tentative agreement, the parties might have been forced to reopen the negotiations. Nevertheless, in view of the factors described above, even if that occurred, it does not appear that either party to the negotiations would have been disadvantaged by such a disclosure vis a vis the other. Again, both parties would have been fully aware of the contents of the documentation; there would have been no inequality of knowledge.

I hope that I have been of assistance.

RJF:jm

cc: City of Oneida Common Council

FOIL-AO - 17323

From: Freeman, Robert (DOS)
Sent: Thursday, August 21, 2008 9:14 AM
To: Mr. Roberg G. Leili
Subject: "F.O.I.L. Act"

Dear Mr Leili:

Please be advised that the Freedom of Information Law specifically excludes the courts from its coverage [see definition of "agency", §86(3)]. This is not intended to suggest, however, that records maintained by courts are not generally available, for other statutes often provide broad rights of access to those records. The general statute dealing with access to court records is §255 of the Judiciary Law, which states in brief that a clerk of clerk of a court must search for and make available records in his/her possession upon payment of the proper fee.

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.

Robert J. Freeman
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FOIL-AO - 17324

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August 21, 2008

Mr. Daniel Taber
01-B-1433
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. Taber:

I have received your letter in which it appears that you have encountered difficulty in receiving responses to your request and appeal from 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."

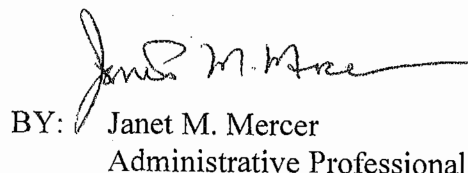
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

The person now designated to determine appeals by the Department is George A. Glassanos, Deputy Counsel to the Department. A copy of this response will be forwarded to him

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: George A. Glassanos

FOIL-AO - 17325

From: Freeman, Robert (DOS)
Sent: Monday, August 25, 2008 11:32 AM
To: Tim Hoefer, Empire Center
Subject: RE: Welfare/Public Assistance

Yes. Section 136 of the Social Services Law has long specified that records identifiable to applicants for or recipients of public assistance are confidential. There is a unique provision within that statute indicating that a "bona fide news disseminating firm or organization" may gain access to "the books and records of the disbursements by such county, city or town for public assistance and care...provided such firm or organization shall give assurances in writing that it will not publicly disclose, or participate or acquiesce in the public disclosure or, the names and addresses of applicants for and recipients of public assistance..."

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FOIL-AO - 17326

From: Mercer, Janet (DOS)
Sent: Monday, August 25, 2008 12:33 PM
To: 'Doug Brasher'
Subject: RE: Identity/Anonymity of FOIL Requesters

Dear Mr. Brasher:

I have received your inquiry in which you asked whether your Freedom of Information Law requests is "subject to disclosure pursuant to future FOIL requests by other individuals."

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 sought are accessible under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a public body, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

In short, except in the situation in which a request includes intimate personal information, in which case identifying details may be withheld, I believe that requests made under the Freedom of Information Law should generally be disclosed.

I hope that I have been of assistance.

Janet Mercer
Committee on Open Government
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STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 17327

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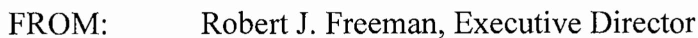
August 25, 2008

E-Mail

TO: Mr. Will Dendis, Editor, Saugerties Times

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. Dendis:

I have received your letter in which you sought an advisory opinion concerning your right to obtain "an uncensored copy of an agreement between the Town of Saugerties and its former police chief, Greg Hulbert." You wrote that the chief was placed on administrative leave in January for an unspecified reason and filed a notice of claim in April, "citing breach of contract, slander, pain and suffering, etc. stemming from the supervisor's comment to another newspaper that [the chief] was on 'suspension.'" The parties settled the matter in June, and an "Agreement and Stipulation of Agreement" (hereafter "the Agreement") was prepared.

You requested a copy of the Agreement, and it was made available to you with certain redactions. You appealed with respect to the redactions and were informed that "the matters were redacted on the basis that disclosure would constitute 'an unwarranted invasion of personal privacy'" pursuant to §89(2)(b) of the Freedom of Information Law. The portion of the preceding sentence that was quoted is the entirety of the rationale offered to justify the denial of access.

The first redaction involves paragraph 3 of the Agreement entitled "Settlement of Claims" and involves a minimal passage stating that "The Town agrees to pay and Hulbert agrees to accept $50,000 ______________________ to settle the Notice of Claim...." The redaction, based on the copy, could not have involved more than a few words. The other involves paragraph 9 entitled "Non-Disparagement and Cooperation", which contains six sections identified as (a) through (f). Paragraph (d) was redacted. Paragraph (c) states that "The parties agree that in the best interest of the Town and Hulbert that a joint press release and statement should be released upon the expiration of all revocation periods. A copy of said press release is attached hereto as Exhibit 'B.'" Paragraph (e) states that "the Town agrees that Hulbert shall be issued a retired police identification card and a retired police chief badge similar to the card and badge provided to previous retirees."

Although I am unaware of the content of the deletions, it appears unlikely that they are consistent with law. From my perspective, the thrust of judicial decisions is clear, and this agreement, like other contracts between government agencies and persons or entities, should, in my view be accessible in its entirety under the Freedom of Information Law. In this regard, I offer the following comments.

First and most importantly, 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)].

Second, as the judicial decisions cited above make clear, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

I note that instances have arisen in which agreements or settlements have included provisions requiring confidentiality. Those kinds of agreements have uniformly been struck down and found to be inconsistent with the Freedom of Information Law. In short, it has been held that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In a different context, in Geneva Printing Co. and Donald C. Hadley v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefitted by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

The basis for the denial offered by the Town, that disclosure would constitute an unwarranted invasion of personal privacy, has been the subject of numerous judicial decisions. It is clear that those who serve or who have served as public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of a public employee's duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981;

Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

In two decisions rendered by the Appellate Division, the facts appear to have been similar to those that you presented, for they involved persons who left their employment with municipalities in accordance with the terms of agreements with those municipalities. In both instances, it was determined that the agreements were accessible under the Freedom of Information Law. One case involved an agreement concerning a separation from employment that contained a "confidentiality clause" [Village of Brockport v. Calandra 745 NYS2d 662 (2002); affirmed, 305 AD2d 1030 (2003)], and it was determined that the agreement was accessible, and that the confidentiality clause "offends public policy" and "cannot stand" (id., 668). The other dealt with a situation in which a municipality disclosed a settlement agreement with a public employee that included provisions regarding confidentiality and was sued for breach of contract as a result of the disclosure. The municipality contended that disclosure was required by the Freedom of Information Law, and the court agreed, stating that none of the exceptions to rights of access applied [Hansen v. Town of Wallkill, 270 AD2d 390 (2000)].

Again, I am unaware of the content of the deletions. The first, however appears to relate to a financial element of the agreement, and the second, in the context of the provisions that follow, appears to involve either disclosure to the public or a benefit of some sort conferred by the Town upon the former chief. In neither instance, according to case law, would disclosure apparently result in an unwarranted invasion of personal privacy.

Lastly, when a denial of access is appealed, §89(4)(a) of the Freedom of Information Law requires that the person or body determining the appeal must either grant access or "fully explain in writing...the reasons for further denial..." Merely indicating that disclosure would constitute an unwarranted invasion of personal privacy, without further rationale or basis for denying access, in my opinion represents a failure to "fully explain" the reason for the denial.

In an effort to encourage reconsideration of the matter, a copy of this opinion will be sent to the Town Board.

I hope that I have been of assistance.

RJF:jm

cc: Town Board, Town of Saugerties

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-4675
FOIL-AO-17328

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August 26, 2008

E-Mail

TO: Mr. Jon Olsen, Town of Montgomery Planning Board

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Olsen:

I have received your letter and the materials relating to it. In your capacity as a member of the Town of Montgomery Planning Board, you have raised a series of questions concerning a confidentiality agreement ("the Agreement") between the Town and several entities comprising the "Taylor Group", which has sought changes in the Town's zoning law to facilitate the approval and construction of a new facility.

Section 1 of the Agreement refers to information or materials provided to the Town during the course of the Town's review of the project and Taylor's assertion that they may "contain trade secrets, confidential, sensitive or proprietary information or any other information over which the courts recognize protection" and which may be designated as "Confidential Information." Section 2 refers to information that "should be excepted from public disclosure under applicable Disclosure Laws, including without limitation NY Pub. Off. §89(5) and 6 NYCRR §616.7(a)(4)..." Section 6 requires that the Taylor Group may request and the Town agrees to return to Taylor "any documents reflecting Confidential Information and any copies made thereof that the recipient of said information may have made..."

You added that "the vast majority of information that Planning Board members who have signed the confidentiality agreement have been allowed to view is freely available on the internet and through third party sources..." However, you wrote that the Town Attorney said, in your words, that "it was impractical to determine what information was confidential and what was not, therefore it was all categorized as confidential" That being so, "the attorney for the town has started with the presumption of confidentiality, and prevented all information from reaching the public's scrutiny." Further, you indicate that the Agreement "has repeatedly been used as justification for holding all Town Board discussions about the project in question during Executive Session."

From my perspective, the Agreement and the means by which it has been implemented are contrary to law in several respects. In this regard, I offer the following comments.

First, the Agreement in my opinion is void and unenforceable insofar as it is inconsistent with statutes, such as the Freedom of Information Law. According to judicial decisions, an agency may not render records deniable or confidential by means of an agreement or contract, unless there is a basis for so doing pursuant to one or more of the grounds for denial appearing in the Freedom of Information Law. The first ground for denial in the Freedom of Information Law, §87 (2)(a), refers to records that may be characterized as confidential and enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." A statute, based upon judicial interpretations of the Freedom of Information Law, is an act of the State Legislature or Congress [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The Court of Appeals, the state's highest court, has held that a request for or a guarantee of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available. In Washington Post v. Insurance Department [61 NY2d 557 (1984)], the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court also concluded that "just as promises of confidentiality by the Department do not affect the status of documents as records, neither do they affect the applicability of any exemption" (id., 567).

Second, assuming that you have described it accurately, the Town Attorney's suggestion that all of the records at issue be presumptively considered confidential is contrary to the judicial interpretation of the Freedom of Information Law. As indicated earlier, the Freedom of Information Law is based upon a presumption of access. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In 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 [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 reference is made in the materials. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In short, based on the direction given by the Court of Appeals in several decisions, when records are requested, they 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.

Third, the reference in the Agreement to §89(5) of the Public Officers Law is erroneous. That provision is part of the Freedom of Information Law, and it applies only to only to records submitted a state agency, and for purposes of determining its scope, §87(4)(b) indicates that a "state agency" means "only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor." The Town clearly is not a state agency. When §89(5) applies, it enables a commercial entity, at the time that it submits records to a state agency, to identify those records or portions of records that it considers to be deniable under §87(2)(d), the so-called "trade secret" exception to rights of access. If the agency agrees with such a claim, it must keep the records confidential. If a request is made for those records, a procedure is initiated that involves notice to the commercial entity and an opportunity to explain its reasons for claiming that the exception may be asserted. None of that procedural protection is required or authorized in this instance, for, again, §89(5) does not apply to a unit of local government.

Similarly, the reference in the Agreement to 6 NYCRR §616 is misplaced. That provision is a section of the regulations promulgated by the Department of Environmental Conservation and its records. Moreover, 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 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.

Fourth, once records come into the possession of the Town, I believe that they are Town records that must be retained in accordance with the retention schedules promulgated pursuant to §57.25 of the Arts and Cultural Affairs Law. Those schedules require that records be retained for particular periods of time, and until the minimum retention period is reached, I do not believe that the Town may return records to Taylor, notwithstanding the terms of the Agreement.

Next, the ability of the Town to withhold the records at issue is limited. The key exception in the context of the matter 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).

Insofar as materials are accessible on the internet or from other public sources, I do not believe that §87(2)(d) may validly be asserted. Other records may be withheld under that provision only to the extent that it can be demonstrated that the exception was properly applied. In the context of a challenge to a denial of access in a judicial proceeding brought under the Freedom of Information Law, the agency denying access, the Town, must meet the burden of proving to the court that disclosure would indeed cause substantial injury to Taylor's competitive position (see Markovitz v. Serio, ___ NY3d ___, June 26, 2008).

Lastly, the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session under the Open Meetings Law are not necessarily consistent with one another. There are often instances in which a discussion held by public body, such as a town board or a planning board, must be conducted open to the public, because there is no basis for conducting an executive session, even though records that are the subject of the discussion might be deniable under the Freedom of Information Law, and *vice versa*.

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies 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 grounds for entry into executive session. It is unlikely in my view that any of the grounds for entry into executive session would apply with respect to much of the discussion relating to the project. I note that §108(3) exempts matters made confidential by state or federal law from the coverage of the Open Meetings Law. For reasons described earlier, I do not believe that the confidentiality agreement is valid or enforceable or, therefore, that discussions relating to the project would be exempt from the requirements of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

FOIL-AO-17329

From: Freeman, Robert (DOS)
Sent: Thursday, August 28, 2008 8:21 AM
To: Edmund Wwiatr
Cc: gyoung@town.new-hartford.ny.us
Subject: RE: ADVISORY OPINIONS - (FOIL-AO-9042 and FOIL-AO-17100)

Dear Mr. Wiatr:

I have some recollection of the conversations with Gail Young, the New Hartford Town Clerk. The first did not indicate that the record at issue related to a police officer, while the later conversation did so indicate. That is a critical fact, because there is a statute separate from the Freedom of Information Law that pertains specifically to police officers' personnel records. 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 provision has been found to prohibit disclosure of complaints or allegations made against police officers, as well as reprimands and similar record reflective of disciplinary action taken with regard to police officers.

I hope that the foregoing serves to clarify your understanding of the matter.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17330

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August 28, 2008

E-Mail

TO: Mr. Jacob Resneck, WNBZ Radio

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 information presented in your correspondence.

Jacob:

I take issue with two of the grounds on which the APA relies to deny access in its August 12, 2008 letter to you.

The first ground is section 4547 of the CPLR, which sets forth, in total:

> "§4547. Compromise and offers to compromise
>
> Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations. Furthermore, the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution."

This provision of law pertains only to evidence as "admissible" or "inadmissible". Generally speaking, "admissible" and "inadmissible" pertain to whether records or testimony is permitted to be introduced in a court of law. This section of law does not address whether a record is confidential and therefore not permitted to be shared with the public pursuant to a request made under FOIL, but rather only whether evidence of offers to compromise can be admitted in court. In my opinion, therefore, this provision does not apply as a valid basis for denying access.

My rationale is based on the Court of Appeals affirmance of an Appellate Division decision in Newsday v. State Department of Transportation, 780 NYS2d 402, 10 AD3d 201, affirmed 5 NY3d 84, 800 NYS2d 67(2005). In that case, the Dept. of Transportation denied Newsday's request for access to records regarding hazardous intersections and highways required to be maintained pursuant to a federal law, which states that those records are not subject to discovery or admitted into evidence "in a federal or state court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists of data." The Appellate Division affirmed the lower court decision holding that the federal statute does not serve as a statute that exempts records from disclosure under section 87(2)(a) of FOIL when sought by an entity "not engaged in a court proceeding involving an accident occurring at a location mentioned in such data." The Appellate Division also held that there must be "clear legislative intent" to properly assert that a statute renders records exempt from disclosure, and that Congress demonstrated no such intent. The Court of Appeals affirmed, stating that the federal statute restricting use of certain records in litigation "does not render the documents sought... exempt from disclosure under FOIL." (Id, 5 NY3d at 89, 800 NYS2d at 70).

The second ground involves the assertion in the last paragraph that "A record that is inspected or examined during a meeting and for which a party has no obligation to provide an agency a copy is not a record held by that agency." The Agency provides no basis for this assertion, and I believe there is none. Further, the Agency does not indicate that such records were not retained, only that the submitting party had no obligation to provide records and that the records were "not necessarily retained, by Agency staff." In my opinion, which is based on my understanding that multiple mediation sessions have been held over two-day periods, the language of the law and decisions rendered by the Court of Appeals, this response is simply the Agency's attempt to obfuscate the issue.

The Freedom of Information Law pertains to all records of an agency, such as the Adirondack Park Agency, 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 "produced by other parties at mediation sessions and 'handled' but not necessarily retained, by Agency staff" constitute Agency records subject to rights conferred by the Freedom of Information Law, irrespective of their origin or function.

The Court of Appeals 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 Agency, even though they may be returned to the submitting entity, I believe that they constitute "records" of the Agency subject to the Freedom of Information Law.

This is not to suggest that these records must be disclosed to you in their entirety. 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. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my opinion, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

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 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 Agency 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 the Agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added). Insofar as provisions of section 87(2)(g) would apply to inter or intra-agency materials, as the Agency indicated, in my opinion, it is under an obligation to provide access to applicable portions of those materials, and complete copies of materials for which no exemptions apply.

I hope that this is helpful to you. Please call if you have questions.

CSJ:jm
cc: Brian Ford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17331

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August 28, 2008

E-Mail

TO: Mr. David M. McKerrow

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. McKerrow:

I have received your letter in which you questioned the propriety of a fee sought to be charged by the Village of Earlville in response to your request for records pursuant to the Freedom of Information Law. Your request involves minutes of meetings of the Board of Trustees, and you were informed that "your request will likely take two to three hours to read through the past meeting minutes and identify your request." In consideration of amendments to. the Freedom of Information Law that were recently enacted, you were also told that "FOIL requests that take more than two hours, will incur a cost of $12.31 per hour."

It appears that the new provisions in the law have been misinterpreted. When a request is made to inspect or copy paper records, the law has not changed. In short, inspection of records is free, and no search or administrative fee may be imposed. When photocopies are requested, unless a statute other than the Freedom of Information Law applies, the maximum that may be charged for records up to nine by fourteen inches remains twenty-five cents per photocopy.

Specifically, §87(1)(b)(iii) refers to "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing *any other record*..." (emphasis added). "Any other record" would involve that which is larger than nine by fourteen inches or which is maintained and reproduced electronically. Only in that latter circumstance would new provisions involving the actual cost of reproduction authorize an agency to charge a fee based on the salary of an employee or outside service. Further, the new provisions concerning the actual cost of preparing copies of records specify that "preparing a copy shall not include search time or administrative costs" [see §87(1)(c)(iv)].

In consideration of the response to your request, I point out that although the Freedom of Information Law as initially enacted required that an applicant must seek "identifiable" records, since 1978 it has merely required that an applicant "reasonably describe" the records sought. Moreover, it has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

In 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 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 the request have failed to meet the standard of reasonably describing the records.

I would conjecture that minutes of meetings of the Board of Trustees are kept chronologically and that the items of your interest involve entries in the minutes involving a relatively brief period of time that you have the ability to suggest. If that is so, it would appear that your request would have reasonably described the records and that the Village would be required locate and retrieve them in response to the request.

In an effort to enhance understanding and compliance with the Freedom of Information Law, a copy of this opinion will be sent to Mayor Campbell and the Village Clerk.

I hope that I have been of assistance.

RJF:jm

cc: Hon. Toni Campbell, Mayor
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17332

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
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Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 28, 2008

Mr. Danny Holliman
01-A-4537
Eastern Correctional Facility
Box 338
Napanoch, NY 12458

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Holliman:

I have received your letter in which you indicated that you submitted Freedom of Information Law requests to the Schenectady County District Attorney's Office and the City of Schenectady 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:

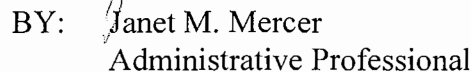
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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

FOIL-AO-17333

mmittee Members

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Dominick Tocci

Executive Director

Robert J. Freeman

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August 28, 2008

Mr. Brian Woodring
07-B-1908
Altona Correctional Facility
555 Devil's Den Road
Altona, NY 12910

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Woodring:

I have received your letter in which you indicated that you have encountered difficulty in gaining access to records from the Allegany 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."

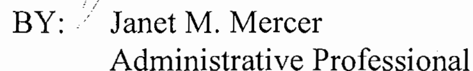
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

In an effort to enhance compliance with law, a copy of this response will be forwarded to the Sheriff's Department.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer

FOIL-AO-17334

From: Freeman, Robert (DOS)
Sent: Friday, August 29, 2008 10:37 AM
To: Ms. Andrea Rebeck

Dear Ms. Rebeck:

I have received your inquiry in which you asked whether you may "take [your] laptop" or use a digital camera when examining town records. In this regard, §87(2) of the Freedom of Information Law states that the public has the right to inspect and copy records made available pursuant to the Freedom of Information Law. Therefore, it is clear in my opinion that you may bring your laptop with you for the purpose of taking notes while inspecting records and that you may make copies of those records through the use of your digital camera.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
Website: www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17335

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August 29, 2008

Mr. Anthony Stevenson
99-A-7134
Clinton Correctional Facility
P.O. Box 2000
Dannemora, NY 12929

Dear Mr. Stevenson:

I have received your letter in which you requested records from this office concerning legislation apparently considered by the State Senate.

In this regard, the Committee on Open Government is authorized to provide advice and guidance relating to the Freedom of Information Law. The Committee does not have custody or control of records generally, and we do not maintain any of the information that you described.

To seek records under the Freedom of Information Law, a request should be directed to the records access officer at the entity that maintains the records of your interest. The records access officer has the duty of coordinating the entity's response to requests for records. The Secretary of the Senate is the person designated to carry out that function for the State Senate, and a request may be sent to him at the NYS Senate, Albany NY 12247.

I point out that the Freedom of Information Law pertains to existing records, and that transcripts of proceedings of the Senate and Assembly are rarely prepared. In short, if the records of your interest do not exist, the Freedom of Information Law would not apply.

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 - 17336

Committee Members

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August 29, 2008

Ms. Francine Tormey

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.</u>

Dear Ms. Tormey:

Your letter addressed to Governor Paterson has been transmitted to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning rights of access to government information, primarily in relation to the state's Freedom of Information Law.

You have sought assistance in obtaining records relating to a complaint made to the Office of Professional Discipline (OPD) at the State Education Department. The matter, according to your letter, involved the treatment of your cat by a veterinarian, and you had several contacts with representatives of OPD. OPD dismissed the complaint, and you requested records pertaining to its investigation, but the request and your ensuing appeal both were denied.

The problem, in my view, involves a requirement that the records at issue be kept confidential pursuant to the Education Law.

In this regard, the Freedom of Information Law, the statute that generally governs rights of access to records, is based upon a presumption of access. Stated differently, all records of an agency are 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 is §6510(8) of the Education Law. That provision states in relevant part that:

> "The files of the department relating to the investigation of possible instances of professional misconduct, or the unlawful practice of any profession licensed by the board of regents, or the unlawful use of a professional title or the moral fitness of an applicant for a

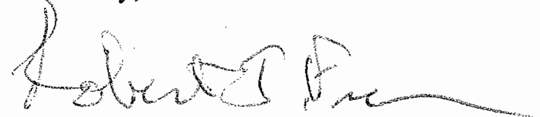
> professional license or permit, shall be confidential and not subject to disclosure at the request of any person, except upon the order of a court in a pending action or proceeding."

When records fall within the coverage of §6510(8), they are exempt from disclosure.

From my perspective, in consideration of the language of §6510(8) of the Education Law, there is no authority with the legal means to compel OPD or the State Education Department to disclose the records of your interest. Only an amendment to that statute would alter the current requirement concerning confidentiality, and it is suggested that you might bring the issue to the attention of your state legislators and recommend that the law be altered.

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-17337

mmittee Members

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September 2, 2008

E-Mail

TO: Mr. David Newman

FROM: Robert J. Freeman, Executive Director

Dear Mr. Newman:

I have received your letter in which you wrote that the Town of Wales has copyrighted its entire website. You have asked how a government body can "prevent citizens from copying information from the web site that is clearly public domain...."

In this regard, the matter does not deal directly with the Freedom of Information Law. However, I offer the following comments.

First, an agency, such as a town, is not generally required to have or post records on a website.

Second, although I am not an expert with respect to the Copyright Act, I believe that a key issue involves the use of records that are copyrighted. With respect to the ability of a person to use an access law to assert the right to reproduce copyrighted materials, the issue has been considered by the U.S. Department of Justice with respect to those materials, and its analysis as it pertains to the federal Freedom of Information Act is, in our view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to §87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, we agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department may properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted material would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work.

I note, too, that reproduction of a minimal aspect of a copyrighted work generally involves a "fair use." When copyrighted materials are obtained for a fair use, I do not believe that there can be a limitation or restriction on their dissemination.

In the context of the situation that you described, I do not believe that records posted on the Town's website would, if reproduced, cause injury to the functions or duties of the Town. If that is so, it is unlikely that the Town has the authority to limit or restrict the use or reproduction of records that it posts on its website.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17338

mmittee Members

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Executive Director

Robert J. Freeman

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September 2, 2008

E-Mail

TO: Mr. Miguel A. Carmona Jr.

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Carmona:

I have received your letter in which you sought information concerning "how to file (FOIL) requests to state prisons to obtain mental health records."

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Although that statute provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If a state prison maintains the records as a facility, I believe that it would be required to disclose the records to the extent required by §33.16. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17339

Committee Members

Laura L. Anglin
Tedra L. Cobb
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Dominick Tocci

Executive Director

Robert J. Freeman

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September 2, 2008

Mr. Jose Medina
89-A-9749
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Dear Mr. Medina:

I have received your letter in which you requested the "The Medicine Handbook" from this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee does maintain possession or control of records generally, and we do not possess "The Medicine Handbook." Nevertheless, in an effort to provide guidance, I offer the following comments.

First, you referred to USC §§552 and 552a, which are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes apply only to records maintained by federal agencies. The statute applicable to records maintained by entities of state and local government in New York is the New York Freedom of Information Law, Article 6 of the Public Officers Law.

Second, when seeking records under the Freedom of Information Law, a request should be made to the records access officer at the agency that you believe maintains the record of your interest. The records access officer has the duty of coordinating an agency's response to requests.

Lastly, since you requested a waiver of fees, I note that the federal Act includes provisions concerning fee waivers, but that the New York law contains no similar provision. Further, it has been held that an agency subject to the New York Freedom of Information Law may charge its established fee, 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17340

Committee Members

Laura L. Anglin
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Lorraine A. Cortés-Vázquez
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Dominick Tocci

Executive Director

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September 2, 2008

Mr. Jorge L. Linares
96-A-3483
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Dear Mr. Linares:

I have received your letter in which you requested the "The Medicine Handbook" from this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee does maintain possession or control of records generally, and we do not possess "The Medicine Handbook." Nevertheless, in an effort to provide guidance, I offer the following comments.

