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NYSERDA New York State Energy Research and Development Authority

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January 28, 1999

Mr Paul Lohaus, Acting Director
Office of State Programs
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Mr. *Paul* Lohaus:

I am responding to the "All Agreement States" transmittal dated December 9, 1998 (SP-98-097), requesting information concerning the ability of Agreement States to protect an alleged's identity. Specifically you request: information concerning New York's laws, procedures, or policies regarding the disclosure of an alleged's identity; information on whether New York laws require labeling or whether specific labeling would assist in meeting the intent of the NRC label, "Sensitive Allegation Material", and the protection of the alleged's identity; and a copy of the pertinent State law, procedure, and policy regarding public disclosure.

This matter has been reviewed by the New York State Agreement Program Agencies, specifically the New York State Departments of Labor, Health and Environmental Conservation, and NYSERDA, with the assistance of counsel. The analysis that follows is the result of that review. As the analysis explains, in most instances, alleged identity cannot be protected from public disclosure, and even in cases where one of the listed exemptions to New York's Freedom of Information Law applies, State agencies are under no obligation to withhold the information - the law simply gives the agencies that option.

It should be noted that this analysis does not include input from the New York City Department of Health and does not, therefore, address the ability of that agency to protect the identity of alleged's.

A policy issue regarding allegations was raised during New York's review of this matter. If the NRC receives an allegation regarding activities licensed/regulated by one of the New York agencies, we would expect that the NRC would inform the alleged that the matter is outside NRC's regulatory jurisdiction and strongly advise the individual to contact the appropriate New York agency directly. While we recognize that some individuals may be reluctant to get involved with multiple regulatory agencies, they should be informed that direct contact with the responsible New York agency would allow the most expeditious handling of the allegation.

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New York's Laws, Procedures, or Policies Regarding Disclosure of an Allegor's Identity:

The release of written information by New York agencies is governed by Article 6 of the Public Officers Law ("POL"), the Freedom of Information Law ("FOIL"). Under FOIL, information is available for public inspection and copying unless it falls within one of the exemptions enumerated in the statute. The exemptions listed in POL Section 87(2) that we deemed to have the greatest possibility of applying to requests for the identity of an allegor include information that is:

- (a) specifically exempted from disclosure by State or federal statute;
- (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of POL Section 89(2);
- ...
- (e) 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 investigation techniques or procedures, except routine techniques and procedures;
- (f) if disclosed would endanger the life or safety of any person;
- (g) are inter-agency or intra-agency materials which are not:
 - i. statistical or factual tabulations or data,
 - ii. instructions to staff that affect the public,
 - iii. final agency policy or determinations, or
 - iv. external audits, including but not limited to audits performed by the comptroller and the federal government;

...

Generally, FOIL exemptions are to be narrowly construed (Aid Soc. of Northeastern New York, Inc. v. New York State Dept. of Social Services (1993), 195 A.D.2d 150; New York Times Co. v. New York State Dept. of Health (1997), 173 Misc.2d 310) and an agency seeking to prevent disclosure bears the burden of demonstrating applicability of particular exemption claims (Spencer V. New York State Police (1992), 187 A.D.2d 919).

The first possible exemption defers to controlling State and Federal statutes prohibiting the release of information. We are unaware of any State laws other than FOIL that would apply. With respect to federal laws that might apply, since the NRC is not citing any applicable federal laws and is investigating the application of and authorities available under State laws, we assume there are no controlling federal laws.

The second possible exemption relates to personal privacy. Under New York statute, an unwarranted invasion of personal privacy includes, but is not limited to, disclosure of employment, medical or credit histories or personal references of applicants for employment; disclosure of items involving the medical or personal records of a client or patient in a medical facility; sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes; 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 disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of the agency. POL Section 89(2)(b) might or might not allow the withholding of information, depending upon the facts and circumstances involved. If the allegations were related to the alleged New York employment, there is a possibility that the employee's name could be redacted from records before disclosure or that records could be withheld in their entirety. We are unaware of any legal support for application of this exemption to federal employees so if the employee were a federal employee, this provision might not apply. The last two enumerations might also provide a basis for nondisclosure, however, in both cases, New York would have to take the position that the information sought is not relevant to the ordinary work of the agency. We doubt that a court would conclude that the NRC was providing confidential information to New York that was unrelated to New State's ordinary work. We also question whether this position would contradict legal determinations that the NRC must make prior to disclosing the alleged's identity to New York.

The third possible exemption relates to information compiled for law enforcement purposes. New York courts have interpreted "law enforcement purposes" to mean criminal law investigations. If the information provided is pursuant to a criminal investigation, there would likely be a basis for denying access to the alleged's identity.

The fourth possible exemption concerns personal endangerment of life or safety. If it could be shown that disclosure of the alleged's identity would endanger the life or safety of any person, the alleged's identity could likely be withheld. New York would, of course, look to the NRC to provide written support for this position including the rationale for why it was disclosing such information to New York. In support of the possible use of this exemption, we notice a "fit" between NRC's policy that allows it to disclose an alleged's identity if "disclosure is necessary because of an overriding safety issue" and New York's ability to withhold disclosure if it would endanger the safety of any person.

The fifth and last possible exemption is that the materials are inter-agency or intra-agency materials. The definition of "agency" only includes New York agencies and we are unaware of any application of this exemption to materials obtained from a federal agency.

Lastly, we reviewed statutes that might generally be categorized as "whistle blower" laws to see if there might be any protection from disclosure afforded by these statutes. Our review included Labor Law Section 740 and Civil Service Law Section 75-b. We found nothing in these statutes that provides additional authority for withholding an alleged's identity.

Does New York State law require labeling to protect an alleged's identity or would specific labeling assist in meeting the intent of the NRC label, "Sensitive Allegation Material", and the protection of the alleged's identity:

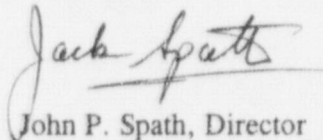
We are unaware of any law that would result in a change in our conclusions above merely because a record was labeled "Sensitive Allegation Material" or contained other words of similar import.