First, you referred to USC §§552 and 552a, which are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes apply only to records maintained by federal agencies. The statute applicable to records maintained by entities of state and local government in New York is the New York Freedom of Information Law, Article 6 of the Public Officers Law.

Second, when seeking records under the Freedom of Information Law, a request should be made to the records access officer at the agency that you believe maintains the record of your interest. The records access officer has the duty of coordinating an agency's response to requests.

Lastly, since you requested a waiver of fees, I note that the federal Act includes provisions concerning fee waivers, but that the New York law contains no similar provision. Further, it has been held that an agency subject to the New York Freedom of Information Law may charge its established fee, 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17341

mmittee Members

Laura L. Anglin
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John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 2, 2008

E-Mail

TO: Mr. Gary L. Rhodes

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open 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 and hope that you will accept my apologies for the delay in response. You have sought guidance concerning "what emails in a town government, town clerk, town board are available for viewing under the foil law."

In this regard, first, the Freedom of Information Law pertains to all agency records, such as those of a town, and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, email communications received or made by any town officer or employee in relation to that person's duties constitute "records" that fall within the coverage of the Freedom of Information Law.

Second, email is, my view, merely a means of transmitting a record. As in other situations involving access to records, their content, not the means by which they are communicated, is the critical factor in determining rights of access. In short, email, for the purpose of determining the extent to which it may be withheld or must be disclosed, should be treated in the same manner as paper.

Lastly, as general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. Again, the content of email, as in the case of all other records, is the key factor in considering the extent to which it must be disclosed to the public.

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 - 17342

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September 3, 2008

E-Mail

TO: Mr. Dan Kuchta

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kuchta:

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 you asked that certain records be emailed to you, but the Town Clerk of the Town of Patterson apparently refused to do so. You indicated that the records at issue were posted on the Town's webpage.

In this regard, first, §89(3)(b) of the Freedom of Information Law, which became effective in October, 2006, states in relevant part that: "All entities shall, provided such entity has reasonable means available, accept requests for records submitted in form of electronic mail and shall respond to such requests by electronic mail, to the extent practicable..."

Second, it is clear that records posted an agency's webpage are stored electronically. When that is so, it is my understanding that they may be transmitted electronically as well. If my assumption is accurate, an agency has the means to transmit such records, with reasonable effort, via email. In that circumstance, I believe that an agency must do so to comply with the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

cc: Hon. Antoinette Kopeck, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 3, 2008

E-Mail

TO: Ms. Suzanne Keiffer

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Keiffer:

I have received your letter in which you questioned whether copies of civil service exams are "covered" under the Freedom of Information Law. You indicated that the exams have been given and the grades posted.

In this regard, first, the Freedom of Information Law pertains to all government agency records, and §86(4) defines the term "record" include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the definition, I believe that copies of civil service exams maintained by an agency clearly constitute "records" that fall within the scope of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Pertinent to the question is §87(2)(h), which authorizes an agency to withhold "examination questions or answers are requested prior to the final administration of such questions." Based on the

foregoing, to the extent that questions appearing on a civil service exam will be used in the future, I believe that the Department of Civil Service has the authority to deny access. Conversely, insofar as the questions have been finally administered and will not be used in the future, they must, in my opinion, be disclosed.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-17344

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September 3, 2008

E-Mail

TO: Mr. Francis L. Crumb

FROM; Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Crumb:

I have received your letter in which you referred to a request made to the State Education Department on August 25 in which you sought "a break-down of state aid for various portions of a Capital Improvement project at Holland Patent Central School." Although the Department acknowledge the receipt of the request, you were informed that you would be notified concerning its determination on or about September 24. You have asked whether that date would "meet the 'reasonable' time period for reply."

In this regard, I offer the following comments.

First, since you referred to a breakdown, 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 new record in response to a request. Therefore, if there is no breakdown, the Freedom of Information Law would not apply. On the other hand, if such a record exists, I believe that it must be disclosed.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Although the kind of record at issue would fall within one of the exceptions, §87(2)(g), that provision in subparagraph (iii) specifies that portions of records falling within the coverage of that provision consisting of statistical or factual tabulations or data must be disclosed. A breakdown of state aid pertaining to a particular project, if it exists, would, therefore, in my opinion clearly be accessible.

Lastly, I am unaware of the number or nature of requests that the State Education Department receives or how those records are file or retrieved. Because that is so, I cannot offer guidance concerning whether a delay of approximately a month to respond to your request would be reasonable. However, I would conjecture that duplicate or similar records are maintained by the Holland Patent Central School. If that is so, it is suggested that a request for those records be made to the School. In consideration of its size, and the likelihood that the records of your interest can be readily retrieved, I do not believe that any significant delay in response to a request made to the School would be reasonable.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17345

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September 3, 2008

E-Mail

TO: Mr. Michael Miranda

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open 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 letter in which you raised a series of questions concerning the obligation of an agency, particularly the New York City Department of Education, to engage in certain actions when an employee has been found to have engaged in misconduct or is, to use your word, "guilty."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning rights of access to government records, primarily in relation to the Freedom of Information Law. With the exception of one of your questions, I do not believe that this office has the jurisdiction or expertise to respond.

Your last question is whether the head of an agency may "decide to withhold findings of guilt, to 'protect the internal deliberative process' at the cost of denying the public the right to protect their children from a known felon."

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 exceptions to rights of access may be pertinent to the question, I believe that an admission of or a determination indicating guilt or misconduct on the part of a public employee is, based on judicial decisions, clearly public.

One of the exceptions, §87(2)(b), enables an agency, such as the Department, to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While that standard may be subject to numerous interpretations, the courts have found, in brief, that public employees enjoy less privacy than others, for they are required to be more accountable than others.

Further, in a variety of circumstances, the courts have found, in essence, that those items about public employees that relate to their duties are in most instances accessible, for disclosure in those circumstances would result in a permissible, not an unwarranted invasion of personal privacy.

The other provision of significance is §87(2)(g), which permits an agency to withhold records that are:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 situations in which a public employee has either admitted or has been found to have engaged in misconduct, it has been held by the courts that the records of such determinations are public. Those records clearly relate to a public employee's duties, and a final determination about an employee would be accessible under subparagraph (iii) of §87(2)(g). However, various aspects of the records used or prepared in an investigation could reflect a deliberative process and consist of advice, opinions, recommendations or the like. To that extent, I believe that records may be withheld.

I hope that I have been of assistance.

RFJ:jm

STATE OF NEW YORK
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FOIL-AO - 17346

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September 3, 2008

E-Mail

TO: Ms. Bonnie Klein

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Klein:

I have received your letter in which you wrote that you are interested in obtaining payroll records from Genesee Community College for the past three months, particularly those pertaining to employees of certain departments within the College.

In this regard, first, 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, and requests should be directed to that person. It is suggested that you contact the College's public information or public relations office to ascertain the identity of the records access officer.

Second, the Freedom of Information Law pertains to existing records, and an agency is not required to create a new record in response to a request. Although I would conjecture that the College maintains payroll records relative to all of its employees, I am unaware of whether it maintains payroll records broken down by Department or function. That being so, it is suggested that you discuss the matter with the records access officer in an effort to learn of the nature of existing records that may be of interest to you and to gain the information necessary to submit a proper and effective request.

Insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

I point out that one of the few instances in which agencies are required to maintain certain records involves payroll information. Specifically, §87(3)(b) of the Freedom of Information Law requires that each agency "shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency." I note, too, that records indicating payments made to public employees are clearly public. Although §87(2)(b) authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", it has been held that records relating to the performance of public employees' duties are accessible, for disclosure would constitute a permissible, rather than an unwarranted invasion of personal privacy. That being so, records or portions of records indicating salaries or wages paid to public employees are clearly available under the Freedom of Information Law

I hope that I have been of assistance.

RJF:jm

cc: Records Access Officer

FOIL-AO-17347

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, September 04, 2008 2:24 PM
To: Ms. Karen Jones
Subject: RE: Sample redaction by FACS

Dear Karen:

Thank you, and I am in receipt of emails conveying your correspondence with the Fort Ann Central School District, and the sample of the invoices that weren't really redacted.

I have two suggestions for you, as follows: (1) To request that the District provide the unredacted copies via email. See the following links for advisory opinions that you might attach to your request: http://www.dos.state.ny.us/coog/ftext/f16389.htm http://www.dos.state.ny.us/coog/ftext/F16279.htm (2) To request that the District provide paper copies free of charge as they were initially redacted without legal authority, and the District is now well beyond the 10 day time limit for responding to an appeal. See the following link for an explanation of the time limits: http://www.dos.state.ny.us/coog/explaination05.htm

Legislation enacted in 2006 broadened the authority of the courts to award attorney's fees when government agencies fail to comply with FOIL. Under the amendments, when a person initiates a judicial proceeding under FOIL 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. Based on the correspondence you provided, it is my opinion that the District has not complied with the time limits set forth in the law.

I trust that this is helpful to you. If you would prefer that we issue a more formalized written advisory opinion please advise.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML - AO - 4682
FOIL - AO - 17348

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September 4, 2008

E-Mail

TO: Ms. Bette Jayne Spinney

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. Spinney:

I have received your letter and hope that you will accept my apologies for the delay in response.

According to your letter, the Board of Trustees in the Village of Stamford "keeps having executive session meetings", and one such executive session involved discussion of the budget. Further, after a meeting, you indicated that the mayor "asked the board if they wanted to go into executive session to talk about wages for employees." You asked whether that is proper, and expressed the belief that "wages were open to the public."

In this regard, first, the phrase "executive session" is defined by §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. That being so, an executive session is not separate from an open meeting, but rather is a portion of an open meeting during which the public may be excluded.

Second, 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.

In most instances, discussions involving a budget must be conducted in public, for none of the grounds for entry into executive session would apply. Often a discussion concerning the budget has an impact on personnel. Nevertheless, and despite its frequent use, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination

of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

Since you referred to discussions relating to "wages for employees", if they involved employees as a group, i.e., consideration of an across the board increase of a certain percentage for all employees of the highway department, and assuming that those employees are not members of a union, there would be no basis for entry into executive session. On the other hand, if the discussion focuses on a particular employee, his/her performance, and whether he/she merits an increase in salary, I believe that §105(1)(f) could properly be asserted. In that situation, the discussion would involve the "employment history of a particular person."

Lastly, although the performance of particular employees may be properly be discussed during an executive session, your comment concerning public to access to wages is accurate. In that context, relevant is the Freedom of Information Law, which pertains to public access to government records. As a general matter, 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.

I note that the grounds for entry into executive session in the Open Meetings Law and the grounds for withholding records under the Freedom of Information Law are not necessarily completely consistent. With respect to your comment, the Freedom of Information Law specifies that each agency, such as a village, must maintain a record indicating the name, public office address, title and salary of every officer or employee of the agency [see §87(3)(b)]. Further, based on judicial decisions, that record or its equivalent has long been accessible to the public.

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

OML-AO-4683
FOIL-AO-17349

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September 8, 2008

E-mail

TO: Ms. Deborah V. Gardner

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. Gardner:

I have received your letter in which you referred to the appointment by the Cicero Town Supervisor of "a group of citizens to an 'assessment review committee.'" The committee was designated to offer recommendations concerning the Town's assessment process and its meetings had been open. You wrote, however, that the chair of the committee recently informed you that the meetings will now be closed. You asked whether the meetings are subject to the Open Meetings Law and whether "the minutes that were distributed to members [must] be made available upon request to the public."

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

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 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)].

Based on the facts as you described them and the determinations in the judicial decisions cited above, because it consists of citizens and is authorized only to offer recommendations, I do not believe that the committee constitutes a "public body" or, therefore, that is required to abide by the Open Meetings Law, even though its initial meetings were open to the public.

With respect to minutes or other documentation prepared or received by the committee, the governing provision is the Freedom of Information Law. That law is applicable to all records of an agency, such as a town, and defines the term "record" expansively in §86(4) to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Due to the breadth of the coverage of the Freedom of Information Law, the minutes to which you referred, as well as another materials kept or produced by or for the Town, are "records" subject to rights of access conferred by that law.

I hope that foregoing serves to clarify your understanding and that I have been of assistance.

RJF:jm

cc: Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-4684
FOIL-AO-17350

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September 8, 2008

E-Mail

TO: Mr. Douglas M. Rogers

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 information presented in your correspondence.

Dear Mr. Rogers:

This is in response to your request for information regarding the Open Meetings Law. In your request, you expressed frustration with what appears to be "back room agreements" between building, planning and engineering offices in the Town of Smithtown. In an effort to provide guidance in these matters, we offer the following comments.

First, the following is a link to an online pamphlet entitled "Your Right to Know": http://www.dos.state.ny.us/coog/Right_to_know.html. The second part of the pamphlet pertains to the Open Meetings Law and meetings of public bodies. The first pertains to access to records of government agencies under the Freedom of Information Law. If you pursue a request for records from the town, you will find that intra-agency and inter-agency communications that contain "final agency policy or determinations" are required to be made available pursuant to §87(2)(g)(iii).

Please note that the Open Meetings Law applies to meetings of public bodies, and that §102(2) of the law defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the definition, the Open Meetings Law pertains to a town board, a planning board, and a zoning board of appeals, for example. It does not apply to gatherings of employees or staff of an agency.

We also note that the Freedom of Information Law pertains to all government agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Second, the staff of the Committee on Open Government renders legal advice verbally and in writing. Many of our opinions are available online, through indexes organized by key phrase. If you would like to learn more about particular issues, for example "executive sessions", you could consult the Open Meetings Law index, under "E" for Executive Session.

On behalf of the Committee on Open Government, we trust that this is helpful. Please advise if you have further questions.

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17351

Committee Members

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Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
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Dominick Tocci

Executive Director

Robert J. Freeman

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 8, 2008

Mr. John L. Minogue

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Minogue:

I have received your letter and hope that you will accept my apologies for the delay in response.

You have sought my views concerning a response to your request for copies of financial disclosure statements pertaining to officers and employees of the Town of North Hempstead. In brief, you were informed that the financial disclosure forms include items that could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy", and that, in order to gain access, photocopies would be prepared, from which the appropriate deletions would be made. However, due to the necessity to make copies, you were told that the cost, in consideration of the number of records sought, would be nearly five-hundred dollars. That being so, you suggested that the Town could design a form that would contain all of the information that could be withheld separate from the remainder, thereby enabling the public to inspect those pages that do not include deniable information with no charge.

In this regard, although your suggestion, in my view, has merit, I do not believe that there is any requirement that the Town revise its form to enhance its accountability to the public or reduce the fee for copying. As you may be aware, 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, when requested records are accessible in their entirety, I do not believe that a fee may assessed to when the request is to inspect the records.

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, 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, but that the agency could charge a fee for preparing a photocopy.

Notwithstanding the foregoing, numerous situations have arisen in which agencies have chosen to design forms in manner in which those items that may be withheld appear on different pages from those that available in their entirety. Action of that nature clearly diminishes the effort that must be expended by a government employee who responds to a request made under the Freedom of Information Law, and further, enhances the ability of the public to obtain records accessible by law efficiently, often without the assessment of a fee. I note, too, that use of a form designed to separate the public from the deniable information would be fully consistent with a recent amendment to the Freedom of Information Law that deals with the design of electronic information systems. A new §89(9) provides as follows:

> "When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard S. Finkel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17352

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September 9, 2008

Mr. Oscar Cunningham
07-A-3292
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508

Dear Mr. Cunningham:

I have received your letter in which you requested from this office a copy of an incident report, the State Constitution, and a code of ethics for correction employees.

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 maintain possession or control of records generally, and we do not possess incident reports or codes of ethics applicable to other agencies. Enclosed, however, is a copy of the Constitution.

In the future, when seeking records, a request should be made to the agency that possesses the records of your interest, which, in the case of an incident report involving an event occurring at a correctional facility and a code of ethics applicable to employees of the Department of Correctional Services would be that agency. It is noted that the Department's regulations indicate that a request for records kept at a facility should be made to the facility superintendent or his designee. A request for records maintained at the Department's central offices in Albany may be directed to Mr. Chad Powell, Administrative Assistant.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17353

ommittee Members

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September 9, 2008

Mr. Rafael Robles
88-A-8275
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Robles:

I have received your letter in which you requested copies of various advisory opinions rendered by this office and asked whether you may obtain records from a village justice.

In this regard, first, many of the opinions that your requested were prepared many years ago and are likely out of date. Consequently, enclosed are opinions that you requested that were prepared within the past fifteen years. If you find that to be inadequate, please inform me.

Second, the Freedom of Information Law pertains to agency records, and §86(3) of that law defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

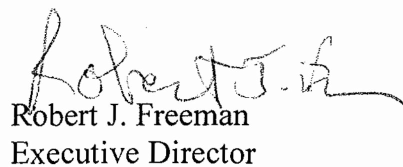
> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, courts are not subject to the Freedom of Information Law.

This not intended to suggest that courts are not required to disclose records that they maintain, for other statutes often require substantial disclosure. In the context of the situation that you described, §2019-a of the Uniform Justice Court Act provides, in short, that records maintained by a town or village justice court are accessible to the public, except in situations in which a different statute confers confidentiality.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17354

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September 9, 2008

Mr. Francis L. Crumb

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Crumb:

I have received your letter in which you sought an advisory opinion concerning rights of access to a petition submitted to the Holland Patent Central School District by the Holland Patent Parents 4 Change and signed by "more than 1,000 people seeking a re-vote" pertaining to a capital project. It is your view that the original petition should be accessible, and that there "is no requirement to edit or redact."

In this regard, first, the Freedom of Information Law pertains to all records of an agency, such as the District, and §86(4) of that statute defines the term "record" to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, a petition submitted to an agency clearly constitutes a "record" falling within the coverage of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. Among the grounds for denial is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would result an unwarranted invasion of personal privacy. In my view, however, that exception could not validly be asserted.

When a petition is circulated, in most instances those who sign can and often do read the names of others who have signed; often, because their friends and neighbors have signed, that public expression of opinion or support for certain action appearing on a petition encourages others to add their names to it. When people sign a petition, frequently their action represents an exception if not a desire on the part of those who signed the petition that their names would be disclosed, and the submission of a petition generally represents an indication that the signatories have essentially waived the protection of privacy that they might otherwise enjoy. In short, it is my opinion that a petition signed by citizens is intended to publicly inform an entity of government as well as the public at large that a group of named individuals seek to express a point of view relative to a particular subject.

If my assumptions are accurate, the "original petition" must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Nancy Nowicki, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17355

Committee Members

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September 9, 2008

Ms. Ruth Mulford
Associated Builders & Contractors, Inc.
33 Comac Loop
Ronkonkoma, NY 11779

The staff of the Committee on 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. Mulford:

I have received your letter and the materials relating to it. You sought an opinion concerning the propriety of a fee sought to be charged by the Town of Oyster Bay in response to a request made under the Freedom of Information Law. Specifically, you were informed that when a request is made by mail, "there is a $30.00 research fee charged per section, block and lot file."

From my perspective, the fee in question is inconsistent with law and cannot validly be assessed. In this regard, I offer the following comments.

When a request involves the retrieval of or search for paper records, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, searching for records or charging more than twenty-five cents per photocopy for records up to nine by fourteen inches, no "research" or other fee may be assessed. In this instance, I know of no statute that would authorize the Town to do so.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To

> remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record...except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> > (1) inspection of records;
> >
> > (2) search for records; or
> > (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

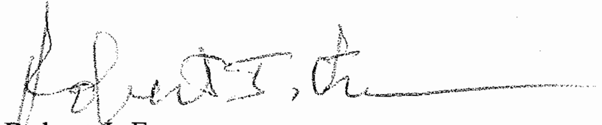
As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

In an effort to enhance understanding of and compliance with law, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Jack L. Libert
Timothy R. Zike

FOIL-AO - 17356

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, September 10, 2008 5:57 PM
To: Douglas Schneider, Binghamton Press & Sun Bulleting
Subject: Freedom of Information Law - format

Doug:

This is typical language from our advisory opinions:

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.

And also:

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered on a keyboard. While some have contended that those kinds of steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, the courts have directed that an agency must follow that course of action.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout.

Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

In another decision which cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

In short, assuming that the Department is able to transfer the requested data to a storage medium usable to you and you are willing to pay the requisite fee, based on judicial decisions, the Department is required to do so.

Again, typically the agency is in the position of refusing to re-format the data.... In my opinion, if the record exists in the electronic format of your choice it must be provided to you in that format.

I hope that this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17357

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September 10, 2008

Mr. Earl Hayes
07-A-4800
Lyon Mountain Correctional Facility
3864 Route 374
Lyon Mountain, NY 12952

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hayes:

I have received your letter and, based on your remarks, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3)(a) provides in part that an agency, such as a police department, is not required to create a record in response to a request. Therefore, if there are no records indicating the reason for a detective's appearance at your residence, the agency would not be required to prepare a new record on your behalf containing 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."

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 - 17358

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Laura L. Anglin
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September 10, 2008

Ms. Pam Harmon

The staff of the Committee on 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. Harmon:

I have received your letter and the correspondence attached to it. You referred to a request for "an accounting of the maintenance and repair of Redmond Gully Rd." in the Town of Avoca, rather than an estimate, as well as other requests that apparently were not answered.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3)(a) provides in part that an agency is not required to create a record in response to a request. Therefore, if, for example, no "accounting" exists with respect to the maintenance and repair of the road that you identified, the Town would not be required to prepare a new record on your behalf containing the information sought.

Second, insofar as records have been prepared, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 an accounting or other records exist relating to the cost of maintenance or repair of the road that you identified, I believe that they would be accessible. In short, none of the grounds for denying access would be applicable.

Third, as you may be aware, the Town Supervisor is required to maintain and disclose records relating to Town financial transactions. Section 29(4) of the Town Law requires 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, 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."

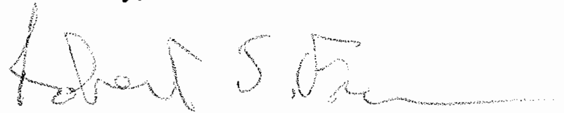
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Supervisor

FOIL-AO - 17359

From: Jobin-Davis, Camille (DOS)
Sent: Friday, September 12, 2008 4:37 PM
To: Sheils, Kate (DOB)
Subject: RE: IP & Non-Disclosure Agreement

Kate,

Only insofar as your agency believes it has the ability to bear the burden of proof on whether disclosure would cause substantial injury to the competitive position of either of the firms involved, or that the material submitted constitutes a "trade secret", would your agency have the ability to withhold the information.

As you know, FOIL permits an agency to deny access under section 87(2)(d), and places the ultimate burden of proof on the agency. Whether the "intellectual property" is a "trade secret" defined in case law, or whether it would cause substantial injury to a firm's competitive position is not always easy to determine, but the following advisory opinions should help:

http://www.dos.state.ny.us/coog/ftext/f16765.htm

Don't forget the timeliness of the request:
http://www.dos.state.ny.us/coog/ftext/f14719.htm

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17360

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Dominick Tocci

Executive Director

Robert J. Freeman

One Commerce Plaza, 99 Washington Ave., Suite 650, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 17, 2008

E-Mail

TO: [redacted]

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear [redacted]

I have received your letter in which you indicated that you recently "registered a complaint" with your local police department concerning your neighbor's dogs. You wrote that you later requested "any complaints regarding that address" but were informed that the agency "found no results of [y]our complaint, hence it was never registered." It appears, therefore, that your complaint, and perhaps others, have not been registered or reduced to writing.

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.

Please note that the Freedom of Information Law pertains to existing records; it generally does not require that agencies prepare or keep particular records. If complaints have not been registered, the Freedom of Information Law would not apply. It is suggested, however, that you attempt to ascertain whether a policy or procedure exists that would require that complaints be registered and in some way memorialized in writing. If such a policy or procedure has been adopted, I believe that such a record would be accessible under 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-17361

mmittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
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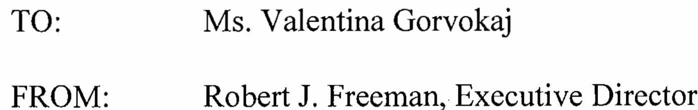
September 17, 2008

E-Mail

TO: Ms. Valentina Gorvokaj

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. Gorvokaj:

I have received your letter concerning whether your neighbors have licenses for their dogs.

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.

Historically, a license in my opinion is intended to enable the public to know that a certain activity has been permitted by a government agency and that the holder of the license has met the proper requirements. In this instance, I believe that dog licenses, including the names and addresses of owners of dogs, must be disclosed.

It is suggested that you share this opinion with the municipal official with whom you have contact, and suggest the he or she may call this office with any questions.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-17362

From: Freeman, Robert (DOS)
Sent: Wednesday, September 17, 2008 9:40 AM
To: Greg.Waldron
Subject: RE: All FOIL requests must be written?

Good morning - -

I believe that the Deputy Clerk's statement is consistent with law. In short, although an agency may accept a verbal request, it may require that any request for a record be made in writing.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
Website: www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17363

State of New York
COMMITTEE ON OPEN GOVERNMENT
MEMORANDUM

TO: Patricia Purcell September 19, 2008

FROM: Bob Freeman

SUBJECT: Internal Working Documents

I have received you inquiry concerning the status of "internal working documents" under the Freedom of Information Law.

In this regard, first, the Freedom of Information Law pertains to all agency records, and §86(4) defines the term "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the breadth of the language quoted above, it is clear that "internal working documents" constitute "records" that fall within the scope of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Pertinent is one of the grounds for denial of access, §87(2)(g), concerning "inter-agency or intra-agency materials.". However, due to its structure, often portions of records may be withheld, while others must be disclosed. Specifically, the cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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-17364

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
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Executive Director

Robert J. Freeman

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September 19, 2008

Mr. Andre Rushion
08-A-1063
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Dear Mr. Rushion:

I have received your letter in which you indicated that two entities had failed to respond to your requests for records. They are the Appeals Bureau of the Supreme Court in Manhattan and the New York City Police Department.

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based upon the foregoing, the Court is not subject to the Freedom of Information Law; the Police Department, however, clearly constitutes an "agency" required to comply with the Freedom of Information Law.

When the Freedom of Information Law is applicable, it provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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."

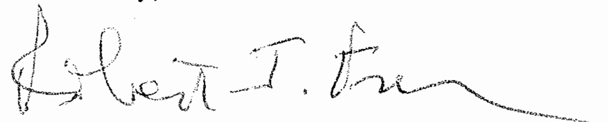
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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 New York City Police Department is Jonathan David.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17365

Committee Members

Laura L. Anglin
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September 19, 2008

Mr. Nigial Lewis
08-B-1907
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lewis:

I have received your letter in which you indicated that you have been "having problems getting a response from the Onondaga County Justice Center" in relation to your 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."

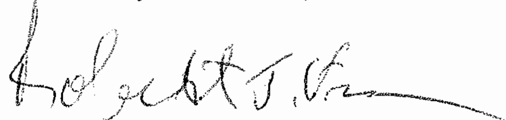
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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:jm

FOIL-AO - 17366

From: Freeman, Robert (DOS)
Sent: Tuesday, September 23, 2008 10:33 AM
To: Sheils, Kate (DOB)
Subject: RE: FOIL Mailbox Question

Hi - -

As you have described the situation, it would not be a request for records and, therefore, the inquiry need not be treated as a FOIL request. FOIL, as you know, pertains to existing records. Although government employees often provide information in response to questions, there is no legal obligation to do so, and when they choose do so, they exceed any responsibility imposed by FOIL.

Hope all is well with you and yours.

Bob

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
Website: www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17369

From: Freeman, Robert (DOS)
Sent: Tuesday, September 23, 2008 11:22 AM
To: Sheils, Kate (DOB)
Subject: RE: FOIL Question Regarding Client Listing

Because the government agencies would, if asked to do so, be required to provide access to records identifying the entity with which they had a contractual relationship, your record containing equivalent information would, in my view, clearly be accessible under FOIL.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
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99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17368

Committee Members

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Lorraine A. Cortés-Vázquez
John C. Egan
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Clifford Richner
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September 23, 2008

Mr. Dominique Joseph
08-R-0259
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Joseph:

I have received your correspondence in which you indicated that you have encountered difficulty in receiving responses to the your Freedom of Information Law requests directed to the New York City Police Department. It also appears that you believe that the Freedom of Information Law was amended to require that fees be waived or reduced "when release of the information would be in the 'public interest'."

In this regard, I offer the following comments,

First, I point out that the Freedom of Information Law has not been amended regarding waiver or reduction of fees. Further, in a decision involving a request for a waiver of fees by an inmate who sought records from an office of a district attorney, it was held that an agency may assess a fee in accordance with the Freedom of Information Law, notwithstanding the inmate's status as an indigent person [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

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, I point out that the person designated to determine appeals by the Police Department 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
cc: Sgt. James Russo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17369

Committee Members

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Tedra L. Cobb
Lorraine A. Cortés-Vázquez
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September 23, 2008

E-Mail

TO: Mr. Charles J. Anthony

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Anthony:

I have received a copy of your letter that was directed to the NYS Office of the State Comptroller. You complained that you have encountered difficulty in gaining access to records from the NYS Department of Public Service in a timely manner.

Please be advised that the Committee on Open Government is responsible for providing advice and guidance concerning access to government records, primarily under the state's Freedom of Information Law. In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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 Public Service to determine appeals is Ms. Jaclyn Brilling, Secretary to the Department.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-17370

From: Freeman, Robert (DOS)
Sent: Tuesday, September 23, 2008 1:07 PM
To: Greg Waldron
Subject: Edited video recordings of Walton Village Board meetings are broadcast & sold

If the tapes are prepared by or for the Village, I believe that they must be made available in their entirety in response to a FOIL request. I am unfamiliar, however, with any provision dealing with ability to edit or delete a video prior to airing.

On the other hand, if the videotape is prepared by a private person and is not a Village record, I believe that person may do with the tape as he or she sees fit.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4690
FOIL-AO-17371

Committee Members

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Lorraine A. Cortés-Vázquez
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Michelle K. Rea, Chair
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September 23, 2008

Hon. Ricardo Montano
County of Suffolk Office of County
Legislature
Courthouse Corporate Center
820 Carleton Ave., Suite 4300
Central Islip, NY 11722

The staff of the Committee 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 Legislator Montano:

I have received your correspondence and the materials attached to it. The documentation consists of news articles, an excerpt of a transcript of a meeting of June 10 of the Suffolk County Legislature, a resolution to amend the Legislature's rules, and a transcript of the Legislature's meeting of August 19 relating to a proposed change in the rules. You have sought my "impressions and thoughts" concerning the numerous issues raised upon review of their content.

The first article pertains in part to a lawsuit that you initiated and concerns whether an action taken by the Legislature "was improperly discharged from committee because Lindsay", the presiding officer, "cast the decisive vote in favor of the bill without counting his presence as a committee member." The article also indicates that a "consensus formed" during "a closed-door discussion" to appeal a lower court decision to the Appellate Division, that "[n]o formal minutes of the meeting were taken and there was no vote recorded in the public record." According to the article, counsel to the Legislature, George Nolan ,"said no public vote is required", that 12 legislators "backed an appeal", indicating that "It was the sense of the group." He added that "[t]he group made the decision, that they wanted to defend the case."

From my perspective, the foregoing suggests a variety of failures to comply with law. In this regard, I offer the following comments.

First, it is noted that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during

which the public may be excluded, and the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

It has been advised that members of a public body may meet in private to seek legal advice from their attorney, and that when they do so, their communications fall within the attorney-client privilege. Because the communications are confidential, a gathering of that nature would be exempt from the coverage of the Open Meetings Law pursuant to §108(3) of that statute, which exempts from the Open Meetings Law matters made confidential by state or federal law. In situations in which a public body has been sued by one of its own members, that member, in my opinion, could be excluded from a gathering of the other members of the body when they are seeking legal advice. However, the transcript of the June 10 meeting specifies that a motion was made to enter into executive session. Because the gathering was an executive session rather than a matter exempt from the Open Meetings Law, I believe that you, a member of the Legislature, had the right to be present. Section 105(2) states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." In short, although you might have been properly excluded from a gathering held outside the coverage of the Open Meetings Law based on the assertion of the attorney-client privilege, in my view, because of the manner in which the Legislature chose to engage in a private discussion, entry into an executive session, you had the right to attend that session.

Second, as indicated earlier, the Legislature took action by reaching a "consensus." In this regard, in Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education, the issue pertained to access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was

found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id.).

Whenever action is taken by a public body, I believe that it must be memorialized in minutes, and §106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In my view, when the Legislature reached a consensus reflective of its decision to appeal, that decision, whether it was made in public or during an executive session, was required to have been memorialized in minutes prepared in accordance with §106 of the Open Meetings Law.

There is a related requirement pertinent to the absence of a vote being recorded. Section 87(3)(a) of the Freedom of Information Law provides that:

> "Each agency shall maintain:

> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an agency subject to the Freedom of Information Law [see §86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually concerning particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

> "it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" <u>Smithson v. Ilion Housing Authority</u>, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)].

There is nothing in either the Freedom of Information or Open Meetings Laws that specifies that a vote must be accomplished by means of a roll call or that a vote be "announced exactly at 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 her vote, an entity would be acting in compliance with the open vote requirements imposed by those statutes.

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 [<u>Perez v. City University of New York</u>, 5 NY3d 522, 530 (2005)].

Lastly, attached to your letter is an editorial that appeared in *Newsday* on August 25 critical of a change the Legislature's rules regarding the presiding officer's votes in committees. According to the commentary, "His vote counts to get the bill out of committee, but his presence doesn't count to increase the number of votes needed for a majority." The new provision, in my opinion, is

contrary to a state statute, §41 of the General Construction Law, entitled "Quorum and majority."

The new provision in the Legislature's rules states that:

> "Legislation laid on the table shall be placed on the agenda for consideration by the full Legislature at its next regularly scheduled meeting and shall be eligible for a vote by the full Legislature only if it has been discharged, with or without recommendation, by a majority of the members present and voting and the number of those present and voting to discharge equals in number at least a majority of the entire membership of the Legislative committee to which it has been assigned[, with or without recommendation]. For purposes of this rule, the term 'entire membership of the Legislative committee' shall mean the members appointed to the committee by the Presiding Officer and shall not include the Presiding Officer acting in his or her ex-officio capacity. The 'entire membership of the Legislative committee' shall not increase when the Presiding Officer votes at a committee meeting in his or her ex-officio capacity. For the purposes of this rule, the term 'members present and voting' shall include members casting an abstention" (emphasis included in the text sent).

A quorum, unless specific direction is provided by statute to the contrary, is, according to §41 of the General Construction Law, a majority of the total membership of a public body. Section 41 was amended in 2000 to authorize the presence of a quorum and the taking of action by public bodies by means of videoconferencing and 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 provision quoted above, 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." A majority of the members present, unless all are present,

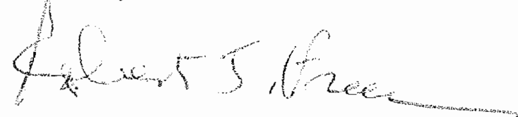
would not constitute a quorum. Only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Moreover, §41 specifies that those powers and duties can only be carried out by means of action approved by "not less than a majority of the whole number."

The new rule also contains an inconsistency involving the role of the Presiding Officer. In one sentence, the rule indicates that the Presiding Officer acting in his or her ex officio capacity is not included as part of the "entire membership of the Legislative committee", but in the next, the rule provides that "The 'entire membership of the Legislative committee' shall not increase when the Presiding Officer votes at a committee meeting in his or her ex officio capacity." In my view, an ex officio member of a entity is a member for all purposes relating to the powers and duties of that entity. That person must in my opinion be included within requirements concerning the presence of a quorum and must be counted as a member when a committee takes action. If my contention is accurate, the presence of that person would alter the meaning of the "entire membership of the Legislative committee", and could alter the number of votes needed to take action. Again, to comply with a state statute, that number cannot be less than a majority of the total membership of the committee.

In an effort to enhance understanding of and compliance with law, a copy of this response will be sent to the County Legislature.

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-17372

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner
Dominick Tocci

Executive Director

Robert J. Freeman

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September 23, 2008

Mr. Emel Mcdowell
92-A-5351
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mcdowell:

I have received your letter in which you indicated that you have encountered difficulty in receiving responses to your Freedom of Information Law request and appeal from the New York State Division of Parole.

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 appeal by the Division of Parole is Terrence X. Tracy, Counsel to the Division.

In an effort to enhance compliance with law, a copy of this response will be forwarded to the Division.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer
Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17393

Committee Members

Laura L. Anglin
Tedra L. Cobb
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September 24, 2008

E-Mail

TO: Mr. 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 information presented in your correspondence.

Dear Mr. Kim:

I have received your letter concerning a request made under the Freedom of Information Law addressed to the Division of Human Rights. According to your letter, the file pertaining to your case was shipped from Buffalo to New York City, but when you asked to inspect the file, you were told that it could not be found.

In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you might request a certification in accordance with §89(3) from Mr. Brill.

I hope that I have been of assistance.

RJF:jm

cc: Richard Brill, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17374

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
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September 24, 2008

Mr. Sidney Butler
91-A-2844
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Butler:

I have received your letter in which you referred to failure on the part of the Laboratory Corporation of America to respond to your request made pursuant to the Freedom of Information Law.

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 includes entities of state and local government within its coverage. That law does not apply to private entities, such as the corporation 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:jm

State of New York
Department of State
Committee on Open Government

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Albany, New York 12231
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September 24, 2008

FOIL AO 17375

Mr. Jose Nunez
06-A-1137
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Nunez:

I have received your letter in which you complained that you have sent numerous Freedom of Information Law requests to your facility and 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.

The person designated by the Department of Correctional Services to determine appeals is George A. Glassanos, Deputy Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17376

Committee Members

Laura L. Anglin
Tedra L. Cobb
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September 24, 2008

Mr. Al Blanche
88-A-6605
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. Blanche:

I have received your correspondence. Please accept my apologies for the delay in response. Having reviewed the correspondence, it appears that you encountered difficulty in obtaining investigation reports and related records concerning grievances you have filed at your correctional facility. You also stated that you have encountered difficulty in obtaining a Vaughn Index from the NYS Division of Parole. You also asked for a copy of the decision that you sent to us whereby you allege that the Court required that a Vaughn Index be prepared.

Since I am unaware of the nature of the grievances filed, except for one that you filed against the dentist at your facility, I can only offer the following general comments.

First, with regard to records relating to grievances and related matters, as you are aware, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. It has been found that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY 2d 652, 568 (1986)].

In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

If the records at issue pertain to a correction officer, §50-a would be most pertinent.

Aside from §50-a, other grounds for denial appearing in the Freedom of Information Law are pertinent to an analysis of rights of access.

For instance, §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 may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. Based upon judicial interpretations of the Freedom of Information Law, 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, supra]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Another 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. Many of the records sought likely consist of intra-agency materials.

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]. Three of those decisions, Powhida, Scaccia and Farrell, involved findings of misconduct concerning police officers. Further, Scaccia dealt specifically with a determination by the Division of State Police to discipline a state police investigator. In that case, the Court rejected contentions that the record could be withheld as an unwarranted invasion of personal privacy or on the basis of §50-a of the Civil Rights Law.

It is also noted, however, that in Scaccia, it was found that although a final determination reflective of a finding of misconduct is public, the records leading to the determination could be withheld. Further, 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., Prisoners' Legal Services, supra; also Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Therefore, to the extent that charges are dismissed or allegations are found to be without merit, I believe that the records related to and including such charges or allegations may be withheld.

Lastly, enclosed, as requested, is a copy of Blanche v. Dennison (Supreme Court, Wyoming County, March 29, 2005). You contend that the decision orders that a Vaughn Index be prepared. Here I point out that while a final administrative determination must "fully explain" the reasons for denial, I note that an agency's burden of justifying a denial in a judicial challenge is clearly more stringent. As stated by the Court of Appeals in a case in which it referred to several decisions it had previously rendered:

> "...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)"[Gould, Scott and DeFelice v. New York City Police Department, 653 NYS2d 54, 89 NY2d 267, 275 (1996)]..

It appears that the Court in Blanche, supra, ordered a detailed explanation as to what materials fall within a specific exemption. However, I am unaware of any provision of the Freedom of Information

Law or judicial decisions that would require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each documents. 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)]. As such, the Division of Parole would not be required to prepare such an index. 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)].

Also enclosed are copies of the Committee's most recent annual report to the Governor and the State Legislature and a supplement to that report.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Terrence X. Tracy
Encs.

FOIL-AO-17377

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, September 25, 2008 12:08 PM
To: Mr. Anthony Fusco
Subject: RE: Opinion Requested

Dear Tony:
Please accept my apology for taking so long to respond to your request. Fall is always a busy time of year, and I was out of town on a few occasions with public speaking commitments. In response to your question about the 30 days response time frame, yes, the statutory language permits an agency up to 20 business days (30 days) to respond without requiring an explanation. In my opinion, when records are readily retrievable, however, there is no reason why an agency should take the full 20 business days, and the law would not support such a lengthy response time frame. The following advisory opinion may be helpful to you in light of how some of the records you have requested may be readily retrievable:
http://www.dos.state.ny.us/coog/ftext/f14137.htm

---Please note that the time limits that are currently in effect (http://www.dos.state.ny.us/coog/explaination05.htm) were not in place when this opinion was written. In my opinion the new time limits would not change the analysis rendered in the paragraph that begins "Following the receipt...". If you think it would be valuable to do so, you may want to ask that you be informed when records that documents be made available to you as they are retrieved, in piecemeal response to your requests.

hope that this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO - 17378

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, September 25, 2008 2:27 PM
To: 'Edward Mc Carthy'
Subject: RE: Thank you/Inquiry

Ed,

Sorry for the delay – I've been out of the office on speaking engagements and haven't kept up with the email as well as I should have.

In response to your question, the answer is no – section 89(3) of the law, as well as the regulations promulgated by the Committee (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Neither the law nor the regulations require that the request be received by the records access officer directly, only that the records access officer has the duty to coordinate an agency's response to requests.

I hope that this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL - AO - 17329

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, September 25, 2008 2:46 PM
To: Mr. Gary Rhodes
Subject: RE: FOIL Material

Gary:

I am in receipt of your fax of September 18. Please accept my apology for not responding sooner, I went out of town for a few days for speaking engagements and am still working through my backlog.

In response to your question about paying for records, as you will note from the advisory opinions previously referenced, a person who is a member of a committee does not necessarily enjoy any greater rights of access due to membership on the Committee.

The materials that you sent include a newspaper description of a resolution passed by the Town Board that seems to be in keeping with practices that I am familiar with in other towns – materials that are related to the work of a committee are provided free of charge, but an individual member of a committee who makes a request for records that are not regarded as related to the work of the committee continues to be required to pay for copies of records as are other residents.

I hope that this and the advisory opinions previously sent are helpful to you. Again, sorry for the delay!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO- 17380

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, September 25, 2008 3:02 PM
To: Gary Rhodes
Subject: RE: Town of Henderson Town Clerk

Gary,

As you probably know, the enforcement mechanism under the law, after appealing to the Town's appeal officer, is to bring an Article 78 proceeding, as outlined at the following link: http://www.dos.state.ny.us/coog/explaination05.htm

Forgive me if we've already spoken about the appointment of a records access officer, however, regulations of the Committee provide that the governing body of a public corporation, such as the Town Board, is responsible for insuring compliance with the law, 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..." (12 NYCRR 1401.2[b]) In my experience, the town clerk is designated as records access in the great majority of towns, for he or she is also the records management officer and the legal custodian of town records, pursuant to §30(1) of the Town Law.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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FOIL-AO-17381

From: Freeman, Robert (DOS)
Sent: Monday, September 29, 2008 12:02 PM
To: David Mack
Subject: RE: Accusitory Insturments

I do not believe that it is correct. Only when charges are fully dismissed are records sealed. I note that a close reading of §160.55 indicates that most charges dropped to violations are sealed in all government offices, such as police departments or offices of district attorneys, except the courts, where they remain open. In the case of a justice court, the records in my view are available under §2019-a of the Uniform Justice Court Act.

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FOIL-AO-17382

From: Freeman, Robert (DOS)
Sent: Monday, September 29, 2008 2:26 PM
To: Jeffrey Chodikov

I have received your inquiry concerning the amendments to the Freedom of Information Law involving fees. Please note that in those situations in which an employee's time is the basis for the fee, the statute refers to the "hourly salary" of the lowest paid employee able to satisfy the request. Salary, in my view, does not include benefits. Also note that the new provisions do not include within their coverage requests copies of paper records up to nine by fourteen inches or the cost of searching for, reviewing or making redactions from those records.

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FOIL-AO - 17383

From: Mercer, Janet (DOS)
Sent: Monday, September 29, 2008 3:05 PM
To: Hon. Donna Arquiett, Town Clerk of Town of Colton
Subject: CSEA request

I have received your inquiry concerning the request by CSEA, which has apparently sent the same requests to hundreds of municipalities.

In this regard, I would like to offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

I hope that I have been of assistance.

Janet Mercer
Committee on Open Government
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FOIL-AO - 17384

From: Freeman, Robert (DOS)
Sent: Monday, September 29, 2008 3:03 PM
To: Hon. Cheryl L. Shackelton, Town Clerk, Town of Oneonta

I have received your inquiry concerning the request by CSEA, which has apparently sent the same requests to hundreds of municipalities.

In this regard, I would like to offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

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-17385

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Clifford Richner
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Executive Director

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September 29, 2008

E-Mail

TO: Ms. Teresa Brickett

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Brickett:

I have received your letter and hope that you will accept my apologies for the delay in response. You have sought an opinion concerning "access to complaints of 'Medicaid Fraud' filed with a county Department of Social Services." You wrote that recent complaints appear to "target people of a single immigrant/refugee community" and referred to those about whom complaints were made as employees. It is unclear, however, whether those persons are employees of government or private employers. Nevertheless, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. I note that the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that there may be instances in which a single record includes both accessible and deniable information, and that an agency is required to review a record that has been requested to determine which portions, if any, may properly be withheld.

The exception to rights of access of primary significance pertains to the protection of privacy, and §87(2)(b) permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In the context of your inquiry, it has generally been advised that those portions of a complaint or other record which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of a member of the person who made the complaint is often irrelevant to the work of the agency, and in most circumstances, I believe that identifying details may be deleted. If the deletion of personally identifying details is insufficient to ensure that the identity of complainant will not become known, other portions of the complaints may, in my view, be withheld.

If complaints are made by organizations, rather than natural persons, it is noted that the provisions dealing with the protection of privacy pertain to records identifiable to natural persons. I do not believe that they would apply to records identifiable to entities. In those instances, the identities of those entities could not, in my opinion, justifiably be deleted.

Lastly, the Freedom of Information Law does not distinguish among applicants for records. 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.

Conversely, when one seeks records as a litigant, that person would likely gain access based on a different vehicle, either discovery or subpoena. Records available in discovery generally involve those that are relevant or material to the litigation, and the ability to gain access in discovery is not conditioned upon the kinds of exceptions to public rights of access found in the Freedom of Information Law. Again, the relevance of records to an individual, or even to a judicial proceeding, is not a consideration when records are sought under the Freedom of Information Law.

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

OML AO- 4693
FOIL AO- 17386

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September 29, 2008

Ms. Joanne M. Novak

The staff of the Committee on 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. Novak:

We are in receipt of your request for an advisory opinion concerning whether the Hepburn Library of Norfolk is an "agency" subject to the Freedom of Information Law in light of the First Department's decision in Metropolitan Museum Historic District Coalition v. De Montebello, 20 AD3d 28, 796 NYS2d 64 (2005). Our opinion, you indicated, will be instructive to your client, the North Country Library System, in providing clear guidance to any similarly situated member libraries.

In your letter you indicated that the Hepburn Library "receives an appropriation from the Town of Norfolk ... transferred to the library for its sole control and use ... as directed by its Board of Trustees", and that it also receives private donations. You wrote that the Library "recommends a slate of trustees to the Town of Norfolk who then appoints the Board" but that trustee vacancies are filled by the Library Board. You added that the Library sets personnel policy, that the employees are "not public employees" and that the Library "is not controlled in their decision and policy making process by the Town." In an effort to provide guidance with respect to your questions, we 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, we believe that a distinction may be made between a public library and an association or free association library. In our view, typically the former would 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 our 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, we do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, it is likely that 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.

It is emphasized that many libraries are characterized as "public", in that they can be used by the public at large. Nevertheless, some of those libraries are governmental in nature, while others are not-for-profit corporations. The latter group frequently receives significant public funding. Because they are not governmental entities, however, they would not be subject to the Freedom of Information Law.

In addition to the information you provided with respect to the Hepburn Library, we learned from the Hepburn Library website (www.nc3r.org/norfolk/) that it is one of seven Hepburn Libraries in St. Lawrence County, made possible through the donation of A. Barton Hepburn, who also established endowments to ensure their continued operation. The website for the Hepburn Library of Edwards indicates that "Each town agreed to raise a specific amount of tax monies, annually to continue the support of the library" (http://www.herd.org/edwards/library/).

As you note, in 2005 the Appellate Division affirmed a New York County Supreme Court case in which the court determined that the Metropolitan Museum of Art was outside the coverage

of the Freedom of Information Law. In considering its status in relation to that statute, the court found that:

> "...the Museum is a not-for-profit educational corporation controlled by a Board of Trustees consisting of 40 self-elected individuals. The City retains no authority to hire or fire the Museum's Director or President, and no City representatives sit on the Executive Committee, although five of seven ex-officio Trustees are City officials. Moreover, the Museum's operating and capital budgets are primarily privately funded, and its budgets are not subject to City approval or public hearings.
>
> "Since, as the Supreme Court correctly held, the Museum is not controlled by municipal officials, there is no danger that they can act through the Museum in order to shield their actions from public scrutiny, and FOIL's overriding purpose of promoting "open and accessible government... a hallmark of a free society" (Matter of Russo v. Nassau County Community College, 81 NY2d 690, 697, 603 NYS2d 294 [1993]), is not implicated" [Metropolitan Museum Historic District v. DeMontebello, 20 AD3d 28 at 37-38, 796 NYS2d 64 at 71 (1st Dept. 2005)].

In light of this decision, and the information cited above, it appears that the Hepburn Library of Norfolk is a private non-governmental entity; however, it is difficult to render a precise opinion without more explicit judicial guidance.

Consider, for example, the following three judicial decisions regarding not-for-profit corporations and their status as "agencies" subject to the Freedom of Information Law:

In the first, Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the issue involved access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they

> become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In another decision rendered by the Court of Appeals, Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court found that a not-for-profit corporation, based on its relationship with an agency, the City of Buffalo was itself an agency subject to the Freedom of Information Law. The decision indicates that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

More recently, in a case involving the City of Canandaigua and a not-for-profit corporation, the "CRDC", the court found that:'

> "...The CRDC denies the City has a controlling interest in the corporation. Presently the Board has eleven members, all of whom were appointed by the City (see Resolution #99-083). The Board is empowered to fill any vacancies of six members not reserved for City appointment. Of those reserved to the City, two are paid City employees and the other three include the City mayor and council members. Formerly the Canandaigua City Manager was president of the CRDC. Additionally, the number of members may be reduced to nine by a board vote (see Amended Certificate of Incorporation Article V(a)). Thus the CRDC's claim that the City lacks control is at best questionable.
>
> "...As in Matter of Buffalo News, supra, the CRDC's intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law...[Canandaigua Messenger, Inc. v. Wharmby, Supreme Court, Ontario County, May 11, 2001, affirmed 292 AD2d 835 (2002)].

We note that the Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing.

On the one hand, the Town has the power to appoint the members of the Library Board, unless there is a vacancy. In that event, the Town-appointed Board fills the vacancy. On the other,

the Library Board appears to be independent with respect to the development of policy and the day to day operation of the Library. On balance, in our view, due to the direct authority of the Town to appoint, and its indirect authority to fill vacancies on the Board, it is suggested that it would likely be found that the Library is an agency subject to the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to non-governmental libraries open to the public has arisen in several instances, perhaps because, as you are likely aware, its companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

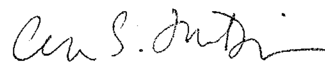
> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries must be conducted in accordance with that statute, even though the records of those entities may fall beyond the coverage of the Freedom of Information Law.

Should you wish to submit additional information regarding the status of the Library Board, we would be willing to review our opinion.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

FOIL-AO - 17387

From: Mercer, Janet (DOS)
Sent: Tuesday, September 30, 2008 8:46 AM
To: Sue Brennessel
Subject: CSEA Request

Dear Sue:

As per our telephone conversation regarding the request you received from CSEA, which has apparently been sent to hundreds of municipalities, I would like to offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

I hope that I have been of assistance.