A copy of the pertinent New York State law, procedure, and policy regarding the public disclosure:

Copies of New York's Public Officers Law Article 6 Freedom of Information Law and Article 6-A Personal Privacy Protection are enclosed.

If you have any questions regarding this matter, please contact me at (518) 862-1090, ext. 3302.

Sincerely,

A handwritten signature in dark ink, appearing to read "John P. Spath". The signature is fluid and cursive, with a horizontal line drawn underneath the name.

John P. Spath, Director
Radioactive Waste Policy and
Nuclear Coordination Program

cc: R. Aldrich
P. Merges
G. Miskin
K. Rimawi
D. White

ARTICLE 6-A—PERSONAL PRIVACY PROTECTION LAW

Section

- 91. Short title.
- 92. Definitions.
- 93. Powers and duties of the committee.
- 94. Agency obligations.
- 95. Access to records.
- 96. Disclosure of records.
- 97. Civil remedies.
- 98. No waiver.
- 99. Executive authority.

Cross References

Unwarranted invasion of personal privacy as grounds for denial of access to records, see sections 87, 89.

United States Code Annotated

Records maintained on individuals, see section 552a of Title 5, Government Organization and Employees.

WESTLAW ELECTRONIC RESEARCH

WESTLAW supplements McKinney's. Consolidated Laws and is useful for additional research. Enter a citation in INSTA-CITE for display of any parallel citations and case history. Enter a constitution or statute citation in a case law database for cases of interest.

Example query for INSTA-CITE: IC 403 N.Y.S.2d 123

Example query for New York Constitution:
N.Y.Const. Const. Constitution /s 6 VI + 3 3

Example query for statute: "Public Officers" /5 100

Also, see the WESTLAW Electronic Research Guide following the Explanation.

§ 91. Short title

This article shall be known as the "personal privacy protection law".

(Added L. 1983, c. 652, § 1)

PERSONAL PRIVACY PROTECTION

Art. 6-A

§ 92

Historical Note

Effective Date; Agency Actions Necessary for This Article. Section 4 of L.1983, c. 652, provided: "This act [adding this article; renumbering former sections 95 to 106 as sections 100 to 111; amending section 89; and enacting provisions set out as notes under this section] shall take effect on the first day of September, nineteen hundred eighty-four; provided however, that agency actions necessary to the functioning of article six-A of the public officers law, as added by this act, on such date shall be taken prior thereto."

Former Sections 91. A former section 91 was renumbered 101.

Another former section 91 was renumbered 116.

Severability. Section 2 of L.1983, c. 652, provided: "If any provision of article six-A of the public officers law, as added by this act, [L.1983, c. 652, § 1] or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of such article or the application thereof to other persons and circumstances."

Library References

American Digest System

Access to records or files in general, see Records ¶30.

Encyclopedia

Access to and right to inspect or use records, see C.J.S. Records § 34 et seq.

§ 92. Definitions

(1) Agency. The term "agency" means 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.

(2) Committee. The term "committee" means the committee on open government as constituted pursuant to subdivision one of section eighty-nine of this chapter.

(3) Data subject. The term "data subject" means any natural person about whom personal information has been collected by an agency.

(4) Disclose. The term "disclose" means to reveal, release, transfer, disseminate or otherwise communicate personal information or records orally, in writing or by electronic or any other means other than to the data subject.

(5) Governmental unit. The term "governmental unit" means any governmental entity performing a governmental or proprietary function for the federal government or for any state or any municipality thereof.

(6) Law. The term "law" means state or federal statute, rule or regulation.

(7) Personal information. The term "personal information" means any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject.

SEE ATTACHED AMENDMENT

(8) Public safety agency record. The term "public safety agency record" means 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 parole, the crime victims board, the division of probation and correctional alternatives or the division of state police or of any agency or 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-b, 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.

(9) Record. The term "record" means 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. The term "record" shall not include personal information which is not used to make any determination about the data subject if it is:

- (a) a telephone book or directory which is used exclusively for telephone and directory information;
- (b) any card catalog, book or other resource material in any library;
- (c) any compilation of information containing names and addresses only which is used exclusively for the purpose of mailing agency information;
- (d) personal information required by law to be maintained, and required by law to be used, only for statistical research or reporting purposes;
- (e) information requested by the agency which is necessary for the agency to answer unsolicited requests by the data subject for information; or
- (f) correspondence files.

(10) Routine use. The term "routine use" means, with respect to the disclosure of a record or personal information, any use of such

record or personal information relevant to the purpose for which it was collected, and which use is necessary to the statutory duties of the agency that collected or obtained the record or personal information, or necessary for that agency to operate a program specifically authorized by law.

(11) System of records. The term "system of records" means any group of records under the actual or constructive control of any agency pertaining to one or more data subjects from which personal information is retrievable by use of the name or other identifier of a data subject.

(Added L.1983, c. 652, § 1; amended L.1985, c. 134, § 29.)

Historical Note

1985 Amendment. Subd. (8). L.1985, c. 134, § 29, eff. Apr. 1, 1985, redesignated as "division of probation and correctional alternatives" former "division of probation".

Effective Date; Agency Actions Necessary for This Article. Section effective Sept. 1, 1984, as provided by section 4 of L.1983, c. 652, set out as a note under section 91.

Former Sections 92. A former section 92 was renumbered 102.

Another former section 92 was renumbered 117.

Transfer of Functions and Other Provisions Supplementary to L.1985, c. 134. See sections 30 to 42 of L.1985, c. 134, set out as a note under Executive Law § 240.

Severability. See section 2 of L.1983, c. 652, set out as a note under section 91.

Cross References

Crime victims board, see Executive Law § 620 et seq.
Criminal justice services, division of, see Executive Law § 835 et seq.
Definitions of terms "agency" and "record" for purposes of Freedom of Information Law, see section 86.
Division for youth, see Executive Law § 500 et seq.
Parole, division of, see Executive Law § 259 et seq.
Probation and correctional alternatives, division of, see Executive Law § 240 et seq.
State commission of correction, see Correction Law § 40 et seq.
State police, division of, see Executive Law § 210 et seq.
Temporary state commission of investigation, see McKinney's Unconsol. Laws § 7501 et seq.

Library References

American Digest System

Access to records or files in general, see Records § 30.

Encyclopedia

Access to and right to inspect or use records, see C.J.S. Records § 34 et seq.

§ 93. Powers and duties of the committee

(1) The committee shall prepare a directory derived from the information provided pursuant to section three of chapter six hun-

dred seventy-seven of the laws of nineteen hundred eighty¹ and subdivision four of section ninety-four of this article. The directory shall include the name of each system of records subject to the provisions of this article, the name and subdivision of the agency maintaining it, the title and business address of the person responsible therefor, the approximate number of data subjects and the categories of information collected, and sufficient information for the identification of rules promulgated by agencies pursuant to this article. Individuals shall be permitted to purchase the directory for a reasonable price as set by the committee in accordance with law.

(2) The committee may, upon request of a data subject eligible to make a request under section ninety-five of this article, investigate, make findings and furnish an advisory opinion in connection with the requirements of section ninety-five of this article. Prior to the issuance of an advisory opinion, the committee may require an agency to provide additional information which the committee deems necessary to render an opinion. However, no system of records exempt from the provisions² of section ninety-five of this article shall be subject to the provisions of this subdivision.

(3) Within thirty business days of the receipt of a privacy impact statement or supplemental statement by an agency the committee shall review such statement to determine whether the maintenance of the system is within the lawful authority of the agency and to determine whether there have been established rules and procedures as required by section ninety-four of this article. However, such review by the committee shall not include examination of personal information or records collected or maintained by such agency. After review of such information the committee may notify the agency of the result of its review. Such notification and result shall not constitute an advisory opinion and shall not be reported as such by the committee and there shall be no obligation upon the agency to respond to such notification or result.

(4) The committee shall promulgate rules for the specification of the form of the privacy impact statement. Such privacy impact statement shall include the following:

(a) the name of the agency and the subdivision within the agency that will maintain the system of records, and the name or title of the system of records in which such information will be maintained;

(b) the title and business address of the official within the agency responsible for the system of records;

(c) where applicable, the procedures by which a data subject may request access to personal information pertaining to such data subject

in the system of records and the procedures by which a data subject may seek to amend or correct its contents;

(d) the categories and the approximate number of persons on whom records will be maintained in the system of records;

(e) the categories of information which will be collected and maintained in the system of records;

(f) the purposes for which each category of information within the system of records will be collected and maintained;

(g) the disclosures of personal information within the system of records that the agency will regularly make for each category of information, and the authority for such disclosures;

(h) the general or specific statutory authority for the collection, maintenance and disclosure of each category of information within the system of records;

(i) policies governing retention and timely disposal of information within the system of records in accordance with law;

(j) each and every source for each category of information within the system of records;

(k) a statement indicating whether the system of records will be maintained manually, by automated data system, or both.

(5) The committee shall report its activities and findings, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth.

(6) In order to carry out the provisions of this article, the committee is authorized to:

(a) enter into contracts or other arrangements or modifications thereof, with any government, any governmental unit, or any department of the state, or with any individual, firm, association or corporation within the amounts appropriated therefor and subject to the audit and warrant of the state comptroller;

(b) delegate any of its functions to such officers and employees of the committee as the committee may designate;

(c) establish model guidelines with respect to the implementation of this article.

(Added L.1983, c. 652, § 1.)

¹ Set out as a note under section 89.

² So in original.

Historical Note

Effective Date; Agency Actions Necessary for This Article. Section effective Sept. 1, 1984, as provided by section 4 of L.1983, c. 652, set out as a note under section 91.

Former Section 93. Renumbered 103.

Severability. See section 2 of L.1983, c. 652, set out as a note under section 91.

Library References

American Digest System

Access to records or files in general, see Records §30.

Encyclopedia

Access to and right to inspect or use records, see C.J.S. Records § 34 et seq.

§ 94. Agency obligations

(1) Each agency that maintains a system of records shall:

(a) except when a data subject provides an agency with unsolicited personal information, maintain in its records only such personal information which is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order, or to implement a program specifically authorized by law;

(b) consistent with the standards of paragraph (a) of this subdivision, maintain all records used by the agency to make any determination about any data subject with accuracy, relevance, timeliness and completeness provided however, that personal information or records received by an agency from another governmental unit for inclusion in public safety agency records shall be presumed to be accurate;

(c) collect personal information directly from the data subject whenever practicable, except when collected for the purpose of making quasi-judicial determinations;

(d) provide each data subject whom it requests to supply information to be maintained in a record, at the time of the initial request, with notification as provided in this paragraph. Where such notification has been provided, subsequent requests for information from the data subject to be maintained in the same record need not be accompanied by notification unless the initial notification is not applicable to the subsequent request. Notification shall include:

(i) the name of the agency and any subdivision within the agency that is requesting the personal information and the name or title of the system of records in which such information will be maintained;

(ii) the title, business address and telephone number of the agency official who is responsible for the system of records;

(iii) the authority granted by law, which authorizes the collection and maintenance of the information;

(iv) the effects on such data subject, if any, of not providing all or any part of the requested information;

(v) the principal purpose or purposes for which the information is to be collected; and

(vi) the uses which may be made of the information pursuant to paragraphs (b), (c) and (f) of subdivision one of section ninety-six of this article;

(e) ensure that no record pertaining to a data subject shall be modified or destroyed to avoid the provisions of this article;

(f) cause the requirements of this article to be applied to any contract it executes for the operation of a system of records, or for research, evaluation or reporting, by the agency or on its behalf;

(g) establish written policies in accordance with law governing the responsibilities of persons pertaining to their involvement in the design, development, operation or maintenance of any system of records, and instruct each such person with respect to such policies and the requirements of this article, including any other rules and regulations and procedures adopted pursuant to this article, and the penalties for noncompliance;

(h) establish appropriate administrative, technical and physical safeguards to ensure the security of records;

(i) establish rules governing retention and timely disposal of records in accordance with law;

(j) designate an agency employee who shall be responsible for ensuring that the agency complies with all of the provisions of this article;

(k) whenever a data subject is entitled under this article to gain access to a record, disclose such record at a location near the residence of the data subject whenever reasonable, or by mail;

(l) upon denial of a request under subdivision one or two of section ninety-five of this article, inform the data subject of its procedures for review of initial determinations and the name and business address of the reviewing officials.