Janet Mercer
Committee on Open Government
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Albany, NY 12231
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FOIL-AO - 17388

From: Mercer, Janet (DOS)
Sent: Tuesday, September 30, 2008 9:54 AM
To: Chief Steve Fajfer, Town of Marlborough Police Department
Subject: CSEA Request

Dear Chief Fajfer:

As per our telephone conversation regarding the request you received from CSEA, which has apparently been sent to hundreds of municipalities, I would like to offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

I hope that I have been of assistance.

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FOIL-AO - 17389

From: Mercer, Janet (DOS)
Sent: Tuesday, September 30, 2008 10:53 AM
To: Hon. Jean Raymond, Supervisor, Town of Edinburg
Subject: CSEA Request

Dear Supervisor Raymond:

As per our telephone conversation regarding the request you received from CSEA, which has apparently been sent to hundreds of municipalities, I would like to offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

I hope that I have been of assistance.

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FOIL-AO-17390

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, September 30, 2008 12:12 PM
To: Hon. Sue Pulverenti, City Clerk, City of Oneida
Subject: Freedom of Information Law - CSEA request

Sue:

As per our conversation, please note the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

Should you have further questions, please let me know.

Camille

Camille S. Jobin-Davis, Esq.
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FOIL-AO-17391

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, September 30, 2008 1:37 PM
To: 'Alice Hunt, Deputy Town Clerk
Subject: Freedom of Information Law - CSEA request

Alice:

As per our conversation, please note the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

I hope that this is helpful. 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
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17392

To: Michael E. Stegmeier, Village of Lancaster
Subject: CSEA Request
Date: October 2, 2008

I have received your telephone inquiry concerning the request by CSEA, which has apparently sent the same requests to hundreds of municipalities.

In this regard, I would like to offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

I hope that I have been of assistance.

Janet Mercer
Committee on Open Government
One Commerce Plaza
99 Washington Ave., Suite 650
Albany, NY 12231
(518) 474-2518
(518) 474-1927 - Fax
Website: http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO - 17393

From: Mercer, Janet (DOS)
Sent: Thursday, October 02, 2008 11:43 AM
To: Mary Lou Christiana
Subject: CSEA Request

As per our telephone conversation regarding the request you received from CSEA, which has apparently been sent to hundreds of municipalities, I would like to offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

I hope that I have been of assistance.

Janet Mercer
Committee on Open Government
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FOIL-AO-17394

From: Mercer, Janet (DOS)
Sent: Thursday, October 02, 2008 11:35 AM
To: Lela
Subject: CSEA Request

As per our telephone conversation regarding the request you received from CSEA, which has apparently been sent to hundreds of municipalities, I would like to offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

I hope that I have been of assistance.

Janet Mercer
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4694
FOIL-AO-17395

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October 2, 2008

Mr. Jack Boden

Hon. Vincent C. Martello
Supervisor
Town of Marbletown
P.O. Box 217
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 information presented in your correspondence.

Dear Mr. Boden and Supervisor Martello:

I have received correspondence from both of you dealing with the implementation of the Freedom of Information and Open Meetings Laws in the Town of Marhletown. Based on a review of the documentation, I offer the following comments.

First, a number of requests involve draft minutes of certain boards operating within the government of the Town. From my perspective, draft minutes should be disclosed, on request, as soon as they exist.

It is noted initially that a document is characterized as a draft is not determinative of rights of access, for the Freedom of Information Law is applicable to all agency records. Section 86(4) of that statute defines the term "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, once information exists in some physical form, i.e., a draft, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

Section 106 of the Open Meetings Law pertains to minutes of meetings and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the clear statutory direction, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, again, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

I point out that there is often a distinction between a "meeting" and a "hearing". The former generally involves a gathering of the members of a public body for the purpose of discussion, deliberation and potentially taking action. The latter typically relates to a situation in which the public is given an opportunity to be heard in relation to a particular matter, such as a town budget or an amendment to a local law. As indicated above, the Open Meetings Law includes requirements concerning the preparation and disclosure of minutes of meetings. I am unaware, however, of similar requirements concerning hearings. Often there is a record, sometimes characterized as minutes, relating to hearings. Nevertheless, I know of no provision that deals specifically with the preparation of a record relating to a hearing or a time within which such a record must be prepared or disclosed. Similarly, the Open Meetings Law, §104, requires that meetings of public bodies be preceded by notice of the time and place "given" to the news media and by means of posting. That section also states that the notice given need not be a legal notice. In contrast, many hearings must be preceded by the publication of a legal notice.

A somewhat related issue concerns the length of time that tape recordings of meetings must be retained. 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."

Section 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.

Because questions regarding the retention of tape recordings of open meetings have been the subject of numerous questions over the course of time, I have learned that the minimum retention period for such records is four months.

Second, one of the issues appears to pertain to the time in which the Town makes records available in response to a request made under the Freedom of Information Law. In my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

Further, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision in 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 legislation enacted in 2006 broadened 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.

It is also noted that the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state in 21 NYCRR §1401.7(b) that a person denied access to records must be informed in writing of reason and the right to appeal the denial, as well as the name and address of the person or body to whom an appeal may be directed.

Lastly, a persistent issue relates to records that the Town has employed or retained an attorney to prepare. 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. Both of exceptions cited in the correspondence are pertinent in determining rights of access.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that records consist of legal advice or opinion provided by counsel to the client, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

The other ground for denial of potential significance, §87(2)(g), permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or

determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In consideration of the foregoing, if an attorney retained or employed by the town, or another town officer or employee, offers an opinion or recommendation, a communication of that nature may be withheld.

I hope that the foregoing serves to provide clarification and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Cathy Cairo Davis, Town Clerk

FOIL-AO-17396

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, October 02, 2008 10:09 AM
To: 'DAVE PENSO'
Subject: FW: Foil Request

Dear Dave:

After I left the office last night, it occurred to me that there could be at least one occasion when a tape recording created by village employees was not a record of the Village, and that would be when the employees were acting on their own, on their own time, using personal equipment, for a non-Village purpose. If the Mayor was giving an election speech, for example, and he asked his friends to use their personal equipment to memorialize his campaign speech, then, I think, the tape recording may not be a record of the Village. You would have to provide me with a few more particulars before I could give my definitive opinion.

Thank you.

Camille

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, October 01, 2008 2:58 PM
To: 'DAVE PENSO'
Subject: RE: Foil Request

Dear Dave:

In response to your question, yes, I believe that a tape recording created by village employees is a record of the Village subject to the Freedom of Information Law. Off the top of my head, I can't think of any provision of law that would permit the Village to deny access....

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO - 17397

From: Mercer, Janet (DOS)
Sent: Friday, October 03, 2008 10:02 AM
To: Mary White, Village Clerk, Village of Nyack
Subject: CSEA Request

As per our telephone conversation regarding the request you received from CSEA, which has apparently been sent to hundreds of municipalities, I would like to offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

I hope that I have been of assistance.

Janet Mercer
Committee on Open Government
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FOIL-AO - 17398

From: Jobin-Davis, Camille (DOS)
Sent: Friday, October 03, 2008 12:29 PM
To: Arthur Eliav, Roosevelt Island Operating Corp.
Subject: Freedom of Information Law - request

Arthur:

Although I am not able to send you what I had thought I could yesterday (because it does not exist), the following will clarify the Committee's opinion on FOIL requests:

Common sense, we believe, would require an agency to respond to requests for records in accordance with the Freedom of Information Law regardless of whether the request indicated that it was being made pursuant to the FOIL; however, we know of no statute, regulation or judicial interpretation that would either require an agency to handle every request for records as a FOIL request, or not.

I hope that 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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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4695
FOIL-AO-17399

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October 6, 2008

Hon. Teresa E. Pierce
Town Clerk
Town of Wawayanda
P.O. Box 106
Slate Hill, NY 10973

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Pierce:

I have received your letter concerning requirements involving minutes of meetings. You sent copies of "worksheets" relating to meetings of the Town of Wawayanda Planning Board and contend that they are insufficient to comply with the Open Meetings Law. The worksheets include minimal information, even when a motion to take action is carried. There is no indication of the nature of action taken or the votes of the members. In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to "public bodies", and a town planning board, based on the definition of "public body" [see §102(2)], as well as the provisions of Article 16 of the Town Law, clearly constitutes a "public body" required to comply with that statute.

Second, §106(1) of the Open Meetings Law provides direction concerning the contents of minutes of open meetings and states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

In a decision pertinent to the matter, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by the School Board president, and the minutes of the Board meeting merely stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as

required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your inquiry, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the precise nature of the Board's action.

Lastly, §87(3)(a) of the Freedom of Information Law provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually concerning particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

> "it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

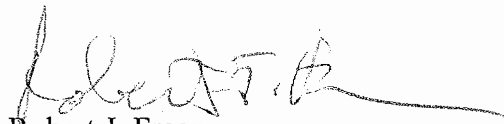
Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)].

There is nothing in either the Freedom of Information or Open Meetings Laws that specifies that a vote must be accomplished by means of a roll call or that a vote be "announced exactly as the same time it is cast." In my view, so long as a record is prepared that indicates the manner in which each member cast his or vote, an entity would be acting in compliance with the open vote requirements imposed by those statutes.

In an effort to enhance knowledge of and compliance with the Open Meetings and Freedom of Information Laws, a copy of this response will be sent to the Planning Board.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17400

Committee Members

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Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

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October 6, 2008

E-Mail

TO: Ms. Lynn Minard

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 information presented in your correspondence.

Dear Ms. Minard:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Dutchess County Association for the Prevention of Cruelty to Animals (the Association). Specifically, you asked whether records generated by humane officers who volunteer for the Association would be required to be made accessible under the law. In this regard, we offer the following comments.

Founded in the late 1800s, and established as a not-for-profit corporation in 1960, the Association's purposes include "to enforce by any and all lawful means all laws of the Legislature of this state which now are, or may hereafter be enacted, or in any wise relating to or affecting animals, and to procure the punishment of any and all violations of such statutes". "Significant accounting policies" summarized by an independent auditor in documents maintained on the website of the Charities Bureau of the Attorney General's Office indicated "The [Association] also provides humane law enforcement in Dutchess County and promotes responsible humane guardianship of companion animals. "

State laws grant enforcement powers to agents or officers of societies for the prevention of cruelty to animals. Section 371 of the Agriculture and Markets Law, concerning the powers of peace officers, provides as follows:

> "A constable or police officer must, and any agent or officer of any duly incorporated society for the prevention of cruelty to animals may issue an appearance ticket pursuant to section 150.20 of the criminal procedure law, summon or arrest, and bring before a court or magistrate having any jurisdiction, any person offending against any of the provisions of article twenty-six of the agriculture and markets law. Any officer or agent of any of said societies may lawfully interfere to prevent the perpetration of any act of cruelty upon any animal in his presence. Any of said societies may prefer a complaint before any court, tribunal or magistrate having jurisdiction, for the violation of any law relating to or affecting animals and may aid in presenting the law and facts before such court, tribunal or magistrate in any proceeding taken."

County Law §654, concerning the deputizing of local police officers or peace officers, provides in relevant part that:

> "The sheriff may in his discretion deputize the police officers or peace officers of cities, towns, villages and special districts and agents of societies incorporated for the purpose of prevention of cruelty to animals, for the purpose of authorizing an arrest without a warrant outside the territorial limits of such city, town, village or special district, when such crime or infraction was committed within such territorial limits in the presence of such officer."

Further, §2.10 of the Criminal Procedure Law, Persons designated as peace officers, states that:

> "Notwithstanding the provisions of any general, special or local law or charter to the contrary, only the following persons shall have the powers of, and shall be peace officers: ...
> 7. Officers or agents of a duly incorporated society for the prevention of cruelty to animals."

In short, agents and officers of the Association, if deputized by the county sheriff, would have the power to enforce laws regarding the prevention of cruelty to animals. The language of these statutes is clear, for only those with the governmental authority to enforce the laws may do so.

The Freedom of Information Law pertains to all agency records, and §86(4) defines the term "record" to include

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Accordingly, when humane society agents are deputized by the county's sheriff, and authorized to enforce laws, the records that they prepare or require in that capacity are, in our opinion, county records that fall within the coverage of the Freedom of Information Law.

If we can assume that the above conclusion is accurate, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 other words, access to records that you request would depend on the contents thereof.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

CSJ:jm

cc: Dutchess County Association for the Prevention of Cruelty to Animals

FOIL-AO-17401

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, October 08, 2008 3:59 PM
To: 'mary.krause@co.madison.ny.us'
Subject: Freedom of Information Law - CSEA request

Mary:

As promised, we offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO - 17402

From: Mercer, Janet (DOS)
Sent: Thursday, October 09, 2008 9:55 AM
To: Mr. Craig Crist'
Subject: CSEA Request

Dear Mr. Crist:

I have received your telephone inquiry concerning the request made by CSEA, which has apparently sent the same requests to hundreds of municipalities. Please note that Bob Freeman is out of the office until tomorrow. However, I think the following will help.

With respect to the request, I would like to offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

I hope that I have been of assistance. If you need anything further, please do not hesitate to call the office.

Janet Mercer
Committee on Open Government
One Commerce Plaza
99 Washington Ave., Suite 650
Albany, NY 12231
(518) 474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OPPL-AO-349
FOIL-AO-17403

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October 10, 2008

Robert J. Ryan, Esq.
Harris Beach PLLC
677 Broadway, Suite 1101
Albany, NY 12207

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ryan:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records pertaining to your client, Mr. Anton Haas, made to the NYS Liquor Authority. Specifically, you requested "any and all records concerning a contact by Mr. Haas to Mr. Daniel A. Malay on or about March 5, 2008, including but not limited to any records sent to the New York State Commission on Public Integrity". Your request was denied based on Executive Law §94(17)(a), a statute specifying that the records at issue maintained by the Commission on Public Integrity are exempt from the Freedom of Information Law. In short, you ask whether the records kept and sent by the Liquor Authority are protected from disclosure as records of the Commission, and if not, whether the provisions of §87(2)(g) of the Freedom of Information Law would require disclosure, at least in part.

From our perspective, the records you have requested would be required to be disclosed to your client, at least in part. In this regard, we offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and §86(4) defines the term "record" expansively to 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, it is clear in our opinion that materials generated by an agency with respect to a particular incident are agency records that fall within the coverage of the Freedom of Information Law.

When an agency prepares a record and copies are transmitted or acquired to one or more other agencies, any of those agencies in receipt of a FOIL request would be obliged to respond [see e.g., Muniz v. Roth, 620 NYS 700 (1994)]. Perhaps most significant for purposes of illustration is a decision rendered by the Court of Appeals involving a request made to a state agency for copies of subpoenas issued by a court for that agency's records. To put the matter in context, while the Freedom of Information Law includes all state and municipal agencies within its scope, the courts are excluded from the coverage of that law. That being so, the agency denied access, contending that court records in its possession were not covered by the Freedom of Information Law. In Newsday v. Empire State Development Corporation [98 NY2d 359 (2002)], however, the Court of Appeals unanimously disagreed, stating that the records were subject to the Freedom of Information Law, "irrespective of whether they are deemed to have been a mandate of a court and issued for a court." The Court found further that "ESDC, a state public corporation, is undeniably an agency under FOIL. It presently has physical possession of the subpoenas. Thus, in the hands of ESDC, the subpoenas constitute agency records: 'information kept [or] held * * * by * * * agency [i.e., ESDC] * * * in any physical form whatsoever."

In like manner, we believe that copies of the records transmitted to the Commission that remain in the possession of an agency are records of that agency for the purpose of consideration of a request made under the Freedom of Information Law.

Second, as you are aware, the Freedom of Information Law generally requires that government agency records be made available for inspection and copying, unless a ground for denial of access may properly be asserted. Here, the initial ground for denial, §87(2)(a), is relevant, in light of the Authority's claim that Executive Law would prohibit disclosure of the records. That provision authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute, §94 of the Executive Law, deals with the powers and duties of the Commission, including records in the possession of the Commission. Paragraph (a) of subdivision (17) of that section states that:

> "Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection and copying are:
>
> > (1) the information set forth in an annual statement of financial disclosure filed pursuant to section seventy-three-a of the public officers law except the categories of value or amount, which shall remain confidential, and any other item of information deleted pursuant to paragraph (h) of subdivision nine of this section;
> >
> > (2) notices of delinquency sent under subdivision eleven of this section;

> (3) notice of reasonable cause sent under paragraph (b) of subdivision twelve of this section;
>
> (4) notices of civil assessments imposed under this section which shall include a description of the nature of the alleged wrongdoing, the procedural history of the complaints, the findings and determinations made by the commission, and any sanction imposed;
>
> (5) the terms of any settlement or compromise of a complaint or referral which includes a fine, penalty or other remedy; and
>
> (6) those required to be held or maintained publicly available pursuant to article one-A of the legislative law."

Article Six of the Public Officers Law is the Freedom of Information Law, and based on the foregoing, the only records required to be disclosed by the Commission are those identified in subparagraphs (1) through (6) of paragraph (a) of §94(17). That being so, other records in possession of the Commission, including the records at issue, are beyond the coverage of the Freedom of Information Law.

Third, the fact that records are exempt from disclosure to the public when in possession of the Commission does not, in our opinion, render them exempt in like manner when duplicates or originals are in possession of another agency. There are a variety of instances in which records sought from one agency are exempt from disclosure, but in which the same records in possession of a different agency are accessible. For instance, in a case involving a request for W-2 forms maintained by a town pertaining to its employees, it was 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 an effort to obtain expert advice on the matter, we contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue and 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. 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 issue was raised and answered in the same manner by the State Department of Taxation and Finance with respect to its records pertaining to taxpayers. Based on that information and an opinion prepared by this office, it was held in Day v. Town Board of Town of Milton (Supreme Court, Saratoga County, April 27, 1992) that W-2 forms in possession of a town are subject to rights of access conferred by the Freedom of Information Law. More recently, in a case involving data maintained by a state agency "derived from tax forms or may be compiled in the same manner as tax forms does not place such data within the protection of the confidentiality provisions of the Tax Law (*see* Tax Law §202, §697[e]; 26 USC 6103)" (The Herald Company v. New York State Department of Economic Development, Supreme Court, Albany County, February 8, 2007).

In short, although records may be exempt from disclosure when in possession of an agency that is the subject of a specific statute that confers confidentiality, that restriction does not render duplicate or original records maintained by other agencies confidential, unless there is statutory direction to do so. An example of a statute that requires confidentiality on the part of recipients of information, §33.13 of the Mental Hygiene Law, states that clinical records pertaining to patients or clients maintained by a mental health facility are confidential, and subdivision (f) states that information disclosed to third parties "shall be kept confidential by the party receiving such information and the limitations on disclosure in this section shall apply to such party." Section 94(17)(a) of the Executive Law contains no such direction. Therefore, in our opinion, §94(17)(a) is inapplicable to records in the Authority's possession, and there is no statutory prohibition regarding disclosure by the Authority. Rather, we believe that the records in your possession fall within the coverage of the Freedom of Information Law. This is not say that they must be disclosed; on the contrary, we agree that they may be accessible or deniable depending on their content.

As noted previously, the Freedom of Information Law is based on a presumption of access. Stated differently, all agency records are accessible to the public, except those records portions thereof that may be withheld in accordance with exceptions to rights of access appearing in paragraphs (a) through (j) of §87(2).

While we are unfamiliar with the contents of the documentation falling within the scope of your request, based on the Authority's response, it appears that §87(2)(g) is particularly relevant. Internal records pertaining to an incident, and a record sent from the Authority to the Commission, both of which are agencies, would fall within its scope. That provision enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

The language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld.

With regard to your specific questions regarding a final determination and instructions to staff that affects the public, in our opinion, an agency's decision to refer a matter to the Commission

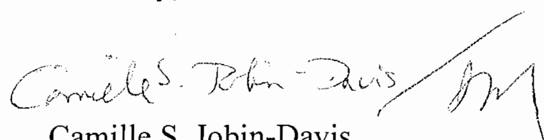
for a determination would constitute neither a final agency determination nor an instruction to staff that affects the public. In our view, insofar as the records at issue consist of recommendations, advice or opinions for example, they could be withheld under Freedom of Information Law; insofar as they consist of statistical or factual information, we believe that they must be disclosed, unless a separate exception is applicable.

Also significant, since you requested records in your capacity as counsel to Mr. Haas, however, the Personal Privacy Protection Law (Public Officers Law, Article 6-A) applies and the result may be different. The Freedom of Information Law deals with rights of access conferred upon the public generally; the Personal Privacy Protection Law deals with rights of access conferred upon an individual, a "data subject", to records pertaining to him or her. A "data subject" is "any natural person about whom personal information has been collected by an agency" [§92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

Rights conferred upon individuals by the Personal Privacy Protection Law are separate from those granted under the Freedom of Information Law. Under §95 of the Personal Privacy Protection Law, a data subject has the right to obtain from a state agency records pertaining to himself, 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. In short, if none of the exceptions apply, we believe that the records should be made available to you and your client.

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: Thomas J. Donohue, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17404

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October 10, 2008

Mr. Larry McCormick

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. McCormick

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Village of Blasdell. Specifically, you requested records pertaining to cell phones issued to Village employees, including the number of cell phones under contract, the phone number for each phone, the name of employee who is responsible for each phone, the amount of minutes used each month for each phone (Jan 2005 through April 2007), monthly itemized lists of all incoming and outgoing calls for all cell phones (Jan 2005 through April 2007), and the written policy on the proper use of village cell phones. In response, the Village has provided access to copies of records or portions of records, and denied access to others. In this regard, we offer the following comments.

First, as you may be aware, the Freedom of Information Law is a state statute that pertains to existing records maintained by an "agency" such as the Town. Section 89(3) of that statute provides in part that an agency need not create a record in response to a request. In the context of your request, if, for example, the Village does not maintain records itemizing calls made from and received by a particular cell phone, it would not be required to attempt to acquire those records from a source outside the agency.

Second, as it pertains to existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law.

The pertinent provisions under the circumstances are, as suggested by the Village attorney, §§87(2)(b) and 89(2)(b), both of which pertain to the ability to deny access when disclosure would constitute an unwarranted invasion of personal privacy. Based on the judicial interpretation of the

Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

With regard to telephone bills, based on the decisions cited above, when a public officer or employee uses a telephone in the course of his or her official duties, bills involving the use of the telephone would, in our opinion, be relevant to the performance of that person's duties. On that basis, we do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to an officer or employee serving as a government officer or employee.

Since cell phone bills often list the numbers called, the numbers from which calls are received, the time and length of calls and the charges, it has been contended by some that disclosure of phone numbers might result in an unwarranted invasion of personal privacy, not with respect to a public employee, but rather with respect to the other party to the call. Nevertheless, when phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call. Therefore, an indication of the phone number would ordinarily disclose little or nothing regarding the nature of a conversation. Further, even though the numbers may be disclosed, nothing in the Freedom of Information Law would require an individual to indicate the nature of a conversation.

Exceptions to the general rule of disclosure might arise if, for example, a telephone is used in the performance of one's official duties to contact recipients of public assistance or persons seeking certain health services. It has been advised in the past that if a government employee contacts those or perhaps other classes of persons as part of the employee's primary ongoing and routine duties, there may be grounds for withholding phone numbers listed on a bill. For instance, disclosure of numbers called by a caseworker who phones applicants for or recipients of public assistance might identify those who were contacted. In our view, the numbers could likely be deleted in that circumstance to protect against an unwarranted invasion of personal privacy due to the status of those contacted. Similarly, if a law enforcement official routinely phones witnesses or informants,

disclosure of the numbers might endanger an individual's life or safety, and they might justifiably be deleted pursuant to §87(2)(f) of the Freedom of Information Law.

That provision might also apply when government officials perform functions related to emergency situations and their cell phones must be free of interference to the greatest extent possible. If their cell phone numbers were to be made public, potential law breakers might call those numbers constantly, thereby precluding the effective use of the cell phones to the detriment of the public. In that kind of situation, we believe that §87(2)(f) might properly be cited.

With respect to your disagreement with the Village over the receipt of certain records, this office is not able to investigate and/or determine whether you took possession of records as stated by the Village attorney. This office is authorized to provide legal advice, both verbally and in writing, with respect to access to records; however, we have no authority or resources to investigate and/or make factual determinations concerning this issue.

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 in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date

by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to

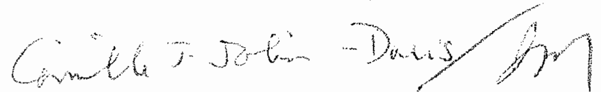
have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Janet L. Plarr
James M. Shaw, Esq.
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO- 17405

Committee Members

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Robert J. Freeman

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October 14, 2008

Ms. Susan Siegel

The staff of the Committee on 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. Siegel:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Town of Yorktown. Specifically, you requested records of "expenditures of a specific town department identifying the vendor, expense and budget line" in a digital format so that you can "sort it by vendor and expense and look for patterns." In response to your request, the Town indicated it would not provide the records to you in digital format despite "[t]he fact that the Town's KVS licensed software has the capability to export data to a digital format...". The basis for the Town's willingness to make the information available in printed form only (approximately 75 pages) is that "[t]he Town does not use this [digital] format and is not obligated to change its format in order to respond to your FOIL request." The Town further indicated that your reliance on an advisory opinion from this office, the Committee on Open Government, is misplaced because the Committee's opinion is that a town has an obligation to provide data in a format of choice only "when an existing format is not usable to the FOIL applicant." We believe that the Town's characterization of our advisory opinion is incorrect, and that the Town must provide the data to you in digital format. 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.

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).

Finally, earlier this year, the Legislature amended the Freedom of Information Law to include the following provisions:

> "...an agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy..." [§89(5)(a)]

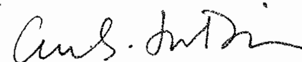
and

> "Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read of printed shall not be deemed to be the preparation or creation of a new record" [§89(3)(a)].

In short, because the Town has confirmed its ability to make the records available digitally and to transfer the requested data to a storage medium usable to you and you are willing to pay the requisite fee, we believe that the Town 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:jm

cc: Town Board
John Buckley

FOIL-AO - 17406

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, October 21, 2008 3:57 PM
To: Hon. Daniel Fleming, Town Supervisor
Subject: Freedom of Information Law - CSEA request

Daniel:

We received your inquiry concerning the request by CSEA, which has apparently sent the same requests to hundreds of municipalities.