(2) In order to carry out the provisions of this article each agency that maintains a system of records shall promulgate rules which shall set forth the following:

(a) procedures by which a data subject can learn if a system of records contains any records pertaining to him or her;

(b) reasonable times, places and means for verifying the identity of a data subject who requests access to his or her record;

(c) procedures for providing access, upon the data subject's request, to the data subject's record;

(d) procedures for reviewing a request from a data subject for access to, and for correction or amendment of his or her record, for making a determination on such request, and for an appeal within the agency of an initial adverse agency determination.

(3) Each agency, for disclosures made pursuant to paragraphs (d), (i) and (l) of subdivision one of section ninety-six of this article, except for disclosures made for inclusion in public safety agency records when such record is requested for the purpose of obtaining information required for the investigation of a violation of civil or criminal statutes within the disclosing agency, shall:

(a) keep an accurate accounting of the date, nature and purpose of each disclosure of a record or personal information, and the name and address of the person or governmental unit to whom the disclosure is made;

(b) retain the accounting made under paragraph (a) of this subdivision as part of said record for at least five years after the disclosure for which the accounting is made, or for the life of the record disclosed, whichever is longer;

(c) at the request of the data subject, inform any person or other governmental unit to which a disclosure has been or is made of any correction, amendment, or notation of dispute made by the agency, provided that an accounting of the prior disclosure was made or that the data subject to whom the record pertains provides the name of such person or governmental unit;

(d) with respect to a disclosure made for inclusion in a public safety agency record or to a governmental unit or component thereof whose primary function is the enforcement of civil or criminal statutes, notify the receiving governmental unit that an accounting of such disclosure is being made pursuant to this subdivision and that such accounting will be accessible to the data subject upon his or her request unless otherwise specified by the receiving governmental unit pursuant to paragraph (e) of this subdivision;

(e) with respect to a disclosure made for inclusion in a public safety agency record or to a governmental unit or component thereof whose primary function is the enforcement of civil or

criminal statutes, if in its request for the record the receiving governmental unit states that it has determined that access by the data subject to the accounting of such disclosure would impede criminal investigations and specifies the approximate date on which such determination will no longer be applicable, refuse the data subject access to such accounting or information that such accounting has been made, except upon court ordered subpoena, during the applicable time period. Upon the expiration of said time period the disclosing agency shall inquire of the receiving governmental unit as to the continued relevancy of the initial determination and, unless requested in writing by the receiving governmental unit to extend the determination for a specified period of time, shall make available to the data subject an accounting of said disclosure; and

(f) in making a disclosure pursuant to subdivision one of section ninety-six of this article, an agency shall make such disclosure pursuant to paragraph (d), (i) or (l) of said subdivision only when such disclosure cannot be made pursuant to any other paragraph of said subdivision.

(4)(a) Any agency which established or substantially modified a system of records after December fifteenth, nineteen hundred eighty, but before the effective date of this article, or which did not report to the committee a system of records which it maintained prior to December fifteenth, nineteen hundred eighty, shall file notice with the committee pursuant to chapter six hundred seventy-seven of the laws of nineteen hundred eighty within thirty business days of the effective date of this article.

(b) Any agency which seeks to establish a system of records subsequent to the effective date of this article shall file with the committee a privacy impact statement as prescribed by subdivision four of section ninety-three of this article. Any agency which seeks to modify a system of records in a way which would render inaccurate any information set forth in the privacy impact statement, in the notice described in paragraph (a) of this subdivision or in the notice filed pursuant to chapter six hundred seventy-seven of the laws of nineteen hundred eighty,¹ shall file with the committee a supplemental statement to conform the privacy impact statement or notice to the proposed modification. Unless the date by which such proposed system or modification is required by law to be instituted is less than thirty business days from the date of the filing of the privacy impact statement, no such proposed system or modification shall be instituted until the completion of the procedures set forth in subdivision three of section ninety-three of this article.

(5) Each agency shall, within fifteen business days of the receipt of an advisory opinion issued by the committee, respond in writing to the committee as to the following:

(a) the actions it has taken, or will take, to comply with the advisory opinion; or

(b) the reasons for disagreement and noncompliance with the advisory opinion.

(6) On or before the first day of September of each year, each agency shall submit a report covering the preceding year to the committee. The report shall include, with respect to requests for access to records and with respect to requests for correction or amendment of records pursuant to subdivisions one and two of section ninety-five of this article, respectively, the following information:

(i) the number of determinations made to grant such requests; and

(ii) the number of determinations made to deny such requests in whole or in part, respectively.

(7) The provisions of paragraphs (c) and (d) of subdivision one of this section shall not apply to the following:

(a) personal information that is collected for inclusion in a public safety agency record;

(b) personal information that is maintained by a licensing or franchise-approving agency or component thereof for the purpose of determining whether administrative or criminal action should be taken to restrain or prosecute purported violations of law, or to grant, deny, suspend, or revoke a professional, vocational, or occupational license, certification or registration, or to deny or approve a franchise;

(c) personal information solicited from a data subject receiving services at a treatment facility, provided that each such data subject shall, as soon as practicable, be provided a notification including information specified in subparagraphs (i), (ii), (iii), (iv), (v) and (vi) of paragraph (d) of subdivision one of this section describing systems of records concerning the data subject maintained by the treatment facility.

(8) The provisions of subdivisions two, three and six of this section shall not apply to public safety agency records.

(9) Nothing in this article shall abrogate in any way any obligation regarding the maintenance of records otherwise imposed on an agency of law or in equity.

(10) Each agency record which is transferred to the state archives as a record which has sufficient historical or other value to warrant its continued preservation by the state shall, for the purposes of this article, be considered to be maintained by the state archives and shall be exempt from the requirements of this article, except as otherwise provided in this section and except that such record shall continue to be subject to inspection and correction by the data subject by application to the agency which compiled it, as provided in subdivisions one through four of section ninety-five of this chapter.

(Added L.1983, c. 652, § 1; amended L.1984, c. 1015, § 1.)

¹ Set out as a note under section 89.

Historical Note

1984 Amendment. Subd. (10). 4 of L.1983, c. 652, set out as a note under section 91.
L.1984, c. 1015, § 1, eff. Sept. 1, 1984, added subd. (10).

Effective Date; Agency Actions Necessary for This Article. Section effective Sept. 1, 1984, as provided by section **Former Section 94.** Renumbered 104.
Severability. See section 2 of L.1983, c. 652, set out as a note under section 91.

New York Codes, Rules and Regulations

Access to personal information in records of—

Commission of correction, see 9 NYCRR Part 7400.

Crime victims board, see 9 NYCRR 525.15.

Department of—

Agriculture and markets, see 1 NYCRR Part 365.

Civil service, see 4 NYCRR Part 81, set out in the Appendix to Bk. 9, Civil Service Law.

Commerce, see 5 NYCRR Part 2.

Environmental Conservation, see 6 NYCRR 616.20 et seq.

Insurance, see 11 NYCRR Part 242.

Labor, see 12 NYCRR Part 703.

Law, see 13 NYCRR Part 121.

Motor vehicles, see 15 NYCRR Part 161.

Social Services, see 18 NYCRR Part 339.

Taxation and finance and State Tax Commission, see 20 NYCRR Part 8G1.

Transportation, see 17 NYCRR Part 2.

Division for youth, see 9 NYCRR Part 166-3.

Division of—

Criminal justice services, see 9 NYCRR Part 6151.

Parole, see 9 NYCRR Part 8009.

Probation, see 9 NYCRR Part 369.

State and local agencies, including counties, cities, towns, villages, school districts and fire districts, see 21 NYCRR Part 1402.

State—

Board of equalization and assessment, see 9 NYCRR Part 185-2.

Commission of investigation, see 21 NYCRR Part 701.

Council on the arts, see 9 NYCRR Part 6402.

Access to personal information in records of—Continued
State—Continued

Energy office, see 9 NYCRR Part 7802, set out in the Appendix to Bk. 17
1/4, Energy Law.

Police, see 9 NYCRR Part 485.

Power authority, see 21 NYCRR Part 462.

Racing and wagering board, see 9 NYCRR Part 5401.

Workers' compensation board, see 12 NYCRR Part 430.

Library References

American Digest System

Access to records or files in general, see Records § 30.

Encyclopedia

Access to and right to inspect or use records, see C.J.S. Records § 34 et seq.

§ 95. Access to records

(1)(a) Each agency subject to the provisions of this article, within five business days of the receipt of a written request from a data subject for a record reasonably described pertaining to that data subject, shall make such record available to the data subject, deny such request in whole or in part and provide the reasons therefor in writing, or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied, which date shall not exceed thirty days from the date of the acknowledgement.

(b) An agency shall not be required to provide a data subject with access to a record pursuant to this section if:

- (i) the agency does not have the possession of such record;
- (ii) such record cannot be retrieved by use of the data subject's description thereof, or by use of the name or other identifier of the data subject, without extraordinary search methods being employed by the agency; or
- (iii) access to such record is not required to be provided pursuant to subdivision five, six or seven of this section.

(c) Upon payment of, or offer to pay, the fee prescribed by section eighty-seven of this chapter, the agency shall provide a copy of the record requested and certify to the correctness of such copy if so requested. The record shall be made available in a printed form without any codes or symbols, unless accompanied by a document fully explaining such codes or symbols. Upon a data subject's voluntary request the agency shall permit a person of the data subject's choosing to accompany the data subject when reviewing and obtaining a copy of a record, provided that the agency may require the data subject to furnish a written statement authorizing discussion of the record in the accompanying person's presence.

(2) Each agency shall, within thirty business days of receipt of a written request from a data subject for correction or amendment of a record or personal information, reasonably described, pertaining to that data subject, which he or she believes is not accurate, relevant, timely or complete, either:

(a) make the correction or amendment in whole or in part, and inform the data subject that upon his or her request such correction or amendment will be provided to any or all persons or governmental units to which the record or personal information has been or is disclosed, pursuant to paragraph (c) of subdivision three of section ninety-four of this article; or

(b) inform the data subject of its refusal to correct or amend the record and its reasons therefor.

(3) Any data subject whose request under subdivision one or two of this section is denied in whole or in part may, within thirty business days, appeal such denial in writing to the head, chief executive or governing body of the agency, or the person designated as the reviewing official by such head, chief executive or governing body. Such official shall within seven business days of the receipt of an appeal concerning denial of access, or within thirty business days of the receipt of an appeal concerning denial of correction or amendment, either provide access to or correction or amendment of the record sought and inform the data subject that, upon his or her request, such correction or amendment will be provided to any or all persons or governmental units to which the record or personal information has been or is disclosed, pursuant to paragraph (c) of subdivision three of section ninety-four of this article, or fully explain in writing to the data subject the factual and statutory reasons for further denial and inform the data subject of his or her right to thereupon seek judicial review of the agency's determination under section ninety-seven of this article. Each agency shall immediately forward to the committee a copy of such appeal, the determination thereof and the reasons therefor.