In this regard, we offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency; 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

On behalf of the Committee on Open Government, I hope that this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
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FOIL-AO - 17407

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, October 22, 2008 3:58 PM
To: Hon. Michelle Gardner, Town Clerk
Subject: Freedom of Information Law - CSEA request

Michelle:

In follow up to our telephone conversation, and your inquiry concerning the request by CSEA, which has apparently sent the same requests to hundreds of municipalities, I offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency §87(3)(b); 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

On behalf of the Committee on Open Government, I hope that this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
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FOIL-AO- 17408

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, October 22, 2008 11:53 AM
To: Kristin Gutenberger, Town Attorney
Subject: Freedom of Information Law - CSEA

Kristin:

In follow up to our telephone conversation, and your inquiry concerning the request by CSEA, which has apparently sent the same requests to hundreds of municipalities, we offer the following basic points: 1) the Freedom of Information Law pertains to existing records and generally does not require that an agency create a new record in response to a request; 2) FOIL has long required that every agency maintain a payroll record that contains the name, public office address, title and salary of every officer or employee of the agency §87(3)(b); 3) the payroll record, as well as the date of hire of a public employee, are clearly accessible; 4) §89(7) of the FOIL specifies that an agency is not required to disclose the home address of a current or former public employee; 5) the home telephone number of a present or former public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy"; and 6) when an agency is unable to make records available in a particular format, it can offer to make the records in a format in which it can generate or copy the records.

On behalf of the Committee on Open Government, I hope that this is helpful to you.

Camille

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FOIL-AO-17409

From: Jobin-Davis, Camille (DOS)
Sent: Monday, October 27, 2008 10:42 AM
To: 'Susan Siegel'
Subject: RE: Freedom of Information; Redacting question

Susan,

The Town has authority to charge $.25 per page for the inspection of records that require redaction prior to inspection. The logic here is that the Town must make a copy in order to redact it and provide it for inspection. The following advisory opinion will help: http://www.dos.state.ny.us/coog/ftext/13366.htm

Camille

Camille S. Jobin-Davis, Esq.
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17410

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October 27, 2008

Mr. Bill Lofquist

The staff of the Committee 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. Lofquist:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Town of Geneseo related to legal representation provided by Harris Beach PLLC. Specifically, you requested "the billing records of Harris Beach related to its work on the Gateway Town Center project for the period September 1, 2007 to April 1, 2008," and "the phone records, including phone billing records, of Harris Beach for its work on the Gateway Town Center project during the period February 1, 2008 to April 5, 2008." In response to your request and subsequent appeal, you were informed that Harris Beach "does not create, or have, telephone records", and you were provided with redacted versions of the requested billing statements.

In its submission to this office, a representative of Harris Beach wrote that in response to your request for telephone logs, "We again confirm that no such records (billing or otherwise) exist which are responsive to the request. Furthermore, the 'telephone log' attached to [your] appeal appears to be a record not generated by our firm." The firm asserted that "Although portions of the invoices were disclosed, those descriptive sections which contained attorney-client privileged communications and/or work product were redacted. Those descriptions which memorialized conversations with outside counsel and/or did not contain attorney work product or attorney client communications were not redacted."

Upon review of the records you provided, names and other details reflective of the nature of services rendered appear to have been deleted. Some records were redacted to the extent that nothing was disclosed other than the fact that an attorney performed work on a certain date.

In response to your request, please note that this office has neither the authority nor the resources to conduct an independent review of Harris Beach's billing records Although without an *in camera* inspection it is impossible to make precise determinations with respect to each redaction,

it appears that some of the redactions might have been improperly made. Accordingly, in keeping with our statutory responsibility to furnish advisory opinions, and in an effort to provide guidance with respect to these matters, we offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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.

Most pertinent here 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.

As you noted, 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).

Certainly we agree with Harris Beach 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.

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. However, we do not believe that the name of a Town official, for example, in relation to a discussion of strategy could be withheld in every instance. Nor do we believe that the name of a third party and a description of the nature of the discussion held with the third party could be withheld.

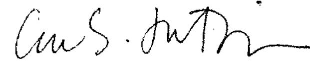
For example, if any of the descriptive entries included references to telephone conferences with named Town officials or employees, and included an actual description of the legal issues that could be redacted, and for which the timing of the conversation, alone, would not reveal information falling within the scope of the privilege, there would appear to be no basis for the deletion of the name of the person with whom the attorney spoke. On the other hand, if disclosure of the name of a Town employee would suggest a particular strategy or tactic that the attorney was pursuing, in our opinion, the name could be withheld. Further, if the description merely indicated that a discussion was held regarding a particular topic, that kind of disclosure would not necessarily specify the nature of service provided and could likely be disclosed without jeopardizing the attorney client privilege.

Finally, with respect to your request for phone records of Harris Beach, we note that twice the law firm has asserted that it does not have telephone records that are responsive to your request. It is apparent that the law firm does not maintain the records at issue distinctly apart from telephone

records pertaining to other clients. Accordingly, we believe its responses are in keeping with the law.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Hon. Jean Bennett, Town Clerk
Hon. William S. Wadsworth, Town Supervisor
Frank C. Pavia, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17411

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October 28, 2008

Mr. James Odato
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.

Dear Mr. Odato:

I have received your letter and the materials relating to it. You wrote that your requests directed to the Research Foundation of the State University of New York ("the Research Foundation") and Health Research, Inc. ("HRI") for records indicating the names and salaries of their employees were denied. The entities have been characterized as private, not-for-profit corporations, and it was contended, therefore, that they are not subject to the Freedom of Information Law.

From my perspective, based on the terms of the Freedom of Information Law and judicial decisions, those entities constitute "agencies" that are required to comply with that statute. In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Although the definition of "agency" refers to "governmental" entities performing a governmental function, the courts have considered the functions of not-for-profit corporations closely associated with government and the extent to which there is governmental control over those corporations in determining whether they are subject to the Freedom of Information Law.

I note that both HRI and the Research Foundation are included within the definition of "state agency" in §53-a of the State Finance Law. Subdivision (5) of that statute provides that:

> "'State agency' means (a) any state department, bureau, commission, authority or division and shall include the state university;
>
> (b) any institution or organization designated and authorized by law to act as agent for the state, including Cornell University and Alfred University as representatives of the state university board of trustees for the administration of statutory or contract colleges at those institutions;
>
> (c) any public corporation or institution the governing board of which consists of a majority of state officials serving ex-officio or has one or more members appointed by the governor; and
>
> (d) certain membership corporations closely affiliated with specific state agencies and whose purposes are essentially to support, supplement or extend the functions and programs of such state agencies, specifically: Youth Research, Inc., The Research Foundation for Mental Hygiene, Inc., Health Research Inc., The Research Foundation of the State University of New York, and Welfare Research, Inc."

In a decision involving the status of a similar entity, it was held that a community college foundation, also a not-for-profit corporation, and its records are subject to the Freedom of Information Law. The Court wrote 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).

The Research Foundation was chartered in 1951 by the Board of Regents as a non-profit educational corporation. It is my understanding that the focal point of the relationship between SUNY and the Foundation is an agreement between those institutions signed in 1977 and approved by the Attorney General and the Comptroller. The agreement describes the powers and duties of SUNY and its Board of Trustees and cites the purposes of the Foundation in its charter as follows:

> "a. To assist in developing and increasing the facilities of the State University of New York to provide more extensive educational opportunities for and service to its students, faculty, staff and alumni, and to the people of the State of New York, by making and encouraging gifts, grants, contributions and donations of real and personal property to or for the benefit of State University of New York;
>
> b. To receive, hold and administer gifts or grants, and to act without profit as trustee of educational or charitable trusts, of benefit to and in keeping with the educational purposes and objects of State University of New York; and
>
> c. To finance the conduct of studies and research in any and all fields of the arts and sciences, of benefit to and in keeping with the educational purposes and objects of State University of New York..."

The agreement also states that "a major function of the Foundation has been to serve as the fiscal administrator of funds awarded by the federal government and other authorized sources for the conduct of sponsored programs at the State-operated institutions of the University." The agreement refers to the fact that:

> "most grants of such funds are initiated by proposals by faculty members of the State-operated institutions of the University detailing the scope, objectives, staffing, and budget of the proposed sponsored program, which are then incorporated into formal applications to the sponsor by the University and the Foundation, following, when applicable, the filing of notice of such applications in accordance with Section 53-a of the State Finance Law; such awards are made to the

> Foundation for and in conjunction with the University subject to the terms and conditions specified by the sponsors, including the ultimate accountability to them for the proper management and use of such grant awards...".

In addition, the agreement states that "the Foundation's sole purpose is to serve the University", that the Foundation "shall assist the University in procurement of funds from the federal government and other authorized sources to support such sponsored programs at the University as the University shall request", and that "All applications to prospective sponsors by faculty or staff members at the State-operated institutions of the University seeking support for sponsored programs shall be made by the University through the Foundation." Further, the agreement states that no application shall be made by the Foundation "without prior written approval of the chief administrative office of the college or other institution of the University where the sponsored program is to be conducted, and the prior written approval of the Chancellor or his designee.

The Charter of the Research Foundation states that the Chancellor of the University or his designee serves ex officio as chair of its Board of Directors and that "Upon dissolution of the corporation, surplus assets, if any, shall be devoted and applied in accordance with law, to the educational objects and purposes of the State University of New York."

In short, the Research Foundation's purpose is "to serve the University", it cannot carry out its duties without the approval of University officials, and it is an "integral part" of the University. Moreover, the Foundation utilizes space at many SUNY campuses.

The most direct judicial precedent concerning the status of the entities in question is a recent decision, Siani v. The Research Foundation of the State University of New York (Supreme Court, Albany County, March 26, 2007) in which, for reasons fully consistent with those offered above, concluded that the Research Foundation is an agency required to comply with the Freedom of Information Law. Specifically, the Court found that:

> "The powers and duties of the Research Foundation as found in its charter are to assist in developing and increasing facilities of the State University of New York by making and encouraging gifts, grants and donations of real and personal property, to receive, hold and administer gifts, grants and to finance studies and research of benefit to and in keeping with the educational purposes and objectives of the State University. The relationship between the State University and the Research Foundation is set out in a 1977 agreement between those entities. The agreement defines the major function of the Research Foundation as serving as the fiscal administrator of funds awarded by the federal government and other authorized sources for the conduct of sponsored programs at the State-operated institutions of the University. Under the agreement, all applications to prospective sponsors by faculty or staff members at the State-operated institutions of the University seeking support for sponsored programs are to be made by the University through the Research Foundation. All such

applications made by the Research Foundation require prior written approval of the chief administrative office of the college or other institutions of the University where the sponsored program is to be conducted and the prior written approval of the Chancellor or his designee. The Chancellor is the chair, ex officio, of the Board of the Research Foundation.

"As the fiscal administrator of the majority of the State University's sponsored programs, the activity of the Research Foundation is included in the financial statements of the State University. In addition, the Research Foundation is included within the definition of a 'state agency' in State Finance Law §53-a.

"Given the functional relationship between the Research Foundation and the State University, the importance of the role played by the Research Foundation in the educational efforts of the State University and the power it has with respect to sponsored programs of the State University, the Research Foundation exercises a governmental function and is therefore, subject to the provisions of the Freedom of Information Law."

As in the case of the Foundation in Eisenberg, the Research Foundation would not exist but for its relationship with SUNY. Due to the similarity between the situation involving the entity at issue in Eisenberg and the Research Foundation, and in view of the essential purposes of the Research Foundation as described in the State Finance Law, its charter, the Agreement referenced earlier, and the holding in Siani, I believe that it is an agency subject to the Freedom of Information Law. To suggest otherwise would, in my opinion, exalt form over substance.

With respect to the other entity at issue, HRI was created as a membership corporation in 1953 and later designated as a not-for-profit corporation in 1973. Its purposes are similar to those of the Research Foundation, but they relate to the State Department of Health. Specifically, the certificate of Incorporation states that the purposes of HRI include:

"(a) To assist in developing and increasing the facilities of the New York State Department of Health, the institutions and agencies within such Department or associated therewith, and other departments of health within the State, to provide more extensive conduct of studies and research into the causes, nature and treatment of diseases, disorders and defects of particular importance to the public health by encouraging gifts, grants, bequests, devises, contributions and donations of real and personal property to the corporation for such purposes:

(b) To receive, hold and administer gifts or grants for the purposes of the corporation and in keeping with the research, prevention and treatment purposes and objectives of the New York State Department

> of Health, the institutions, and agencies within such Department or associated therewith; and other departments of health within the State;
>
> (c) To conduct and finance the conduction of studies and research in any and all fields of the arts and sciences and in keeping with the purposes and objectives of New York State Department of Health, the institutions and agencies within such Department or associated therewith; and other departments of health within the State..."

Based on the foregoing, as in the circumstance of the Research Foundation, HRI's essential purpose is to enhance the functioning of a state agency, and it would not exist but for its relationship with that agency. That conclusion is bolstered by information expressed on HRI's website, which states that "HRI's mission is to assist DOH [the New York State Department of Health] and RCPI [the Roswell Park Cancer Institute, a unit of the DOH] to effectively evaluate, solicit, and administer external financial support for DOH and RPCI projects, and to disseminate the benefits of DOH expertise through programs such as technology transfer."

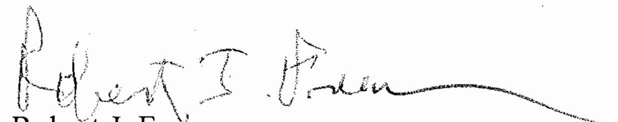
For the reasons indicated in the preceding commentary, I believe that the Research Foundation and the HRI are "agencies" required to comply with the Freedom of Information Law.

Lastly, an obligation imposed by the Freedom of Information Law relates to the information sought, the names and salaries of employees. Specifically, §87(3)(b) of the Freedom of Information Law requires that "Each agency shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency." The record required to be maintained pursuant to §87(3)(b) is routinely disclosed by other agencies, entities of state and local government, for none of the grounds denying access appearing in §87(2) of the Freedom of Information Law may justifiably be asserted.

In an effort to resolve the matter, copies of this opinion will be forwarded to representatives of both the Research Foundation and HRI.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: John J. O'Connor
Heather D. Diddel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17412

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October 28, 2008

E-Mail

TO: Mr. Dennis McEnery

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. McEnery:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Metropolitan Transportation Authority ("Authority"). In response to your request of January 17, 2008, the Authority acknowledged receipt and indicated that it would provide a substantive response within twenty business days. In response to a reminder that you sent, the Authority indicated on March 20, 2008 that "a response to your FOIL will be sent out shortly." To date, you indicated that you received no further response from the Authority regarding this request. 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an 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."

From our perspective, the lack of any further response from the Authority is a constructive denial of your request, and you now have the authority to appeal. Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Turning now to the underlying requests, we note that, specifically, you requested "the complete and most up to date 'Public Outreach Campaign Schedule' which the Long Island Rail Road (LIRR) requires its consultant to provide as part of the Engineering and Environmental Consultant (EC) services for the development of a preliminary design and preparation of an Environmental Impact statement (EIS) to support Main Line Corridor Improvements including the addition of a third main track." Further, you requested to be provided with "the intended results for each such planned outreach effort", "the initial public schedule . . . and any subsequent modifications", "documents the Railroad has provided the EC with formal notification to proceed with each Public Campaign activity and/or element", "all communications between the Railroad and the EC with the evaluation and comments concerning the success, failure or improvements that may need to be relating to each Public Campaign activity", "any and all documents prepared in anticipation of meetings with any local press media representatives with Railroad representatives including but not limited to draft 'Questions and Answers' or 'Talking Points' or the like, including

but not limited to such meetings which have taken place with media reporters and editors associated with Anton News, the Floral Park Dispatch, the Floral Park Gateway and/or Cablevision Channel 12, including any e-mails from/or between the MTA LIRR and the EC."

In this regard, first, based on the language of the law and its judicial construction, a request made for a specific document or documents does not necessarily indicate that a person seeking the record has made a valid request that must be honored by an agency. In considering the requirement that records be "reasonable described", the Court of Appeals has indicated that whether or the extent to which a request meets the standard may be dependent on the nature of an agency's filing, indexing or records retrieval mechanisms [see Konigsburg v. Coughlin, 68 NY2d 245 (1986)]. When an agency has the ability to locate and identify records sought in conjunction with its filing, indexing and retrieval mechanisms, it was found that a request meets the requirement of reasonably describing the records, irrespective of the volume of the request. By stating, however, that an agency is not required to follow "a path not already trodden" (id., 250) in its attempts to locate records, 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.

While we are unfamiliar with the record keeping systems of the Authority, to the extent that the records sought can be located with reasonable effort, we believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the Authority can locate the records sought with a reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, if it can be established that the Authority maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 confirmed its general view of the intent of the Freedom of Information Law most recently in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the New York City Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

While §87(2)(g) potentially serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld.

The same kind of analysis would apply with respect to records prepared by consultants for agencies, for the Court of Appeals has held that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency.

It is reiterated that Xerox, supra, dealt with reports prepared "by outside consultants retained by agencies" (id. 133). In such cases, it was found that the records prepared by consultants should be treated as if they were prepared by agency staff and should, therefore, be considered intra-agency materials. As the term "consultant" is ordinarily used and according to an ordinary dictionary definition of that term, a consultant is an expert or a person or firm providing professional advice or services. In the context of the Xerox decision, we believe that a consultant would be a person or firm "retained" for compensation by an agency to provide a service.

Accordingly, if for instance, in an item of correspondence, an employee of the Authority or of the consultant offered a recommendation regarding an upcoming meeting, or a narrative evaluation of a previous outreach effort, in our opinion, that portion of the correspondence could be withheld.

Lastly, some aspects of your request appear to be prospective, involving records that do not yet exist. Because the Freedom of Information Law pertains to existing records, it has consistently been advised that an agency is not required to honor a request for records that may be prepared, but which do not yet exist.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

CSJ:jm

cc: Mark Weinberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17413

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October 30, 2008

Mr. Michael Rothfeld
Reporter
Los Angeles Times
1121 L St., Suite 200
Sacramento, CA 95814

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rothfeld:

As you are aware, I have received your correspondence in which you sought my views concerning the denial of access to records relating to certain investments of the New York State Common Retirement Fund ("the Fund") that you requested from the Office of the State Comptroller ("the Agency").

The records sought involve records of the Fund pertaining to Stockbridge Capital, Stockbridge Real Estate Fund, Gold Bridge Capital, Kenwood Investments and individuals associated with those entities, including Darius Anderson. Although your initial request and appeal were denied in part, you asked for reconsideration of the denial of access based on the Agency's contention that the records at issue consist of "deliberative material" or "proprietary information." In response to your request for reconsideration, Albert W. Brooks, the State Comptroller's Records Appeals Officer prepared an "exemption log" describing the records that were withheld and a brief rationale for withholding each.

From my perspective, based on Mr. Brooks' explanations offered in the exemption log, certain of the records were properly withheld. For instance, a memorandum prepared by an attorney in which legal advice or a legal opinion is offered to an employee of the Agency could in my opinion be withheld in accordance with §87(2)(a) of the Freedom of Information Law concerning records that "are specifically exempted from disclosure by state or federal statute." The statute in that context would be §4503 of the Civil Practice Law and Rules (CPLR), the codification of the attorney-client privilege. It would also fall within §87(2)(g), which authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In numerous instances, records were withheld in their entirety based on a contention that they consist of "a mix of deliberative material and proprietary information." In my view, there may be aspects of "deliberative material" that must be disclosed, and the characterization of records as "proprietary information" without more is inadequate to ascertain the extent to which they may properly be withheld.

The provision cited earlier, §87(2)(g), pertains to communications between and among agency officers and employees, as well as those prepared by consultants retained by agencies [see Xerox Corp. v Town of Webster, 65 NY2d 131 (1985)]. Some of the records as described in the exemption log clearly involve communications between or among employees of the Agency; others involve records prepared by or communications with the Townsend Group, a consulting firm retained by the Agency. Insofar as those records consist of advice, opinion, recommendations and the like, again, I believe that they may be withheld. However, portions of those records consisting of statistical or factual information, even though they may be part of or relate to the deliberative process, must, in my view, be disclosed, unless a separate basis for denial of access may properly be asserted.

In a decision focusing on §87(2)(g), the Court of Appeals, the state's highest court, confirmed its general view of the intent of the Freedom of Information Law, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the New York City Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)."

While I am unfamiliar with the contents of the records in question falling within the coverage of §87(2)(g), I would conjecture that portions consisting of narrative expressions of opinion and

recommendations that may be withheld. It would seem likely, however, that others would consist of narrative expressions of fact and/or numbers constituting statistical or factual information accessible under subparagraph (i) of §87(2)(g).

Further, some of the records withheld on the ground that they include deliberative material did not apparently involve Agency staff or consultants. The exemption refers, for example, to items 17 and 18, which pertain to emails between Agency staff and employees of Stockbridge Real Estate Funds. It is my understanding that Stockbridge is not a consultant, but rather an entity that sought to engage in an investment manager relationship with the Agency. If that is so, those communications would not consist of inter-agency or intra-agency materials, and §87(2)(g) would not serve as basis for a denial of access, despite their characterization in the exemption log as deliberative material. I note that the Court in Gould found that statements of members of the public appearing in reports prepared by police officers are "far removed from the type of internal exchange sought to be protected by the intra-agency exemption" (id., 277).

The other basis for denial of access involves claims that the records contain "proprietary information." That phrase does not appear in the Freedom of Information Law. The provision dealing with the subject matter of proprietary information, §87(2)(d), permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

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.

Mr. Brooks wrote that he "was asserting the exemption equally with respect to records of the Fund, records of the consultant to the Fund and records of the entity in which Fund assets were invested, i.e., Stockbridge."

In this regard, it has been advised and held that when a government agency carries out functions as an entity in competition with private firms, it may, in proper circumstances contend that disclosure of the records that it prepares would, if disclosed, cause substantial injury to its competitive position in accordance with §87(2)(d) (Syracuse & Oswego Motor Lines, Inc. v. Frank, Sup. Cty, Onondaga County, October 15, 1985). Because the Fund is involved in the purchase and sale of securities, as well as real property, with values in the millions of dollars, it is possible in my view that it may justify a denial of access to certain of its records based on that exception.

With respect to records of the Fund and those involving its consultants and firms in which the Fund invests and the assertion of §87(2)(d), the concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade

secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of record, the area of commerce in which an entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Perhaps most relevant is a decision rendered by the Court of Appeals, which considered the phrase "substantial competitive injury" in Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale [87 NY2d 410(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains

to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...
>
> "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)."

I have no special knowledge or expertise relating to the operation of the Fund or the securities industry. However, in consideration of the amount of information that is freely available in a variety of books, journals, educational institutions and other sources, it is unlikely in my view that it could be demonstrated that the records sought may be withheld, in their entirety, "as a mix" of material properly deniable under §87(2)(g) or on the ground that disclosure would "cause substantial injury"

to the competitive position of the Fund, its consultants or the entities in which investments are made. This may be particularly so in consideration of the recent changes in market conditions and the upheaval in the securities and real estate industries.

Mr. Brooks made specific reference to the release of "placement agent fee letters", but "determined that the amount of any placement agent fee paid in connection with an investment made by the Fund may be withheld as proprietary..." From my perspective, the records referenced here do not involve any indication of methodology, formulas, or special or unique considerations, but rather merely figures indicating fees paid in connection with an investment made by the Fund, a public entity. If that is so, it does not appear that the records may justifiably be withheld pursuant to §87(2)(d) or any other exception to rights of access.

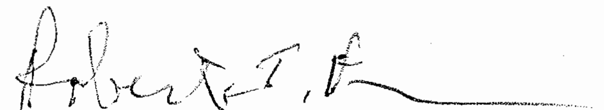
As indicated earlier, a point that bears emphasis is that an agency bears the burden of defending secrecy and must demonstrate in a challenge to a denial of access that the records withheld fall squarely within the scope of an exception to rights of access. That principle was recently reaffirmed by the Court of Appeals in a case involving the assertion of §87(2)(d) in which it was stated that:

> "To meet its burden, the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm.
>
> "Here, the Department and insurers have failed to meet this burden" (Markowitz v. Serio, Court of Appeals, June 26, 2008; ___ NY3d ___).

In an effort to attempt to resolve the matter and obviate the need to initiate litigation, a copy of this response will be sent to Mr. Brooks.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Albert W. Brooks

FOIL-AO - 17414

From: Freeman, Robert (DOS)
Sent: Thursday, October 30, 2008 2:19 PM
To: Greg Waldron
Subject: RE: Access to Village of Walton draft financial statement

Who prepared the audit? If a government employee or consultant retained by the Village did so, it would be intra-agency material, and those portions consisting of statistical or factual would information would be accessible under FOIL as soon as the document exists. Other portions consisting of a narrative expression of opinion or recommendation could be withheld from the draft. That it is marked confidential or has not been approved or accepted by the Board is irrelevant. If it was transmitted by a private auditor or firm, I do not believe that any of the grounds for denial access in the FOIL would be applicable.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 17415

Committee Members

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Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

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October 30, 2008

Mr. Ross R. Bluhm

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bluhm:

I have received your letter in which you indicated that you have been trying to obtain records from the New York City Police Department for over a year and, as of the date of your letter to this office, you had not received any responses from the Police Department.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions,

> submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

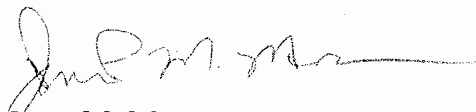
It is noted that the person designated by the Police Department to determine appeals is Mr. Jonathan David.

I note that legislation enacted in 2006 broadened 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.

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-17416

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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October 30, 2008

Mr. James P. Stevenson
07-A-0369
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.</u>

Dear Mr. Stevenson:

I have received your letter in which you indicated that you have submitted a request for records to the City of Elmira Police Department and that, as of the date of your letter to this office, you had not received a response.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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-17417

Committee Members

Laura L. Anglin
Tedra L. Cobb
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John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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October 30, 2008

Mr. Victor Ocasio
96-A-1289
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ocasio:

I have received your letter in which you indicated that you have submitted numerous requests to the New York County District Attorney's Office and the New York City Police Department and that, as of the date of your letter to this office, you had not received any responses.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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."