(4) If correction or amendment of a record or personal information is denied in whole or in part upon appeal, the agency shall inform the data subject of the right to file with the agency a statement of reasonable length setting forth the reasons for disagreement with the agency's determination and that, upon request, his or her statement of disagreement will be provided to any or all persons or governmental units to which the record has been or is disclosed, pursuant to paragraph (c) of subdivision three of section ninety-four of this article. With respect to any personal information about which a data subject has filed a statement of disagreement, the agency shall clearly note any portions of the record which

are disputed, and shall attach the data subject's statement of disagreement as part of the record. When providing the data subject's statement of disagreement to other persons or governmental units pursuant to paragraph (c) of subdivision three of section ninety-four of this article, the agency may, if it deems appropriate, also include in the record a concise statement of the agency's reasons for not making the requested amendment.

(5)(a) Any agency which may not otherwise exempt personal information from the operation of this section may do so, unless access by the data subject is otherwise authorized or required by law, if such information is compiled for law enforcement purposes and would, if disclosed:

(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.

(b) When providing the data subject with access to information described in paragraph (b) of subdivision seven of section ninety-four of this article, an agency may withhold the identity of a source who furnished said information under an express promise that his or her identity would be held in confidence.

(6) Nothing in this section shall require an agency to provide a data subject with access to:

(a) personal information to which he or she is specifically prohibited by statute from gaining access;

(b) patient records concerning mental disability or medical records where such access is not otherwise required by law;

(c) personal information pertaining to the incarceration of an inmate at a state correctional facility which is evaluative in nature or which, if such access was provided, could endanger the life or safety of any person, unless such access is otherwise permitted by law or by court order;

(d) attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivisions (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena issued in the course of a criminal action or

proceeding, court ordered or grand jury subpoena, search warrant or other court ordered disclosure.

(7) This section shall not apply to public safety agency records.

(8) Nothing in this section shall limit, restrict, abrogate or deny any right a person may otherwise have including rights granted pursuant to the state or federal constitution, law or court order.

(Added L.1983, c. 652, § 1.)

Historical Note

Effective Date; Agency Actions Necessary for This Article. Section effective Sept. 1, 1984, as provided by section 4 of L.1983, c. 652, set out as a note under section 91.

Another former section 95 was renumbered 105.

Severability. See section 2 of L.1983, c. 652, set out as a note under section 91.

Former Sections 95. A former section 95 was renumbered 100.

Cross References

General provisions relating to access to records; certain cases, see section 89.

Library References

American Digest System

Access to records or files in general, see Records ¶30.

Encyclopedia

Access to and right to inspect or use records, see C.J.S. Records § 34 et seq.

Notes of Decisions

1. Inmates, information regarding

Listing of inmates, who were housed in area primarily used for housing inmates segregated from general population for punitive reasons and who may have witnessed assault on inmate by corrections officers, was not exempt from disclosure under Freedom of Information Law under subsection exempting

personal information pertaining to incarceration of inmate at state correctional facility on the basis that if access was provided, it could endanger life or safety of any person; information was probably already available to requester's client, assaulted inmate, by virtue of fact that he was physically housed with the other inmates. *Bensing v. LeFevre*, 1986, 133 Misc.2d 198, 506 N.Y.S.2d 822.

§ 96. Disclosure of records

(1) No agency may disclose any record or personal information unless such disclosure is:

(a) pursuant to a written request by or the voluntary written consent of the data subject, provided that such request or consent by its terms limits and specifically describes:

(i) the personal information which is requested to be disclosed;

(ii) the person or entity to whom such personal information is requested to be disclosed; and

(iii) the uses which will be made of such personal information by the person or entity receiving it; or

(b) to those officers and employees of, and to those who contract with, the agency that maintains the record if such disclosure is necessary to the performance of their official duties pursuant to a purpose of the agency required to be accomplished by statute or executive order or necessary to operate a program specifically authorized by law; or

(c) subject to disclosure under article six of this chapter, 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; or

(d) 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;

(e) for a routine use, as defined in subdivision ten of section ninety-two of this article; or

(f) specifically authorized by statute or federal rule or regulation;

(g) to the bureau of the census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of Title XIII of the United States Code; or

(h) to a person who has provided the agency with advance written assurance that the record will be used solely for the purpose of statistical research or reporting, but only if it is to be transferred in a form that does not reveal the identity of any data subject; or

(i) pursuant to a showing of compelling circumstances affecting the health or safety of a data subject, if upon such disclosure notification is transmitted to the data subject at his or her last known address; or

(j) to the state archives as a record which has sufficient historical or other value to warrant its continued preservation by the state or for evaluation by the state archivist or his or her designee to determine whether the record has such value; or

(k) to any person pursuant to a court ordered subpoena or other compulsory legal process; or

(l) for inclusion in a public safety agency record or to any governmental unit or component thereof which performs as one of its principal functions any activity pertaining to the enforcement of

criminal laws, provided that, such record is reasonably described and is requested solely for a law enforcement function; or

(m) pursuant to a search warrant; or

(n) to officers or employees of another agency if the record sought to be disclosed is necessary for the receiving agency to comply with the mandate of an executive order, but only if such records are to be used only for statistical research, evaluation or reporting and are not used in making any determination about a data subject.

(2) Nothing in this section shall require disclosure of:

(a) personal information which is otherwise prohibited by law from being disclosed;

(b) patient records concerning mental disability or medical records where such disclosure is not otherwise required by law;

(c) personal information pertaining to the incarceration of an inmate at a state correctional facility which is evaluative in nature or which, if disclosed, could endanger the life or safety of any person, unless such disclosure is otherwise permitted by law;

(d) attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivisions (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena issued in the course of a criminal action or proceeding, court ordered or grand jury subpoena, search warrant or other court ordered disclosure.

(Added L.1983, c. 652, § 1; amended L.1984, c. 1015, § 2.)

Historical Note

1984 Amendment. Subd. (1), par. (j). L.1984, c. 1015, § 1, eff. Sept. 1, 1984, substituted "the state archives" for "a public archival facility" and "state archivist" for "head of the archival facility".

Effective Date; Agency Actions Necessary for This Article. Section effective Sept. 1, 1984, as provided by section

4 of L.1983, c. 652, set out as a note under section 91.

Former Sections 96. A former section 96 was renumbered 101.

Another former section 96 was renumbered 106.

Severability. See section 2 of L.1983, c. 652, set out as a note under section 91.

Library References

American Digest System

Access to records or files in general, see Records ¶30.

Encyclopedia

Access to and right to inspect or use records, see C.J.S. Records § 34 et seq.

§ 97. Civil remedies

(1) Any data subject aggrieved by any action taken under this article may seek judicial review and relief pursuant to article seventy-eight of the civil practice law and rules.

(2) In any proceeding brought under subdivision one of this section, the party defending the action shall bear the burden of proof, and the court may, if the data subject substantially prevails against any agency and if the agency lacked a reasonable basis pursuant to this article for the challenged action, award to the data subject reasonable attorneys' fees and disbursements reasonably incurred.

(3) Nothing in this article shall be construed to limit or abridge the right of any person to obtain judicial review or pecuniary or other relief, in any other form or upon any other basis, otherwise available to a person aggrieved by any agency action under this article.

(Added L.1983, c. 652, § 1.)

Historical Note

Effective Date; Agency Actions Necessary for This Article. Section effective Sept. 1, 1984, as provided by section 4 of L.1983, c. 652, set out as a note under section 91.

Former Sections 97. A former section 97 was renumbered 102.

Another former section 97 was renumbered 107.

Severability. See section 2 of L.1983, c. 652, set out as a note under section 91.

Library References

American Digest System

Access to records or files in general, see Records ¶30.

Encyclopedia

Access to and right to inspect or use records, see C.J.S. Records § 34 et seq.

§ 98. No waiver

Any agreement purporting to waive a data subject's rights under this article is hereby declared to be void as against public policy.

(Added L.1983, c. 652, § 1.)

Historical Note

Effective Date; Agency Actions Necessary for This Article. Section effective Sept. 1, 1984, as provided by section 4 of L.1983, c. 652, set out as a note under section 91.

Former Sections 98. A former section 98 was renumbered 103.

Another former section 98 was renumbered 108.

Severability. See section 2 of L.1983, c. 652, set out as a note under section 91.

Library References

American Digest System

Access to records or files in general, see Records ¶30.

Encyclopedia

Access to and right to inspect or use records, see C.J.S. Records § 34 et seq.

§ 99. Executive authority

Nothing in this article shall limit the authority of the governor to exercise his or her responsibilities.

(Added L.1983, c. 652, § 1.)

Historical Note

Effective Date; Agency Actions Necessary for This Article. Section effective Sept. 1, 1984, as provided by section 4 of L.1983, c. 652, set out as a note under section 91.

Former Sections 99. A former section 99 was renumbered 104.

Another former section 99 was renumbered 109.

Severability. See section 2 of L.1983, c. 652, set out as a note under section 91.

Library References

American Digest System

Access to records or files in general, see Records ¶30.

Encyclopedia

Access to and right to inspect or use records, see C.J.S. Records § 34 et seq.

thin four months of denial and, as time-barred, even though attorney's response to request was disingenuous and could not be sanctioned by *Cerro v. Town of Kingsbury* (3 Dept. 1998) 230 A.D.2d 270, 657 N.Y.S.2d 504.

Article 78 proceeding to enforce compliance with Freedom of Information Law, denying application for relief as could be modified on appeal to petitioner to take administrative appeal respondents' partial production of documents despite lapse of 30-day period to seek such appeal, in view of respondent's inactivity in not addressing petitioner's until he commenced present proceeding. *Malerba v. Kelly* (1 Dept. 1995) 230 A.D.2d 479, 621 N.Y.S.2d 318.

Petitioner's Freedom of Information Law (FOIL) application seeking order to produce personnel files of officers testified at petitioner's trial was denied, where petitioner's order to produce was not served until more than four months after his appeal of police department's refusal to provide him with requested records was denied by police department. *Swinton v. Record Access for City of New York Police* (1 Dept. 1993) 198 A.D.2d 165, 604 N.Y.S.2d 59.

Police department's laxity in responding to freedom of information law request for records related to criminal indictment against petitioner had been commenced and that petitioner be permitted to partial production of documents running of statutory 30-day limit, petitioner would not be entitled to relief with respect to indictment and until he perfected his administrative appeal. *Newman v. Police Dept.* (1 Dept. 1992) 183 A.D.2d 621, 585 N.Y.S.2d 604.

Refusal of bank to appeal denial of disclosure of confidential, nonpublic portions of document submitted by competitor to City Board in connection with application to allow hostile takeover of bank within business days precluded judicial review of denial, even though appeal was within time period permitted under City Department rules. *Irving Bank v. Considine*, 1988, 138 Misc.2d 849, 672 N.Y.S.2d 770.

Access by public officials to community board established by New City Charter lacked capacity to challenge Article 78 proceeding challenging

city planning department's denial of access to certain documents sought under Freedom of Information Law in connection with proposed development, notwithstanding possibility that board had standing to seek such documents; Charter and its provisions relating to uniform land use review procedure did not expressly authorize board to bring suit, and board's role in land use review procedure was limited. *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 1994, 84 N.Y.2d 148, 615 N.Y.S.2d 644, 639 N.E.2d 11.

22. In camera inspection

To same effect as *Fink v. Lefkowitz*, 1979, 47 N.Y.2d 567, 419 N.Y.S.2d 467, 393 N.E.2d 463. *Moore v. Santucci* (2 Dept. 1989) 151 A.D.2d 677, 543 N.Y.S.2d 103.