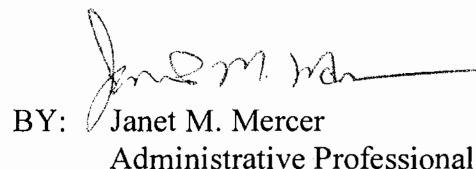
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I note that the person designated by the New York County District Attorney's Office to determine appeals is Ms. Patricia J. Bailey, Assistant District Attorney. The person designated by the New York City Police Department to determine appeals is Mr. Jonathan David.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 17418

Committee Members

Laura L. Anglin
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Lorraine A. Cortés-Vázquez
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Clifford Richner

Executive Director

Robert J. Freeman

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October 30, 2008

Mr. Jovan Santiago
07-A-0369
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. Santiago:

I have received your letter in which you indicated that you have submitted numerous requests to the Southport Correctional Facility and that, as of the date of your letter to this office, you had not received any responses.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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."

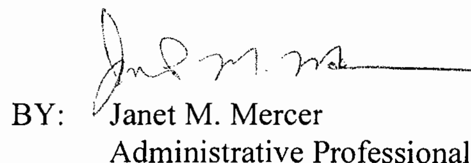
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I point out that the person designated to determine appeals by the Department of Correctional Services is Mr. George A. Glassanos, Deputy 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- 17419

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 30, 2008

Mr. Mark Harvey
07-A-4144
Groveland Correctional Facility
P.O. Box 50
Sonyea, NY 14556

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Harvey:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request to the Albany County Court, but that as of the date of your letter to this office, you had not received a response.

In this regard, 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."

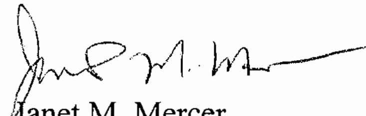
Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law may grant broad public access to those records (see e.g., §255, Judiciary Law). Even though 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 as the basis for you request.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 17420

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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October 30, 2008

Mr. George Hegel
96-A-2409
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-9199

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hegel:

I have received your letter in which you indicated that you requested a copy of your transfer order and, as of the date of your letter to this office, you had not received a response to your request or appeal.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Of relevance to records relating to transfers is §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I point out that a decision rendered in 1989 might have dealt with the kinds of records concerning transfers in which you are interested. In that case, it was stated that:

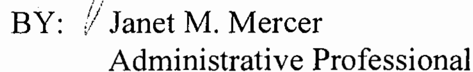
> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Kheel v. Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

Insofar as the records sought are equivalent to those described in Rowland D., it appears that they could be withheld.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17421

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

One Commerce Plaza, 99 Washington Ave., Suite 650, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 30, 2008

Mr. Donald James Hunt
01-B-2147
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

Dear Mr. Hunt:

I have received your letter in which you indicated that you submitted a motion to furnish various records to the Ontario County Supreme Court, but were denied access to those records.

In this regard, I point out that 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 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.

In short, the matter that you described is outside the jurisdiction of this office.

I hope that I have been of assistance.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17422

Committee Members

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 31, 2008

E-Mail

TO: Ms. Patricia Podolak

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 information presented in your correspondence.

Dear Ms. Podolak:

We are in receipt of your request for an advisory opinion concerning your ability to bring an additional person with you to school district offices to inspect records requested pursuant to the Freedom of Information Law. Specifically, you indicated that despite an appointment to inspect records, you were denied access when you appeared at the District office with another person. You were informed that the District "had to be told in advance if another person would be with [you]." You expressed the view that "there was plenty of room for the second person, and it caused no inconvenience" and that you "would never take a large group of people with me." In this regard, we offer the following comments.

As you suggest, we believe that an agency can not be expected to accommodate large numbers of people who seek to inspect records; however, we do not believe that an agency can refuse to permit the inspection of records solely on the ground that two people seek to do so without prior notice to the agency. In our opinion, an agency must offer records for inspection in a reasonable manner consistent with the intent of the Freedom of Information Law. We note that the legislative declaration appearing at the beginning of that statute provides that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." Accordingly, we believe that an agency must permit two people to inspect records when reasonable, and when so doing is not disruptive.

Although we are not aware of any judicial decisions directly on point, we can compare this request to one in which the applicant sought to use his own photocopier to make copies of agency records. In Murtha v. Leonard, 210 AD2d 411 (1994) it was held that a rule prohibiting the use of one's own photocopier was valid and reasonable when such use would cause disruption. The

situation that you described is different, however, for there would be little additional use of the an agency's space or electricity. More importantly, there would be no distinction in terms of the agency's efforts in retrieving the records.

Further, while an agency is not required to do so, we believe that it may have a staff person observe an applicant or applicants for records while the records are being inspected. Agencies have a responsibility to ensure that the custody and integrity of their records is maintained (see Arts and Cultural Affairs Law §57.25). We do not believe that having an additional person with you to inspect records would necessarily impose an additional burden on an agency with respect to the agency's observation of the inspection.

In short, we believe that a prohibition against an additional person to inspect records, alone, is unreasonable and inconsistent with law, and that the agency should not have denied access to the requested records based on a failure to provide advance notification.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17423

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

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October 31, 2008

E-Mail

TO: Ms. Patricia Podolak

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 information presented in your correspondence.

Dear Ms. Podolak:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to a school district. You wrote that the school district "wanted to charge me for photocopies of documents that were available by e-mail", and asked: "Are they allowed to do that?" In this regard, we offer the following comments.

In 2006, the Freedom of Information Law was 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 have the ability to do so with reasonable effort.

More recently, a new provision was adopted which defines, for the first time, the basis for determining the actual cost of reproducing records maintained electronically. For many years, §87(1)(b)(iii) of the Freedom of Information Law permitted a school district to charge a maximum of twenty-five cents per photocopy, or the actual cost of reproducing other records, i.e., those that are not or cannot be photocopied. The new provisions balance the public interest in gaining access to computerized records at low cost with the tasks carried out by agencies when making those records available.

In most instances, the actual cost of reproducing an electronic record involves only the cost of the storage medium in which the information is made available, i.e., a computer tape or disk. When the materials can be emailed, in our opinion, there would be no "actual costs" of reproduction because the records are not photocopies and a storage medium is not involved. However, in those instances in which substantial time is needed to prepare the copy, at least two hours of an employee's

time, §87(1)(c) now permits an agency to charge a fee based on the cost of the storage medium used, as well the hourly salary of the lowest paid employee who has the skill needed to do so. This change in FOIL for the first time authorizes agencies to determine and assess a fee to be charged on the basis of an employee's time, but only when at least two hours of an employee's time is necessary to prepare records.

The new legislation defines "preparation" of the record, prohibiting an agency from charging for "search time or administrative costs" [§87(1)(c)(iv)]. Further, the statute now clarifies that "[a]ny programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record." [§89(3)(a)]. Accordingly, it is our opinion that an agency may charge for employee time spent extracting or segregating data from an electronic database, but not for redacting or transferring the record to the requested medium. In sum, an agency may now require an applicant to pay for employee time spent on programming necessary to retrieve data.

Accordingly, it is our opinion that if the records are to be emailed, and if their preparation involves less than two hours, the agency has no authority to charge a fee.

Please take note that if the records that you requested include information that must be disclosed, as well as information that may be withheld, the only method of transmitting those portions that are accessible to the public may involve the preparation of a photocopy, from which the appropriate redactions would be made. 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 without payment (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, we believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record. Further, it is our opinion that if the agency does not have the ability to make secure redactions electronically, it would not be obliged to purchase software to do so.

In conclusion, it is our opinion that an agency such as a school district may not require payment for records transmitted electronically, unless the recently adopted "actual cost" provisions apply, and that if the agency cannot redact electronic records electronically, it may require payment for photocopies of records from which redactions were made.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17424

Committee Members

Laura L. Anglin
Tedra L. Cobb
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Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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October 31, 2008

Mr. Craig Surprise
Town Assessor
Town of Rotterdam
John F. Kirvin Government Center
1100 Sunrise Boulevard
Rotterdam, NY 12306

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Surprise:

I have received your letter and the materials attached to it. In brief, you described a situation in which an individual has repeatedly requested the same records. You indicated that copies of all of the records that were requested were made available to that person, but that he "wants to come back into the office to watch the files being pulled so he can review them again and tell [you] what new copies he would need."

Assuming that the files that would be "pulled" involve records that have already been copied and made available to the individual, I do not believe that you would be required to honor his request that he "watch the files being pulled" or to make additional copies of those records available to him. I note that it has been held by appellate courts that an agency is not required to make records available to an individual if those records had already been disclosed that person or his/her representative, i.e., his/her attorney [Moore v. Santucci, 151 AD2d 677 (1989; also Walsh v. Wasser, 225 AD2d 911 (1996)]

It is suggested that you share this information and advise the individual that unless they involve records that had not previously been disclosed, his requests will be ignored.

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 - 17425

Committee Members

Laura L. Anglin
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Executive Director

Robert J. Freeman

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November 4, 2008

Mr. Joseph Owens
07-A-6628
Clinton Correctional Facility Annex
Box 2002
Dannemora, NY 12929

Dear Mr. Owens:

I have received your letter in which you appealed a denial of access to records by the Office of the New York County District Attorney.

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) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17426

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
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November 4, 2008

Mr. Reginald Lawrence
97-A-7376
Great Meadow Correctional Facility
11739 State Route 22
Comstock, NY 12821

Dear Mr. Lawrence:

I have received your letter in which you requested from this office certain "directives" that appear to have been issued by the Department of Correctional Services.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee does not have general custody or control of records. In short, this office does not possess the records of your interest.

When seeking records, a request should be made to the "records access officer" at the agency that maintains the records of interest. The records access officer has the duty of coordinating an agency's response to requests for records. Assuming that the Department of Correctional Services maintains the records at issue, it is suggested that a request be made to Mr. Chad Powell, Records Access Officer, NYS Department of Correctional Services, State Office Building 2, 1220 Washington Avenue, Albany, NY 12226.

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-17427

Committee Members

Laura L. Anglin
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November 5, 2008

E-Mail

TO: Ms. Mary A. Buckley, Senior Attorney, NYS Department of Health

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. Buckley:

I have received your letter in which you sought an advisory opinion concerning the ability of the New York State Department of Health (DOH) to withhold information that it may receive from the United States Department of Health and Human Services (DHHS) Coordinating Office for Terrorism Preparedness and Emergency Response.

In brief, DHHS has offered to inform DOH of the locations of facilities in New York that "have the potential to pose a severe threat to public health and safety, animal or plant health, or animal or plan products", as specified in federal regulations. That offer, however is, according to your letter, conditioned on submission to DHHS of information designed to ensure protection of the information from disclosure, including a Memorandum of Understanding with the recipient of the information in the state, a plan for protection, and copies of the state's policies and procedures for protection of the information within the state." DHHS also requires a written legal opinion from a state's attorney general advising that the information provided can be protected under state law. You indicated that DHHS has agreed that an opinion offered by this office would satisfy that requirement.

As you are aware, the Committee on Open Government was created as part of the state's Freedom of Information Law in 1974. Section 89(1)(b) of the Public Officers Law states that: "The Committee shall: i. furnish to any agency advisory guidelines, opinions or other appropriate information regarding this article...", which is the Freedom of Information Law, Article 6 of the Public Officers Law. Although opinions rendered by the Committee are not binding, it has been held in several judicial determinations that when such an opinion "is consistent with that of the agency administering the records at issue...that interpretation is entitled to deference so long as it is not irrational or unreasonable" [see e.g., Brown v. Goord, 45 AD3d 932 930, 932 (2007)].

You indicated that the records at issue are exempt from disclosure pursuant to 42 U.S.C. §262a(h), which is a portion of the Public Health Security and Bioterrorism and Bioterrorism Preparedness and Response Act of 2002. That provision in paragraph (1) entitled "Nondisclosure of certain information" states that "No Federal agency specified in paragraph (2) shall disclose under section 552 of title 5 any of the following...." As I understand the records at issue, they are included in the description of records deemed nondisclosable under 5 U.S.C §552, which is the federal Freedom of Information Act.

While a federal agency may be authorized by the provision cited above to withhold certain records, I believe that the federal Freedom of Information Act is applicable only to records maintained by federal agencies, and that it does not apply to records that may come into the possession of a state agency, such as DOH. Any such records would in my view fall with the scope of the New York Freedom of Information Law. That statute pertains to all records of an agency of state or local government in New York, 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, the materials received by DOH would constitute agency "records" for purposes of the Freedom of Information Law.

As a general matter, like the federal Freedom of Information Act, the New York counterpart is based upon a presumption of access. Stated differently, all records of an agency are 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 to rights of access, §87(2)(f), is, in my view, most pertinent in considering the authority of DOH, or any other agency of state or local government in New York, to deny access to the records at issue. For more than twenty years that provision authorized agencies to withhold records insofar as disclosure "*would* endanger the life or safety of any person" (emphasis mine). Although an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more of the grounds for denial [see §89(4)(b)], in the case of the assertion of that provision, the standard developed by the courts was less stringent. In citing §87(2)(f), it was found that:

> "This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner's assertion that respondents are required to prove that a danger to a person's life or safety will occur if the information is made public (see Nalo v. Sullivan, 125 AD2d 311, 312, *lv* denied 69 NY2d 612). Rather, there need only be a possibility that such

> information would endanger the lives or safety of individuals...."[Stronza v. Hoke, 148 AD2d 900,901 (1989)].

The principle enunciated in Stronza appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Division of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991), Fournier v. Fisk, 83 AD2d 979 (1981) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994], and it was determined in American Broadcasting Companies, Inc. v. Siebert that when disclosure would "expose applicants and their families to danger to life or safety", §87(2)(f) may properly be asserted [442 NYS2d 855, 859 (1981)]. Also notable is the holding by the Appellate Division in Flowers v. Sullivan [149 AD2d 287, 545 NYS2d 289 (1989)] in which it was held that "the information sought to be disclosed, namely, specifications and other data relating to the electrical and security transmission systems of Sing Sing Correctional Facility, falls within one of the exceptions" (id., 295). In citing §87(2)(f), the Court stated that:

> "It seems clear that disclosure of details regarding the electrical, security and transmission systems of Sing Sing Correctional Facility might impair the effectiveness of these systems and compromise the safe and successful operation of the prison. These risks are magnified when we consider the fact that disclosure is sought by inmates. Suppression of the documentation sought by the petitioners, to the extent that it exists, was, therefore, consonant with the statutory exemption which shelters from disclosure information which could endanger the life or safety of another" (id.).

In short, although §87(2)(f) referred to disclosure that *would* endanger life or safety, the courts have clearly indicated that *"would"* meant *"could."*

In an effort to ensure that agencies are able to deny access to records insofar as disclosure could reasonably be expected to endanger life or safety, the Committee on Open Government recommended in a report to the Governor and the State Legislature that "would" be replaced with "could", and legislation was enacted in 2003 accomplishing that goal.

Based on the language of the Freedom of Information Law, several judicial decisions interpreting §87(2)(f), and the amendment of that provision, it is clear in my opinion that an agency subject to the Freedom of Information Law, such as DOH, has the ability to withhold the records that are the subject of your inquiry when there is a reasonable likelihood that disclosure "could endanger the life or safety of any person."

I hope that the foregoing satisfactorily meets the condition imposed by DHHS and that I have been of assistance.

RJF:jm

FOIL-AO-17428

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, November 05, 2008 11:49 AM
To: Captain Paul Rhodes, Tioga County Sheriff's Department
Subject: Freedom of Information Law - MV104As

Captain Rhodes:

As promised, attached is a copy of the case that you referenced. I don't know of anything that is more recent, and this is still good case law.

Tangentially related, please note that the text of Public Officers Law Section 89 was recently changed with respect to this issue. It now reads as follows (new language underlined):

2. (a) The committee on open government may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.

(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
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;
v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or
vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law.

(c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

i. when identifying details are deleted;
ii. when the person to whom a record pertains consents in writing to disclosure;
iii. when upon presenting reasonable proof of identity' a person seeks access to records pertaining to him or her; or
iv. when a record or group of records relates to the right, title or interest in real property, or relates to the inventory, status or characteristics of real property, in which case disclosure and providing copies of such record or group of records shall not be deemed an unwarranted invasion of personal privacy.

....

(3)(a) .... An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes.

I hope that these are helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17429

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, November 06, 2008 4:39 PM
To: Dan Bryson
Subject: Freedom of Information Law - prevaling wage data

Dan:

In addition to checking out the three advisory opinions on our website, under "P" for Prevailing Wage Data, I think you can characterize the Hopkins case as one in which the agency denied access based on "conclusory allegations" that disclosure would cause an unwarranted invasion of personal privacy, and elaborate, using some of the language from those advisory opinions and/or the Joint Industry Board case.

Further, while the burden of proof rests on the agency denying access, and an agency must articulate particularized and specific justification for the denial of access, in my opinion, disclosure of private employees' names, home addresses and/or social security numbers or dates of birth would have a chilling effect on (a) employees working for contractors to government entities and (b) contractors to government entities. Knowing that their names and home addresses, if not more, would be made public, in my opinion, would be a significant deterrent to working for particular employers.

As a corollary, please note that even the home addresses of public employees are protected [section 89(7)], despite a requirement in the Freedom of Information Law that the agency create and provide access to a list of the names, titles, salaries and office addresses of all public employees [section 87(3)(b)].

I hope that this is helpful. – and that your son/daughter is feeling well soon!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17430

From: Jobin-Davis, Camille (DOS)
Sent: Friday, November 07, 2008 10:20 AM
To: Mr. Mac McGonigle
Subject: Freedom of Information Law - appeal process

Mac:

In response to your request, the following is a link to our description of the time limits and appeal process set forth in the Freedom of Information Law: http://www.dos.state.ny.us/coog/explaination05.htm

Also, please note that the attorneys fees provision was amended in 2006, as described at the following link: http://www.dos.state.ny.us/coog/highlights.htm

On a more substantive note, however, after looking through the materials that you submitted, it may be that the County does not have the record that you have requested, and in that event, it would not be required to create such a list in response to your request. You requested "a list of the State and Federal Mandates that impact Monroe County's Budget". In my opinion, a list of this type would require subjective determinations on the parts of perhaps multiple County officials and employees. See http://www.dos.state.ny.us/coog/ftext/f12012.htm (note that the explanation of time limits is out of date).

The title of the Freedom of Information Law may be somewhat misleading, for it is not a law that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. 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.

On the other hand, if as you state, the County has publicized that 71% of its budget is mandated by state and federal law, and there is a document that indicates the factual basis for this statement, in my opinion, the document would be required to be made available upon request. To the extent that intra or inter-agency communications contain statistical or factual tabulations or data, they are required to be made available upon request pursuant to Section 87(2)(g)(i). See advisory opinions under "I" for "Inter-agency" for more detailed explanations.

I hope that these are helpful to you. I am leaving the office at 11 AM today, but I will return on Monday and we can talk then if you have further questions. Sorry for the delay in responding to your telephone call!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17431

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, November 12, 2008 3:48 PM
To: Beth Coursen, Town Supervisor
Subject: RE: Pawling Town Clerk response to Town Supervisor request for information

Supervisor Coursen:

As you know, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision in 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.

Typically, board resolutions appointing attorneys and other such professionals are contained within minutes from organizational meetings at the beginning of each year. Hopefully, this is the case in the Town of Pawling, making them relatively easy to locate. On the other hand, if, for example, a resolution creating an attorney position was adopted many years ago, or materials pertaining to a residency requirement are not kept or filed in such a way as to make them available with reasonable effort, it may be that your request does not reasonably describe those records. Please refer to the following advisory opinions for greater analysis of this issue:

http://www.dos.state.ny.us/coog/ftext/f15098.htm (beginning with the paragraph "Second...".); http://www.dos.state.ny.us/coog/ftext/f12631.htm; and http://www.dos.state.ny.us/coog/ftext/f15751.htm.

On behalf of the Committee, I hope that 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
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17432

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

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November 18, 2008

Mr. Robert Kushner

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kushner:

As you are aware, I have received your letter in which you sought an advisory opinion concerning a denial of a request made to the East Williston School District for an audit report prepared by the District's "internal auditors." The request was denied on the ground that the report is "intra-agency material."

Although you raised a similar issue that was addressed in an advisory opinion prepared at your request in 1997, I offer the following comments.

First, because the report was prepared by District staff, I agree with the District's characterization of the report as "intra-agency material." A record of that nature falls within §87(2)(g), which potentially serves as a ground for denying access. Nevertheless, due to its structure, it often requires substantial disclosure, and I would conjecture that would be so in this instance.

The cited 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 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)].

It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][I], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by agency staff or a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I note that in a case that reached the Court of Appeals, the state's highest court, one of the contentions was that certain reports could be withheld because they were not final and they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that the records may not be final would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access..

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

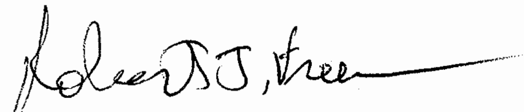
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of

> Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation" (id., 276-277)."

Again, I would conjecture that elements of the report, in accordance with the direction offered by the Court of Appeals, would consist of statistical or factual information that must be disclosed.

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-17433

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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November 18, 2008

Cheryl L. Kates, Esq.

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Kates:

As you are aware, I have received your correspondence relating to unanswered requests for records directed to certain New York City police precincts.

In this regard, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government require that each agency designate one or more persons as "records access officer" (21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records.

It is my understanding that records access officers are not designated in individual precincts in the New York City Police Department. While I believe that your requests should have been answered by the recipients of the requests or forwarded to the records access officer, it is suggested that you might resubmit the request to the Records Access Officer, New York City Police Department, Room 110C, One 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 by the Department to determine appeals is Mr. Jonathan David.

Lastly, I point out that the Freedom of Information Law pertains to existing records. Since your requests involve "command logs" pertaining to certain dates in 1990 and 1991, it is possible that the records of your interest no longer exist.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17434

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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November 18, 2008

Mr. Thomas Campanile

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Campanile:

As you are aware, I have received your correspondence. Please accept my apologies for the delay in response.

In brief, following your attempts to gain access to certain property tax records from the Town of Broadalbin, you expressed the view that its response was incomplete. That being so, you requested a "diligent search of their property tax records and to confirm what they sent [you] was all the FOIL'ed records that they have in their possession." Due to its failure to do so, you asked that this office "investigate the Town of Broadalbin's violation of the above FOIL law and write [a] decision on their behavior."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. It does not have the resources to "investigate" and is not empowered to issue a binding decision. Nevertheless, in an effort to enhance understanding of and compliance with law, I offer the following comments and, as you request, I will send a copy of this response to the Town.

First, the Freedom of Information Law pertains to existing records and states in §89(3)(a) in relevant part that an agency, such as a town, is not required to create a record in response to a request.

Second, the regulations promulgated by the Committee, which have the force of law, require that the governing body of a municipality, in this instance, the Town Board, must designate one or more persons as "records access officer" (see 21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records.

Third, in any case in which requested records are withheld in whole or in part, both the Freedom of Information Law and the regulations require that a denial of access be indicated in writing and that the person denied access informed of the right to appeal pursuant to §89(4)(a). That provision states in relevant part that:

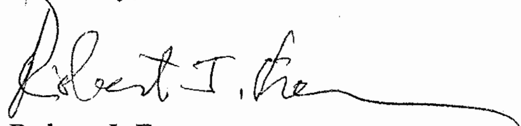
> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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)(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."

I point out that early decisions concerning the certification associated with an unsuccessful search for records held that the certification was required to have been prepared by the person who actually performed the search [see e.g., Key v. Hynes, 205 AD2d 779 (1994). However, the Court of Appeals, the state's highest court held to the contrary in Rattley v. New York City Police Department [96 NY2d 873 (2001)]. In brief, the Court found that the Freedom of Information Law does not specify the manner in which in agency must certify that records cannot be located, and that no personal statement from the person who actually conducted the search is required. Nevertheless, that decision does not absolve an agency from preparing a certification pursuant to §89(3) in instances in which the certification is requested. Based on the Committee's regulations, an agency's records access officer has the duty to ensure that appropriate agency staff prepare the certification described above [see §1401.2(b)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Kimberly A. Verrego, Town Clerk
Leamon Steele
Joey McDonald
Laurie Bollock

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17435

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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November 18, 2008

Christopher M. Grant, Esq.
Chief of Staff
Erie County Executive's Office
Rath Building
95 Franklin Street
Buffalo, NY 14202

Dear Mr. Grant:

I appreciate having received a copy of your determination of an appeal rendered on June 13 pursuant to the Freedom of Information Law relating to a request made by Mr. Jason E. Markel of the law firm of Hodgson Russ.

In the second paragraph of the determination, you wrote that:

> "The information you are requesting was collected under a confidentiality provision of a City of Buffalo and County of Erie Joint Certification Committee agreement. According to the rules and regulations of this Joint Committee, Section 9: *All information by the Joint Certification Committee will be kept strictly confidential. All files are secured for privacy and protection*" (emphasis yours).

In this regard, first, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Second, the Court of Appeals has held that an agreement, a request for, or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available. In Washington Post v. Insurance Department [61 NY2d 557 (1984)], the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court of Appeals reversed a finding that the documents were not "records" subject to the Freedom of Information Law, thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Moreover, it was determined that:

> "Respondent's long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'records' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt (see *Matter of John P. v Whalen*, 54 NY2d 89, 96; *Matter of Fink v Lefkowitz,* 47 NY2d 567, 571-572, *supra*; *Church of Scientology v State of New York*, 61 AD2d 942, 942-943, affd 46 NY2d 906; *Matter of Belth v Insurance Dept.*, 95 Misc 2d 18, 19-20). Nor is it relevant that the documents originated outside the government...Such a factor is not mentioned or implied in the statutory definition of records or in the statement of purpose..."

The Court also concluded that "just as promises of confidentiality by the Department do not affect the status of documents as records, neither do they affect the applicability of any exemption" (id., 567).

In a different context, in Geneva Printing Co. and Donald C. Hadley v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education' s right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).

> “A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> “The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

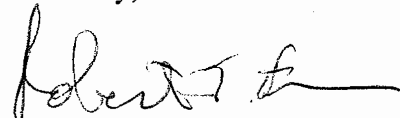
Also pertinent is another decision rendered by the Court of Appeals in which the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Lastly, the foregoing is not intended to suggest that the records at issue must be disclosed, for it may be that elements of them may properly be withheld in accordance with the exceptions appearing in §87(2) of the Freedom of Information Law. Rather, it is intended to advise that an agreement conferring or requiring confidentiality is in my view, and that of the courts, inconsistent with law.

I hope that the foregoing serves to clarify your understanding that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Jason E. Markel

FOIL-AO-17436

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, November 20, 2008 9:46 AM
To: 'Susan Siegel'
Subject: RE: AMENDED workers' comp FOIL request

Susan,

If the town has this data, I believe it would be sufficiently removed from data pertaining to an individual so that it would not be prohibited from disclosure under WCL section 110-a or cause an unwarranted invasion of person privacy. The question remains whether the town has the data mentioned in your later requests.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17437

From: Jobin-Davis, Camille (DOS)
Sent: Friday, November 21, 2008 3:13 PM
To: Bradley Hanscom, NYS Department of Motor Vehicles
Subject: RE: fees for redacting records that are to be inspected

Hi Brad, sorry for the delay!

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.

If you would like me to fax or inter-agency mail over a copy of VanNess (16 pages), please advise.

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-17438

From: Jobin-Davis, Camille (DOS)
Sent: Monday, November 24, 2008 12:07 PM
To: Amanda Avery, CDTA
Subject: Freedom of Information Law - format

Amanda:

In follow up to our telephone conversation, please know that I have been unable to locate a more helpful advisory opinion. In my searching I was repeatedly reminded of two things: (1) that the Authority has an obligation to maintain a record of employee salaries under section 87(3)(b), and (2) that if the data can be made available in the format in which the applicant requests it, and the applicant is willing to pay the requisite fee, the agency is obliged to do so. I have to say, it is still surprising to me, even after your explanation, that no amount of programming can convert the collected data into the requested format! Sorry that I couldn't be more helpful.

Please let me know if you have further questions.

Camille

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FOIL-AO-17439

From: Jobin-Davis, Camille (DOS)
Sent: Monday, November 24, 2008 4:45 PM
To: 'Daniel Lefkowitz'
Subject: RE: Asbestos Inspection

Thank you.

My understanding of your situation evolves with my read of the note from Mr. Sposato, which is that he is not requiring you to submit an additional FOIL request at this time, but that he is essentially responding to your FOIL request, made at the time of the inspection, and will provide you with the record within the 20 business days as permitted by statute. The time frame does not seem reasonable to me, as the records were readily available (provided to you) and clearly public (you inspected them), and in my opinion you could appeal the unreasonably delay in disclosure. Whether that would be the most efficient route, of course, would be better determined by you.

I hope that this is helpful. Happy Thanksgiving.

Camille

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FOIL-AO-17440

From: Freeman, Robert (DOS)
Sent: Wednesday, November 26, 2008 3:29 PM
To: Dillon, Linda
Cc: Pilbeam, Kathy
Subject: RE:

Hi Linda - -

My feeling is that an agency cannot condition disclosure on a promise or assurance that the records sought and disclosed may be altered. Your question arises frequently, and as you know, it was held years ago that when a record is accessible under FOIL, it must be made equally available to any person, without regard to one's status or interest. Further, once a record is disclosed, I believe that the recipient may do with it as he/she sees fit. The protection enjoyed by an agency is that it continues to maintain the original. Because that is so, if in the future there are questions or issues relating to the record, or concerning an alteration of the record made by the recipient, the content of the original maintained by the agency serves to resolve them and provide proof of the content.

I hope that this helps, and that you will enjoy a wonderful Thanksgiving.
Bob

Robert J. Freeman
Executive Director
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FOIL-AO-17441

From: Mercer, Janet (DOS)
Sent: Tuesday, December 02, 2008 1:09 PM
To: Cathy Giordano, Town Clerk, Town of Pawling
Subject: FOIL Appeal

Dear Ms. Giordano:

This is in response to your email of November 14, 2008, and our telephone conversation of November 20, in which you request my opinion as to the reasonableness of your response to the Supervisor's requests for records. You attached various emails between yourself and the Supervisor, ranging in date from October 9, 2008 through November 14, 2008, including her appeal to the Pawling Town Board.

Based on my understanding of the correspondence exchanged, it appears that the Supervisor is appealing the constructive denial of access to oaths of office for Attorney Stewart for the following years: 1986, 1988, 1989, 1990, 1992 and 1996. Although Stewart was the attorney from 1986 through 2005, and you were able to provide oaths for the other years, you were unable to locate these particular oaths despite "extensive research."

It has long been our advice 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." It is emphasized that when a certification is requested, an agency "shall" prepare the certification; it is obliged to do so. Here, it appears that you have provided the Supervisor and the Town Board with a statement tantamount to a certification, particularly that you provided all oaths of office that you could locate with extensive research.

The Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the oaths of office do not exist, the Freedom of Information Law would not apply.

I hope that this is helpful to you and to the Town, and that these issues can be resolved expeditiously and amicably. If I have misunderstood the facts, or if you have questions in the future, please feel free to contact me.

Sincerely,

Camille

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FOIL-AO-17442

From: Mercer, Janet (DOS)
Sent: Wednesday, December 03, 2008 8:41 AM
To: 'Samuel Rivers'
Subject: RE: FOIL 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 in 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 Mercer
Committee on Open Government
One Commerce Plaza
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FOIL-AO - 17443

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, December 03, 2008 2:17 PM
To: Mr. Jeff Boaz
Subject: NYS Freedom of Information Law - property records

Jeff:

In response to your question concerning the accessibility of records from the Chemung County Clerk, please be advised that the NYS Freedom of Information Law was recently amended, and section 89(2)(c)(iv) now specifies that disclosure of records relating to "the right, title or interest in real property" such as assessment records critical to ascertain fair tax assessments, and title records critical to ascertain clear title, would not constitute an unwarranted invasion of personal privacy. The provision of law that the clerk mentioned, section 89(2)(b)(iii), in which the word "commercial" was changed to "solicitation", describes instances of unwarranted invasions of personal privacy, and, as clarified by this recent amendment, does not apply to requests for records pertaining to "the right, title or interest in real property."

I hope that this is helpful. 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

FOIL-AO - 17444

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, December 03, 2008 12:20 PM
To: Edward Rowley, NSY Dept. of Agriculture and Markets
Subject: Freedom of Information Law - privacy

Ed,

The case I was trying to remember, NYTimes v. NYC Fire Dept., is cited and quoted in the following advisory opinion: http://www.dos.state.ny.us/coog/ftext/f15401.htm. I think you will find the analysis helpful when thinking about disclosure to a third party.

And, the Public Health Law contains strict provisions regarding "qualified persons" and who can have access to medical records: http://www.dos.state.ny.us/coog/ftext/f16471.htm; however, there is nothing remotely similar for access to records or photographs of accidents. There is a provision protecting access to medical examiner reports, but for your purposes, I think that if an attorney has indicated his client relationship in writing, that is sufficient.

Camille

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17445

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December 3, 2008

Ms. Elizabeth B. Snyder
Associate Attorney
Mental Hygiene Legal Service
Appellate Division, Fourth Department
207 Genesee St., Room 1601
Utica, NY 13501-2876

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Snyder:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Office of Mental Health. Please accept my apology for the delayed response.

You indicated that you have "encountered some difficulty" in obtaining a copy of a sex offender treatment program manual containing "protocols, a list of the recommended test battery, phase goal outline and consent form to advance to Phase II-IV of programming", and you questioned whether a state agency would be required to pay copying costs to another state agency, or whether the information could be provided electronically. In this regard, we offer the following remarks.

First, with respect to rights of access to the manual, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are 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 confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d

> 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In short, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed when requested for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

Second, from our perspective, three of the exceptions to rights of access may be pertinent to an analysis of the Office of Mental Health's ability to deny access to treatment manuals.

Section 87(2)(g) potentially serves as a means of denying access to records. However, due to its structure, it often requires substantial disclosure. That provision authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld. Insofar as treatment manuals reflect the Office of Mental Health's instructions to staff, policy or determinations, those manuals must be disclosed unless a different exception might justifiably be asserted.

One such exception might be subparagraph (iv) of §87(2)(e), which authorizes an agency to withhold records "compiled for law enforcement purposes and which, if disclosed, would....reveal criminal investigative techniques or procedures, except routine techniques and procedures." The Court in Gould referred to the leading decision concerning that exception, Fink v. Lefkowitz [47 NY2d 567 (1979)]. That decision involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.

> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the manual in question includes descriptions of criminal investigative techniques or procedures which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others, a denial of access would be appropriate.

Lastly, when safety and security are of primary concern, often most pertinent is §87(2)(f), which was amended in 2003. By way of background, that provision had since 1978 authorized an agency to withhold records or portions thereof which if disclosed "would endanger the life or safety of any person." Although an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more of the grounds for denial [see §89(4)(b)], in the case of the assertion of that provision, the standard developed by the courts was somewhat less stringent. In citing §87(2)(f), it was found that:

> "This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner's assertion that respondents are required to prove that a danger to a person's life or safety will occur if the information is made public (see, *Matter of Nalo v. Sullivan*, 125 AD2d 311, 312, *lv* denied 69 NY2d 612). Rather, there need only be a *possibility* that such information would endanger the lives or safety of individuals...."[emphasis mine; Stronza v. Hoke, 148 AD2d 900,901 (1989)].

The principle enunciated in Stronza appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Division of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991), Fournier v. Fisk, 83 AD2d 979 (1981) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994], and it was determined in American Broadcasting Companies, Inc. v. Siebert that when disclosure would "expose applicants and their families to danger to life or safety", §87(2)(f) may properly be asserted [442 NYS2d 855, 859 (1981)]. Also notable is the holding by the Appellate Division in Flowers v. Sullivan [149 AD2d 287, 545 NYS2d 289 (1989)] in which it was held that "the information sought to be disclosed, namely, specifications and other data relating to the electrical and security transmission systems of Sing Sing Correctional Facility, falls within one of the exceptions" (id., 295). In citing §87(2)(f), the Court stated that:

> "It seems clear that disclosure of details regarding the electrical, security and transmission systems of Sing Sing Correctional Facility might impair the effectiveness of these systems and compromise the safe and successful operation of the prison. These risks are magnified when we consider the fact that disclosure is sought by inmates. Suppression of the documentation sought by the petitioners, to the extent that it exists, was, therefore, consonant with the statutory exemption which shelters from disclosure information which could endanger the life or safety of another" (id.).

In sum, although §87(2)(f) referred to disclosure that *would* endanger life or safety, the courts clearly indicated that *"would"* meant *"could."*

The Legislature acted to change the word "would" to "could" (Ch. 403, Laws of 2003). Therefore, when there is a reasonable likelihood that disclosure could endanger life or safety, we believe that the Office of Mental Health may deny access, whether the records are kept by a law enforcement agency or any other unit within State government.

While we are unfamiliar with the manual in question, based on your description, it would appear that there may be no grounds for denying access to any portion of the manual; however, again, the Office of Mental Health has an obligation to review the manual to determine which portions, if any, may justifiably be withheld.

With respect to the agency's ability to charge $.25 per page, 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, state agencies are required to transmit requested records via email, when they have the ability to do so with reasonable effort.

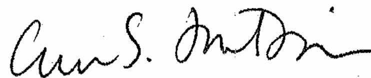
If the records at issue include information that must be disclosed, as well in some instances as information that is exempted from disclosure by statute, the only method of transmitting those portions that are accessible to the public may involve the preparation of a photocopy, from which the appropriate 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, it has been held that an agency has the authority to charge a fee for photocopying [Brown v. Goord, 796 NYS2d 349, 19 AD3d 773 (2005)].

Likewise, because the Freedom of Information Law authorizes the assessment of a fee per page when records are photocopied, when records such as manuals can be emailed and no photocopying is necessary, no fee may be charged.

Lastly, agencies often waive fees for photocopies when requests are made by other governmental entities seeking records in the performance of their official duties. It is suggested that because you are seeking the manual in the performance of your duties, you ask that it be made available, in its entirety, at no cost.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17446

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December 8, 2008

Mr. Nehemiah Nash
97-A-3995
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. Nash:

I have received your letter and offer the following comments.

First, the "FOIA" is the federal Freedom of Information Act, which applies only to federal agencies. The "PA" is the federal Privacy Act, which also applies to federal agencies. Each state has enacted its own version of a law dealing with access to government records. The law falling within the advisory jurisdiction of this office is the New York Freedom of Information Law, also known as "FOIL."

Second, FOIL pertains to entities of state and local government agencies in New York, and this office is authorized to prepare advisory opinions in response to complaints regarding that law. There is no particular form that must be used when submitting a complaint.

Third, since you referred to "FOIL/FOIPA requests made to 'media groups and networks'", I point out that those entities, because they are not government agencies, are not required to comply with state or federal freedom of information or privacy laws. Further, I do not believe that the Better Business Bureau performs functions or services in relations to those laws.

Lastly, when a proper request is made under that statute, the New York FOIL provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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."

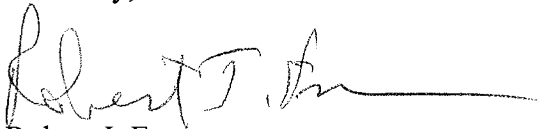
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17447

Committee Members

Laura L. Anglin
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Clifford Richner

Executive Director

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December 8, 2008

Mr. Charles Hathaway
04-B-3390
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. Hathaway:

I have received your correspondence concerning a request for your pre-sentence report pursuant to the Freedom of Information Law.

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."

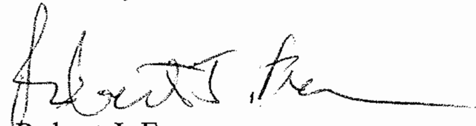
In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

I note that 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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17448

Committee Members

Laura L. Anglin
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December 8, 2008

Mr. Timothy E. Mahler
Commission of OCIS
County of Dutchess
503 Haight Avenue
Poughkeepsie, NY 12603

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mahler:

As you are aware, I have received your correspondence, and I hope that you will accept my apologies for the delay in response. In your capacity as Dutchess County Commissioner of the Office of Computer Information Systems, you have sought guidance concerning information collected by the County from its residents.

You wrote that:

> "This data would be garnered from two website computer applications: the first is *eSubscriber*, whereby the public can sign-up to receive an email when subjects of interest change on our website. The second one is a planned system that will allow the public to submit service requests, ask questions and raise concerns through our website (the correspondence to/from the County would be stored in a database)."

You have asked whether the following items must be disclosed, or conversely, may be withheld under the Freedom of Information Law:

"1. Name
2. Home Address
3. Phone Number
4. Email Address
5. Content of correspondence to/from the County regarding the public's service requests, questions and comments on issues?

6. Regarding the content of the correspondence - Can we tag specific records as 'private/confidential' (e.g. HIPAA related) and not release these?"

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 issue involves whether or the extent to which disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §§87(2)(b) or 89(2)(b), the latter of which includes a series of examples of unwarranted invasions of personal privacy.

Since you referred to an advisory opinion rendered earlier this year concerning an analogous issue and information, it appears that you are familiar with the opinion of this office. Nevertheless, I offer the following observations.

First, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

The only exception to the principles described above involves a provision pertaining to the protection of personal privacy. One of the examples of an unwarranted invasion of personal privacy pertains to:

> "sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant and the purposes for which a request is made are irrelevant to rights of access, and an agency cannot ordinarily inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an assurance that a list of names and addresses will not be used for commercial or fund-raising purposes. The requirement described in Golbert is now part of the Freedom of Information Law [see §89(3)(a)]. Accordingly, I believe that the County may condition disclosure of a list of names and home addresses, or equivalent records, upon an assertion by an applicant for such records that the records will not be used for solicitation or fund-raising purposes.

Although there is specific statutory guidance concerning lists of names and addresses sought for solicitation or fund-raising purposes, as suggested in the earlier opinion, names and residence addresses are widely available, irrespective of the purpose for which they are requested in the form of voter registration lists available under §5-602 of the Election Law and assessment records available under both §516 of the Real Property Tax Law and new provisions added to the Freedom of Information Law [see §89(2)(c)(iv)] concerning disclosure. Therefore, in my opinion, release of the names and/or addresses of recipients of the County's newsletter would not constitute an unwarranted invasion of personal privacy, again, unless they would be used for solicitation or fund-raising purposes.

On the other hand, I believe that home telephone numbers or cell phone numbers may be withheld, for the Appellate Division recently reached that conclusion [see Humane Society v. Brennan, 53 AD3d 909 (2008)]. That is so, in my view, because of the possibility of unwanted interruptions. Unlike unwanted mail which can easily be recycled or ignored, a telephone call, by nature, interrupts. Accordingly, in my opinion, home and cell phone numbers may be withheld.

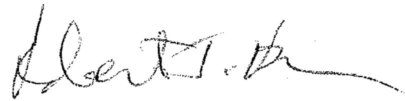
Email communications involve a lesser invasion of privacy than a phone call or contact at a person's home address, because an email address does not divulge the geographic location of a person's home, and in many instances does not include a person's name or other identifying information. Further, individuals may maintain multiple email accounts, reserving one for internet business and another for social communications. Consequently, I believe that disclosure of an email address would be less likely to cause an unwarranted invasion of personal privacy than disclosure of a home or cell phone number and must be disclosed.

With respect to the second kind of communication to which you referred, "service requests, questions and comments on issues" submitted by the public, I believe that the obligation to disclose, or the ability to withhold, is dependent on the content of the communication. For instance, if the communications relate to public assistance, personal medical or mental health matters, based on the examples of unwarranted invasions of personal privacy appearing in §89(2)(b), any portion of those communications which if disclosed would identify the correspondent may be withheld. Similarly, if the correspondence involves a particular characteristic, such as questions concerning either senior citizens' or youth activities, both of which are age related, again, disclosure of identifying details would in my view constitute an unwarranted invasion of personal privacy. In those instances, following the redaction of personally identifiable details, the remainder of those communications

would be accessible. However, if correspondence is of a more general nature, i.e., a request for the schedule of meetings of the County Legislature or a county map, there is little that could be characterized as intimate or highly personal, and in those instances, I believe that the records would be available, for it could not be demonstrated that disclosure would result in an unwarranted invasion of personal privacy.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17449

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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December 8, 2008

Mr. Julio Cesar Borrell
98-A-6799
Great Meadow Correctional Facility
Route 22, 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. Borrell:

I have received your correspondence concerning an alleged failure on the part of the Dutchess County Board of Elections to respond to your request for a certain "voters registration card."

In this regard, first, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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."

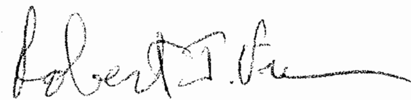
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I believe that the person to whom an appeal may be made is the Dutchess County Attorney.

Second, based on §3-220 of the Election Law, the record of your interest, in my opinion, is accessible to the public.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Elections

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17450

(mmittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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December 8, 2008

Mr. Dennis Whetsel
The Mental Health Association of Westchester, Inc.
Employment Services
29 Sterling Avenue
White Plains, NY 10606

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Whetsel:

I have received your correspondence in which you complained that your requests for records made pursuant to the Freedom of Information Law to the Office of Mental Health 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."

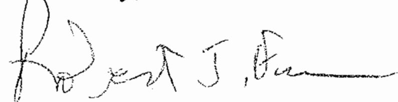
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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:jm

cc: Jill Daniels, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17451

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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December 8, 2008

Mr. Anthony Brandon
06-A-6450
Auburn Correctional Facility
135 State Street, Box 618
Auburn, NY 13024

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brandon:

I have received your correspondence in which you referred to requests for records made pursuant to the Freedom of Information Law to news organizations.

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York. Private, such as news organizations, are not governmental in nature and, therefore are not required to comply with that 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-17452

ommittee Members

Laura L. Anglin
Tedra L. Cobb
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John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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December 8, 2008

E-Mail

TO: Hon. Virginia O'Dell, Clerk-Treasurer, Village of Walton

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. O'Dell:

I have received your letter in which you asked that I "confirm...when the clock starts on an email request." You wrote that a resident of the Village of Walton "states that the clock starts when he sends his email to [your] computer", but that I indicated, in your words, that "it would be on the next business day after the email is received.

In my view, neither of those statements is fully accurate.

From my perspective, a proper response must be based on reasonableness and reality. If a request is emailed and reaches your computer on a Friday night at 10 p.m., I do not believe that the "clock starts" at that time. Rather, assuming that the Village office remains closed from Friday evening until Monday morning, I believe that the clock would start, for purposes of responding to a request made under the Freedom of Information Law, when regular business hours commence on Monday morning.

If email is sent on Monday morning at 9 a.m., and business hours begin on or about that time, I believe that the clock starts on that day, not the next. On the other hand, if a request made by email is received at 4:25 p.m., and business hours end at 4:30 p.m., it is my view that the time for response would begin on the next day when regular business hours begin.

I hope that I have been of assistance.

RJF:jm

cc: Greg Waldron

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17453

C_mmittee Members

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Clifford Richner

Executive Director

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December 8, 2008

Mr. Anthony Ferrari
Ferrari & Sons, Inc.
220 Overocker Road
Poughkeepsie, NY 12603

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.</u>

Dear Mr. Ferrari:

I have received your letter and the materials relating to it. In brief, you have sought guidance concerning the failure on the part of the Village of Red Hook to respond to your requests for records pertaining to additions to and renovations of the Village Hall

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 in 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:

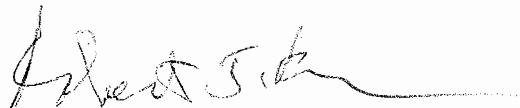
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, 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 legislation enacted in 2006 broadened 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Hon. David Cohen, Mayor

FOIL-AO-17454

From: Freeman, Robert (DOS)
Sent: Tuesday, December 09, 2008 12:40 PM
To: Jacob Resneck, WNBZ
Subject: RE: Saranac Lake fire department FOIL

Dear Mr. Resneck:

To confirm the matters considered in our conversation relating to your request for dispatch tapes pertaining to alarm activations at Paul Smith's College during the past year, I offer the following brief remarks.

First, often a critical issue concerning analogous requests involves the requirement imposed by §89(3)(a) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. Based on a decision rendered by the state's highest court, that requirement is met when an agency has the ability to locate or retrieve the records with reasonable effort. You informed me that the records of your interest are maintained electronically and can be located/retrieved without undue burden. If that is so, I believe that your request would reasonably describe the records.

Second, as you are likely aware, §§87(2)(b) and 89(2)(b) of the Freedom of Information Law authorize an agency to withhold records or portions of records when disclosure would constitute "an unwarranted invasion of personal privacy." Therefore, insofar as the records at issue include names or other personally identifying details relating to a medical injury or condition or similar items, those portions could, in my view, be redacted prior to disclosure of the remainder of the records.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
Website: www.dos.state.ny.us/coog/coogwww.html

FOIL-AO - 17455

From: Freeman, Robert (DOS)
Sent: Tuesday, December 09, 2008 5:08 PM
To: Ms. Carol Birkholz
Attachments: O2920.wpd

Dear Ms. Birkholz:

I have received your inquiry concerning the use of "paper ballots" by the members of the Warrensburg Board of Education. In short, the Freedom of Information Law, §87(3)(a), requires that when action is taken by a public body, such as a board of education, a record must be prepared that indicates the manner in each member cast his or her vote. Although the record of votes of the members typically is found in minutes of a meeting, there is no requirement that it appear in minutes specifically, but rather only that such a record must be maintained.

Attached is a copy of an advisory opinion that deals with the matter more expansively.

I hope that I have been of assistance.

cc: Board of Education

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17456

ommittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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December 10, 2008

Ms. Therese Panico
Executive Secretary
Long Island Board of Community Organizations
P.O. Box 721
Levittown, NY 11756

The staff of the Committee on 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. Panico:

I have received your letter in which you asked whether a school district "is entitled to keep the names of candidates for the position of Superintendent of Schools confidential."

In this regard, §89(7) of the Freedom of Information Law specifies that the name and address of an applicant for appointment to public employment are not required to be disclosed. However, there is nothing in the law that *requires* that a school district or other agency to withhold or deny access to the names of candidates, and in my experience, it is not unusual for a school district to disclose the identities of candidates determined to be finalists for such a position.

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-4710
FOIL-AO-17457

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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December 10, 2008

Mr. William J. Zwerger

Dear Mr. Zwerger:

Your letter addressed to 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 and Open Meetings Laws.

You referred to a meeting held in Syracuse involving the Commissioner of Human Rights, other officials of that agency, representatives of the New York Civil Liberties Union and "members of LGBT advocacy groups." Despite your efforts to learn of the location and to attend, they apparently did not succeed.

In this regard, as a general matter, the right of the public to attend meetings is governed by the Open Meetings Law. The gathering to which you referred, in my view, would not have been subject to the requirements of that statute, because it pertains to meetings of "public bodies." Section 102(2) of that law defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

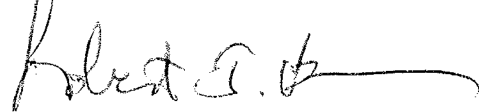
Based on the foregoing, a public body is an "entity" consisting of two or more members either elected or appointed to carry out some governmental function collectively as a body. Examples of public bodies are city councils, town boards, boards of education, county legislative bodies, and the like. Further, a meeting is a gathering of a quorum, a majority of the total membership, of a public body for the purpose of conducting public business.

As you described the gathering, although there may have been several government officials present, no "public body" would have been involved. Consequently, the gathering would not have been subject to the Open Meetings Law, and there would have been no right to attend conferred upon the public.

With respect to the site of the gathering, I point out that the Freedom of Information Law does not require that government employees answer questions; rather, that law deals with existing records. Assuming that a record existed indicating the location of the gathering, I believe that such a record, or the portion of the record indicating the location, would have been accessible to the public under the Freedom of Information Law. However, even if the record had been disclosed, that would not have triggered the application of the Open Meetings Law or required that the meeting be open to the public.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: William Herbert, NYS Office of the Inspector General

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

cmL-Ao-4712
FOIL-AO-17458

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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December 10, 2008

Ms. Lucille Held

Dear Ms. Held:

This is in response to your inquiry concerning the adequacy of minutes of meetings of the Town Board of the Town of Harrison and rights of access to records, particularly those reflective of the expenditure of public money. In this regard, I offer the following comments.

First, the Open Meetings Law provides direction concerning minutes and states in §106 that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In a decision pertinent to our discussion, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by a school board president, and the minutes of the board meeting merely stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that

"these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of the issues that you raised, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the precise nature of the Board's action. Stated differently, any action taken by the Board to expend public money, whether the action was taken during an open meeting or an executive session, must, based on the language of the law and judicial precedent, be memorialized in minutes indicating the nature of the action.

Second, aside from minutes of meetings, records containing information concerning the expenditure of public moneys are required to be prepared and made available to the public pursuant to both the Freedom of Information Law and the Town Law. With respect to the Freedom of Information Law, which is based on a presumption of access, none of the exceptions to rights could, in my view, properly be asserted to withhold those records. Section 118 of the Town Law focuses on claims for payment and states that payment cannot be made:

> "...unless an itemized voucher therefor, in such form as the town board or the town comptroller shall prescribe, shall have been presented to the town board or town comptroller and shall have been audited and allowed. Such voucher shall be accompanied by a statement by the officer whose action gave rise or origin to the claim that he approves the claim and that the service was actually rendered or supplies or equipment actually delivered."

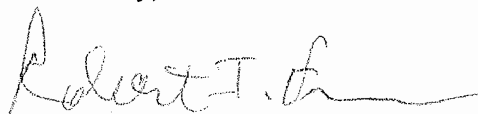
In addition, §119(2) of the Town Law states in relevant part that:

> "In a town in which there is a town comptroller, he shall cause each claim presented to him for audit to be numbered consecutively, beginning with the number one in each year and to be stamped or otherwise marked with the date of presentation. The claims shall be available for public inspection at all times during office hours."

In short, I believe that records indicating the allocation or expenditure of public moneys must be prepared and made available, either in minutes of meetings or other records maintained by the Town.

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-17459

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
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Robert J. Freeman

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December 10, 2008

E-Mail

TO: Mr. Kevin Jones

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. Jones:

I have received your letter in which you wrote that the chief of police in your community "sent out an email about [you] 'causing trouble in the school district." In response to your request for that communication, you received a "redacted copy", and you asked whether you may obtain "an unredacted copy."

In this regard, the content of the communication would serve as the key factor in determining your right to gain 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.

Without knowing more about the nature of the communication or the basis for the redactions, I cannot offer specific guidance. There might have been names of students or the name of a person who made a complaint. In either case, I believe that identifying details pertaining to those persons could likely have been redacted based on §87(2)(b) of the Freedom of Information Law concerning unwarranted invasions of personal privacy. If the communication was made by the chief to another government employee, those portions of the record consisting of advice, opinion, recommendation and the like could be withheld under §87(2)(g) concerning inter-agency and intra-agency materials. Section 87(2)(f) pertains to the ability to withhold records to the extent that disclosure "could endanger the life or safety of any person."

In short, without additional detail concerning the nature and content of the communication, I regret that I cannot be of greater assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17460

_ommittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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December 11, 2008

E-Mail

TO: Hon. Melissa A. Naegeli, Town Clerk

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee 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. Naegeli:

I have received your letter and the materials relating to it. You have sought an opinion concerning a request for assessment data sought by Mr. Martin Roby. As you are aware, Mr. Roby contacted me, and we discussed the matter. However, it appears that he might not have had all of the facts that you offered in the materials sent to this office.

In short, Mr. Roby has requested "an electronic copy of the current property inventory for every parcel in the Town of Stuyvesant..." From my perspective, there is little doubt that a town's real property inventory records are generally accessible to the public under the Freedom of Information Law, as well as the Real Property Tax Law. I note that both §89(2)(c) of the former and §500 of the latter statutes were recently amended to indicate that the content of an inventory cannot be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

The issue, in my view, does not involve whether the contents of the records are accessible to the public, but rather the capacity of the Town to make the records available in the electronic form or format requested. As you know, and as discussed with both you and Mr. Roby, the Freedom of Information Law was recently amended in relation to information that is maintained electronically. Section 87(5)(a) states in relevant part that "An agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy..." Similarly, §89)3)(a) states in part that: "When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so." I believe that those new provisions are based on a recognition that records and data are now frequently maintained in electronic storage systems, and that to give effect to the intent of the Freedom of Information Law,

government agencies are required, when they have the ability to do so, "reasonably" or "with reasonable effort", to disclose them in a manner consistent with developments in information technology.

As I understand the situation, the information sought by Mr. Roby was acquired by the Town from Columbia County, and you wrote that the Director of the County's Real Property Tax Service Agency indicated that "in order to convert the information to excel format, a staff member (her Deputy Director) would have to 'literally go in and out of each and every field for every parcel in the Town of Stuyvesant' (there are 1074 parcels)."

In consideration of the process that would need to be undertaken and the time needed to honor Mr. Roby's request, it is my opinion, and I believe that a court would determine, that neither the Town nor the County has the ability to provide access to the information sought in the format that has been requested "with reasonable effort."

I point out that §87(5)(a) provides that if an agency cannot make records available in the medium requested, it may engage an "outside professional service" to do so. In that event, the agency may charge a fee based on the actual cost of reproducing the records, which would be "the actual cost to the agency of engaging an outside professional service" [§87(1)(c)(iii)], in which case the person requesting the records "shall be informed of the estimated cost..." [§87(1)(c)(iv)].

In sum, based on the information that you and the County's Director of its Real Property Tax Service Agency, due to the effort that would necessarily be expended by the Town or the County, I do not believe that either is required to make the records available in the format requested by Mr. Roby, unless he is willing and able to pay the cost of engaging an outside professional service retained to do so.

I hope that I have been of assistance.

RJF:jm

cc: Martin Roby

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4714
FOIL-AO-17461

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

One Commerce Plaza, 99 Washington Ave., Suite 650, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 15, 2008

Mr. Alan L. Silverman
Computing Solutions
20 Leonardo Drive
Stone Ridge, NY 12484

<u>The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.</u>

Dear Mr. Silverman:

I have received your letter in which you raised issues relating to the Town of Marbletown and particularly its Planning Board.

In this regard, it is noted that the implementation of the Freedom of Information Law by the Town has been discussed with various Town officials, and it is my hope that many of the difficulties to which you referred have been resolved. However, as you are likely aware, the Freedom of Information Law as amended in 2005 provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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.

With respect to a limitation on the amount of time that a person is permitted to speak during a meeting, while individuals may have the right to express themselves and to speak, I do not believe that they necessarily have the right to do so at meetings of public bodies. It is noted that there is no constitutional right to attend meetings of public bodies. Those rights are conferred by statute, i.e., by legislative action, in laws enacted in each of the fifty states. In the absence of a statutory grant of authority to attend such meetings, I do not believe that the public would have the right to attend.

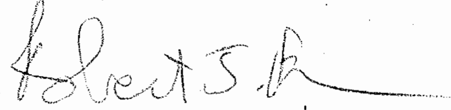
In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies, to listen to their deliberations and observe the performance of public officials. However, as you may be aware, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions.

Within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which I am aware provides the public with the right to speak during meetings, I do not believe that a public body is required to permit the public to do so during meetings.

On the other hand, a public body may in my view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally. From my perspective, a rule authorizing any person in attendance to speak for a maximum prescribed time would be reasonable and valid, so long as it is carried out reasonably and consistently.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board
Hon. Katherine Cairo Davis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17462

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 15, 2008

Mr. and Mrs. Lanny Fromm

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. and Mrs. Fromm:

I have received your letter and the materials attached to it. The issue involves your request for the "paperwork" in possession of the Town of Fenton building inspector relating to a particular property. He refused to disclose the records to you, as well as the Town Clerk. Although you appealed the denial of access to the Town Board, it appears that you did not receive a response.

In this regard, I offer the following comments.

First, the Freedom of Information Law applies to all records maintained by or for an agency, such as a town, and §86(4) of that law defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the definition of "record", any paperwork or other information existing in some physical form kept by the building inspector on Town premises or in the performance of his duties constitute "records" that fall within the coverage of the Freedom of Information Law.

Second, §30 of the Town Law states in part that the Town Clerk is the custodian of all Town records. Therefore, even when records are in the physical possession of other Town officials or employees, they are in the legal custody of the Town Clerk

Third, the regulations promulgated by this office require that the governing body of the Town, the Town Board, must adopt procedures to implement the Freedom of Information Law. An aspect of the procedures requires that the Board designate one or more "records access officers" (21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records. In most towns, the Town Clerk, due to his or her other legal functions, is designated as Town Clerk. If that is so in the Town of Fenton, the Town Clerk is authorized to respond to requests and determine whether records must be disclosed, or conversely, may be withheld.

Next, when an appeal is made following an initial denial of access, the person or body designated to determine appeals must do so within ten business days of the receipt of the appeal. By the expiration of that time, the appeals person or body must either grant access to the records or fully explain in writing the reasons for further denial.

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. Although I am unfamiliar with the nature or content of the records at issue, the exceptions are narrow, and in my experience, most records maintained by a building department or inspector are accessible, for they usually consist largely of factual information that must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Jean S. Baker, Town Clerk
Bill Broderick, Building Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 17463

mmittee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Michelle K. Rea, Chair
Clifford Richner

Executive Director

Robert J. Freeman

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December 15, 2008

E-Mail

TO: Richard Meyers

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Meyers:

I have received your letter and hope that you will accept my apologies for the delay in response. You have raised a series of questions, most of which relate to the designation of the town board in the community in which you reside to determine appeals made pursuant to the Freedom of Information Law. That designation replaced the town supervisor, who had been so designated.

From my perspective, it is within the board's authority to designate itself as appeals body. In this regard, I offer the following comments.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, I believe that the public corporation is the town, and that the governing body would be the town board.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

When a request is denied, it may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall determine appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

In short, it is clear that a town board may determine appeals. It has been suggested that it may not be efficient or convenient to do so, for a town board would be required to conduct a meeting in order to carry out its duties as appeals body. In some instances, it may be difficult to convene a meeting in order render such a determination within ten business days of receipt of an appeal. Again, however, there is nothing that would prohibit a town board from serving as the entity designated to determine appeals made under the Freedom of Information Law.

Further, there is nothing inconsistent with law in my view to require a supervisor to transmit appeals and the determinations that follow to this office.

Lastly, you suggested that a proposal to amend existing provisions offered by the "records officer" might have been "a major conflict of interest." While I am not an expert regarding conflicts of interest, I do not believe that so doing would in any way constitute a conflict of interest as that phrase is described in Article 18 of the General Municipal Law.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

RJF:jm

FOIL-AO-17464

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, December 17, 2008 12:08 PM
To: 'Susan Siegel'
Subject: RE: interpreting Section 87 (2) (g)

Hello Susan, sorry for the delay.

You are correct: for the inter or intra-agency exception (section 87[2][g]) to apply, the record must have been communicated within an "agency" or between or among "agencies". This exception protects the deliberative process. The Court of Appeals ,in Xerox Corporation v. Town of Webster, has determined that when it is necessary for an agency to hire an outside consultant to provide professional advice that the agency is unable to obtain in-house, communications between the agency and the outside consultant, because they are also part of the deliberative process, may also be protected from disclosure under this provision. Please note the explanation of the Court of Appeals case in the following advisory opinion: http://www.dos.state.ny.us/coog/ftext/13401.htm. Accordingly, if there were a memo from a town's outside counsel that was not protected under the attorney-client privilege, section 87(2)(g) would apply to give the town the authority to deny access to some if not all of the memo.

If you would like to see more detailed analysis, please take a look at related advisory opinions under "C" for "Consultant Report" on our website.

I hope that this is helpful. Please let me know if you have further questions. I hope to be able to respond to your later email by the end of the day.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17465

Committee Members

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Robert J. Freeman

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December 19, 2008

Mr. Kenneth Bartholomew

The staff of the Committee on Open 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:

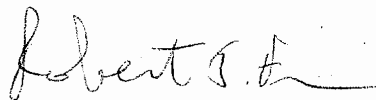
I have received your letter in which you asked whether it is proper for the County Clerk to direct you to a different agency that might possess records that you requested.

In this regard, by way of brief background, §87(1) of the Freedom of Information Law requires the governing body of a public corporation, i.e., the legislative body of Washington County, to adopt procedures to implement the law that apply to entities under its control. As you may be aware, county clerks are independently elected, and they perform a variety of functions, some of which involve duties as clerk of a court. In that situation, the Freedom of Information Law would not apply, for that statute exempts the courts from its coverage. Other functions are unrelated to the courts, and a clerk's records in those instances would, in my view, be subject to the Freedom of Information Law. One aspect of the procedures involves the obligation of the governing body to designate one or more persons as "records access officer" [see regulations promulgated by the Committee on Open Government, 21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests made pursuant to the Freedom of Information Law.

In my view, if the County Clerk has been designated as records access officer for all County agencies, including the Office of Real Property, in her capacity as coordinator, she would have the responsibility of forwarding your request to that Office or acquiring the records in order determine rights of access. If, on the other hand, she does not serve as records access officer for the Office of Real Property, her suggesting that you contact that office would, in my opinion, have been fully appropriate.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Dona J. Crandall

FOIL-AO- 17466

From: Jobin-Davis, Camille (DOS)
Sent: Friday, December 19, 2008 3:04 PM
To: Officer Frazer, Town of Hamburg
Subject: Freedom of Information Law - record previously disclosed

Officer Frazer:

In Moore v. Santucci, 543 NYS2d 103, 151 AD2d 677 (1989) it was 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 this is helpful to you. Happy Holidays!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17467

Committee Members

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Robert J. Freeman

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December 22, 2008

Mr. Thomas Tocco
99-A-2307
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. Tocco:

I have received your letter in which you complained that a request made under the Freedom of Information Law to the Bronx Supreme Court has not been answered.

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts are not subject to the Freedom of Information Law. However, most court records are available under other provisions of law (see e.g., Judiciary Law, §255), and it is suggested that you resubmit a request citing an applicable statute 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-17468

Committee Members

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December 22, 2008

Ms. Genevieve Coffey

The staff of the Committee on 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. Coffey:

I have received your note and the correspondence attached to it. You wrote that the Town of Orangetown has failed to respond to your request made pursuant to the Freedom of Information Law.

In this regard, having reviewed your request, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3)(a) states in part that an agency, such as the Town, is not required to create a record in response to a request. Therefore, if, for example, the Town maintains no "list" containing the information of your interest, it would not be required to prepare a list on your behalf. Rather than requesting a list, it is suggested that you request "records identifying elected officials and Town employees who have take home vehicles, including records indicating the departments to which the employees are assigned and the make, model and year of the vehicles assigned to them." Similarly, you might request "records indicating, mileage, gasoline usage and tolls regarding each such vehicle during 2007 and 2008."

Second, the Freedom of Information Law as amended in 2005 provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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."

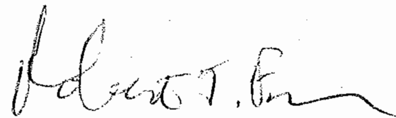
If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request 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: Hon. Charlotte Madigan
Dennis Michaels

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17469

Committee Members

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December 22, 2008

E-Mail

TO: Mr. Michael Ballman

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. Ballman:

As you aware, I have received your letter, and I hope that you will accept my apologies for the delay in response. You have requested an advisory opinion concerning a denial of access to records by the New York Lottery.

The request pertained to the Finger Lakes Racing Association, Inc. and involves three items: its annual marketing and promotion plan for 2008, "detailed internal control procedures controlling the player rewards club program", and "internal control procedures for the authorization and issuance of all complimentary services and items." The records at issue were withheld in their entirety. Access to the marketing and promotion plan was denied pursuant to §87(2)(d) of the Freedom of Information Law; the other two items were withheld based on §87(2)(d) and §89(2)(i). The former authorizes an agency to withhold records insofar as they consist of trade secrets or would, if disclosed, "cause substantial injury to the competitive position" of a commercial enterprise. The latter permits an agency to deny access to 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."

From my perspective, it is doubtful that §87(2(i) may properly be asserted, and the extent to which §87(2)(d) may be asserted is questionable. 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. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single

record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Department contended that certain records could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, because the records sought have been withheld in their entirety, the Lottery's determination would, in my view, likely be inconsistent with the language of

the law and judicial interpretations. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the Lottery for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof...* as long as the requisite particularized showing is made" (id., 277; emphasis added).

Second, the initial basis for denial cited by the Lottery is §87(2)(d), and the question under that exception involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity. The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Also relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" in Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale [87 NY2d 410(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise...obtain the requested information, the inquiry ends here (id., 419).

From my perspective, it is possible that some aspects of the records at issue may have some value to competitors, but whether every aspect of every record that has been withheld would, if disclosed, cause *substantial injury* to the competitive position of the Finger Lakes Racing Association is questionable, and that is the standard that must be met to justify a denial of access.

I note, too, that in a recent decision rendered by the state's highest court, it was found that the agency did not justify its denial of access under §87(2)(d), holding that "To meet its burden, the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest upon a speculative conclusion that disclosure might potentially cause harm" [Markowitz v. Serio, 11 NY3d 43 (2008)].

Lastly, with respect to the assertion of §87(2)(i), the language of that exception relates to disclosures that would jeopardize an agency's ability to guarantee the security of its information assets. The term "agency" is defined in §86(3) of the Freedom of Information Law to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the authority to invoke §87(2)(i) relates the protection of an entity of state or local government; I do not believe that it is applicable with respect to records submitted to an agency by a private entity, such as the Finger Lakes Racing Association.

I hope that I have been of assistance.

RJF:jm

cc: Julie B. Silverstein Barker
Michelle Mattiske

FOIL-AO-17470

From: Freeman, Robert (DOS)
Sent: Tuesday, December 23, 2008 11:09 AM
To: Brendan Lyons
Subject: RE: Try this

Hi - -

It's clear that you requested copies, but you didn't specify how you wanted them. A new provision in FOIL, §87(5)(a), states in part that "An agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service".

Insofar as the records are maintained electronically, you could ask they be transferred to an electronic storage medium, i.e., a tape or disk. In that event, the fee would be based on the actual cost of reproduction, and if it would take less than two hours to do so, the fee would involve only the cost of the tape or disk. If more than two hours would be needed, the charge would be based on the hourly salary of the lowest paid employee able to do the job, plus the cost of the storage medium. If they can be emailed, there would be no charge, because they wouldn't be reproduced. If the only means of reproducing the records involves photocopying, as you know, the City could charge up to 25 cents per photocopy.

Hope this helps, and have a great holiday!

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17471

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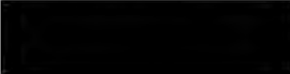
December 23, 2008

Mr. John Culkin



The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Culkin:

I have received your letter in which you indicated that you have made a Freedom of Information Law request to the New York State Office of the State Comptroller and, that as of the date of your letter to this office, you had not received a response.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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."

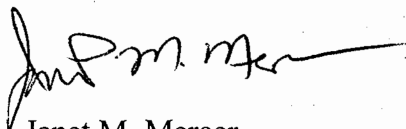
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

The person designated by the Office of the State Comptroller to determine appeals is Mr. Harvey Silverstein.

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 - 17472

Committee Members

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Executive Director

Robert J. Freeman

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December 23, 2008

Mr. Arthur Harrison
91-A-0070
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Harrison:

I have received your letter in which you indicated that you have made several Freedom of Information Law requests to the Greene Correctional Facility and the Department of Correctional Services 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."

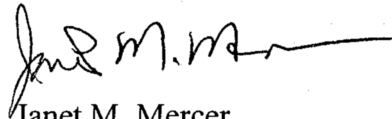
Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

The person designated by the Department of Correctional Services to determine appeals is Mr. George Glassanos, Deputy 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- 17473

ommittee Members

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Executive Director

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December 23, 2008

Mr. Larry Laws
06-R-2054
Wallkill Correctional Facility
Route, 208, Box G
Wallkill, NY 12589

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Laws:

I have received your letter concerning requests for court records made pursuant to the Freedom of Information Law.

In regard, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

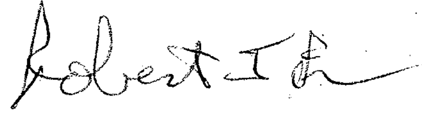
In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

I 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-17474

Committee Members

Laura L. Anglin
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December 23, 2008

Ms. Maria Ortiz

The staff of the Committee 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. Ortiz:

As you are aware, I have received your letter and the correspondence relating to it, and I hope that you will accept my apologies for the delay in response. It is noted that this office also received a copy of a determination of your appeal rendered by Arnold Goldstein, Superintendent of the North Bellmore Union Free School District.

You have sought an advisory opinion concerning your request for records maintained by the District that "pertain in any way to Dominic Mucci's decision not to recommend Dania Hall for tenure." Minimal information was provided, but the remainder was withheld on the basis of §87(2)(b) and (g) of the Freedom of Information Law. I am unaware of the content of the records that might have been withheld. However, in order to offer guidance, 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.

The other exception cited by the District 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:

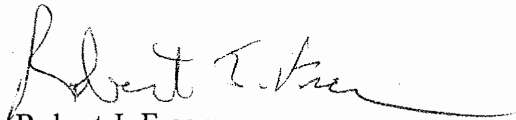
> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller 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.

Again, I am unaware of the content of the records at issue. It is clear in my view that portions may be withheld, such as those reflective of opinions or recommendations. However, others may be accessible. For instance, attendance records or references to lateness or absences would constitute factual information, and it has been held that disclosure of records of that nature would constitute a permissible rather than an unwarranted invasion of personal privacy [see Capital Newspapers, supra. Records indicating a teacher's certification, duties, and the like would also consist of factual information that must be disclosed. Further, if a determination is made in relation to a performance evaluation, it has consistently been advised that such a record or portion of a record is accessible, for a determination concerning performance would clearly relate to one's duties, and as indicated above, a final determination is accessible under subparagraph (iii) of §87(2)(g).

I hope that I have been of assistance. Should further questions arise, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Arnold Goldstein, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17475

Committee Members

Laura L. Anglin
Tedra L. Cobb
Lorraine A. Cortés-Vázquez
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Clifford Richner

Executive Director

Robert J. Freeman

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December 23, 2008

Mr. Mark A. Fowler
Satterlee Stephens Burke & Burke LLP
230 Park Avenue
New York, NY 10169-0079

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fowler:

I have received your letter in which you sought an advisory opinion on behalf of your clients, the *Journal News* and its online news site, concerning "the refusal of the Town of Bedford Police Department to disclose the name of a 17-year-old suspect charged with a felony offense." Despite your efforts, the Chief of Police wrote that "it is and has been a longstanding practice of the Bedford Police Department to not release the name, date of birth and address of those individuals arrested who are under the age of nineteen (19)."

From my perspective, while shielding the identity of a person charged with a felony may be "longstanding practice" of the Department, that practice is inconsistent with law. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." While records concerning "apparently eligible youths" might at some point fall within a statutory exemption from disclosure, that point is reached, in my view, only when or after a court adjudicates a person as a youthful offender thereby determining that records must be sealed and judicial proceedings closed.

Most relevant to the issue in my view is§720.15 of the Criminal Procedure Law, which provides that:

> "1. When an accusatory instrument against an apparently eligible youth is filed with a court, the court, with the defendant's consent, must order that it be filed as a sealed instrument, though only with respect to the public.
>
> 2. When a youth is initially arraigned upon an accusatory instrument, such arraignment and all proceedings in the action thereafter may, in the discretion of the court and which the defendant's consent, be conducted in private.
>
> 3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action be conducted in private shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law."

Based upon the foregoing, it is clear in my opinion that only a court has the authority to seal an accusatory instrument that identifies "an apparently eligible youth". Further, subdivision (3) of §720.15 narrows the applicability of subdivisions (1) and (2) and the capacity to seal records or conduct private proceedings by distinguishing between apparently eligible youths charged with felonies from others. As such, I do not believe that records pertaining to eligible youths become "exempted from disclosure" by statute unless or until a court orders that they be sealed. Further, the records and proceedings pertaining to youths charged with felonies are accessible perhaps permanently or for a period of time.

It is possible that an apparently eligible youth charged with a felony may at some point be adjudicated a youthful offender, in which case the records pertaining to that person may be sealed under §720.35 of the Criminal Procedural Law. However, until that occurs, I believe that the records and proceedings concerning such an individual would be open to the public to the same extent as analogous records or proceedings concerning adults.

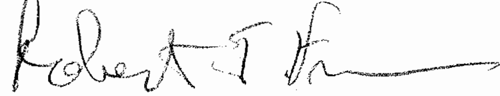
Lastly, unless police records relate to the arrests of juveniles, in which case they are confidential and cannot be disclosed absent a court order (see Family Court Act, §784), booking records and records of arrests have historically be accessible to the public. While arrest records are not specifically 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, those 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)].

In short, for the reasons expressed in the preceding remarks, I believe that the Department's "longstanding practice...to not release" the names of those arrested who are under the age of 19 is

contrary to law. In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Christopher Menzel, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 17476

Committee Members

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Clifford Richner

Executive Director

Robert J. Freeman

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December 23, 2008

Mr. Gary L. Liano

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Gary:

In response to your request, please note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. 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

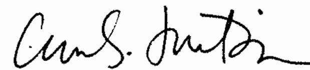
date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively 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. Based on the information and the copy of the appeal that you provided, it appears that this legal remedy is now available to you.

On behalf of the Committee on Open Government, I hope that this is helpful to you.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: David Darwin
David Jolly

FOIL-AO - 17477

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, December 31, 2008 11:27 AM
To: Mr. Bradley Bing, Town of Brookhaven
Subject: Freedom of Information Law

Bradley:

As promised.

First, the following are links to advisory opinions regarding financial disclosure statements: http://www.dos.state.ny.us/coog/ftext/13559.htm and http://www.dos.state.ny.us/coog/ftext/f9826.htm. Additional opinions can be found utilizing the FOIL index of advisory opinions, on our website, under "F" for Financial Disclosure Statements.

Second, with respect to the issue of a certification that the applicant will not use a list of names and addresses for solicitation or fund-raising purposes, section 89(3)(a) of the Freedom of Information Law now provides as follows:

3. (a) Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article. An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes. If an agency determines to grant a request in whole or in part, and 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. Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of

section eighty-eight of this article. When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.

If the applicant fails to provide such certification, the agency has the authority to deny access to the names and addresses based on an unwarranted invasion of personal privacy. For further analysis with respect to the privacy issue, prior to the 2008 amendment underlined above, please see the following: http://www.dos.state.ny.us/coog/ftext/f12362.htm

Third, with respect to disclosure of a person's home address and telephone number for a boat slip, this will confirm my opinion, that if copies of boat slip permits containing names, home address and home telephone numbers are not requested for solicitation or fund-raising purposes, the Town could deny access to the home telephone number based on the reasoning in the following opinion: http://www.dos.state.ny.us/coog/ftext/f12191.htm.

I hope that these are helpful to you. Please let me know if you have further questions.

Happy New Year!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.html