In camera review of documents requested by inmate under Freedom of Information Law (FOIL) was not necessary; assistant district attorney provided sufficiently detailed basis to support claims of nonpossession of documents and exemption, and inmate failed to offer factual basis for his claim to the contrary. *Anzalone v. Bonanno*, 1998, 176 Misc.2d 132, 670 N.Y.S.2d 1013.

District attorney could not satisfy duty under Freedom of Information Law, following convicted defendant's request for copies of investigative reports, by asserting general privilege and turning documents over to court for in camera inspection. *Brownell v. Grady*, 1990, 147 Misc.2d 105, 554 N.Y.S.2d 382.

23. Commercial or fundraising purposes

Petitioner was not required to serve subpoena on public agency before filing Freedom of Information Law (FOIL) request. *De Corse v. City of Buffalo* (4 Dept. 1997) 230 A.D.2d 949, 659 N.Y.S.2d 604.

Disclosure under Freedom of Information Law (FOIL) of lists of names and cities of residence of lottery winners who have been subject of publicly disseminated press release is limited to only that information which was contained in original press release disclosing identity of lottery winner, and does not include changes of

name or cities of residence where winners have changed their marital status or moved since announcement. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

Disclosure by Department of the Lottery of lists of lottery jackpot winners who were already subject of publicly disseminated press release and their cities of residence is not unwarranted invasion of personal privacy of winners in violation of personal privacy protection law, and thus, such lists are discoverable under Freedom of Information Law (FOIL); expectation of privacy of part of lottery participants is tempered by acknowledgement on ticket that they agree to be subject to lottery rules, one of which requires winners to allow use of his or her name and city of residence to publicize winnings. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

Request for lists of names and cities of residence of lottery winners by company which purchased lottery prize winnings in exchange for lump-sum payment did not come within statutory exception to mandatory disclosure under Freedom of Information Law (FOIL) for information sought for commercial purposes, even though request was for commercial purposes; information was routinely released by Division of the Lottery at time winners were announced, and was defined as "public information" in Division's own regulations. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

Freedom of Information Law (FOIL) grants public agency authority to deny access to records if request seeks release of lists of names and addresses for commercial or fund-raising purposes because no governmental purpose is served by such disclosure, and rights of individuals to be free from unwanted commercial contacts can be given precedence without undercutting purpose of FOIL. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

ARTICLE 6-A—PERSONAL PRIVACY PROTECTION LAW

Rules of the City of New York

Department of juvenile justice, see 41 RCNY Chapter 1.

Pre-sentence reports, see 42 RCNY Chapter 1.

Public attendance at city planning meetings, see 62 RCNY §§ 2-03, 2-05 and 2-06.

West's McKinney's Forms

The following forms appear in Selected Consolidated Laws under Public Officers Law § 91 et seq.:

Notice of motion for reargument and renewal of motion to dismiss action to preliminarily enjoin municipal transit authority from posting disciplinary dispositions of authority police officers, see SCL, PUB OFF § 91 et seq., Form 1.

Affirmation in support of motion for reargument and renewal of motion to dismiss action to preliminarily enjoin municipal transit authority from posting disciplinary dispositions of authority police officers, see SCL, PUB OFF § 91 et seq., Form 2.

§ 92. Definitions

[See main volume for (1) to (7)]

(8) Public safety agency record. The term "public safety agency record" means a record of the commission of correction, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of parole, the crime victims board, the division of probation and correctional alternatives or the division of state police or of any agency or 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-b, 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 and by the department of state pursuant to section ninety-nine of the executive law.

(9) Record. The term "record" means 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 irrespective of the physical form or technology used to maintain such personal information. The term "record" shall not include personal information which is not used to make any determination about the data subject if it is:

[See main volume for (a) to (f); (10) and (11)]

(As amended L.1991, c. 313, § 1; L.1992, c. 336, § 11.)

Historical and Statutory Notes

1992 Amendments. Subd. (8). L.1992, c. 336, § 11, eff. July 12, 1993, included records maintained by the department of state pursuant to Executive Law § 99 within term "public safety agency record".

1991 Amendments. Subd. (9), opening par. L.1991, c. 313, § 1, eff. July 15, 1991, in sentence beginning "The term 'record' means" inserted "irrespective of the physi-

cal form or technology used to maintain such personal information" following "the data subject".

Effective Date of Amendment by L.1992, c. 336. Amendment by L.1992, c. 336, to take effect 360 days after July 17, 1992, [eff. July 12, 1993] pursuant to L.1992, c. 336, § 12, set out as a note under Executive Law § 841-a.

Legislative Histories

L.1985, c. 134: For memorandum of the State Executive Department, see McKinney's 1985 Session Laws of New York, p. 2984.

Notes of Dec

Personal information 1 41
Record 2 N

1. Personal information

References to political candidate in campaign financing investigation file of State Election Board, which contained manually compiled paper records that were not electronically indexed in any fashion and did not permit retrieval under candidate's name or other identifier, were not "personal information" for purposes of Personal Privacy Protection Law which protected against invasions of personal privacy by computerized data collection and retrieval systems, so that law did not bar public disclosure of file. *Spargo v. New York State Com'n on Government Integrity* (3 Dept. 1988) 140 A.D.2d 26, 531 N.Y.S.2d 80.

§ 95. Access to records

Notes of Dec

Immunes, information regarding 1 fo
Law enforcement investigations 3 ee
Material prepared for litigation 4 en
Public safety agency records 2 P

2. Public safety agency records

Records relating to application for position of state trooper consisted of "public safety agency records" to which personal privacy protection law (PPPL) did not apply. *O'Shaughnessy v. New York State Div. of State Police* (2 Dept. 1994) 202 A.D.2d 508, 609 N.Y.S.2d 18, leave to appeal denied 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216.

Records compiled by State Election Board in investigation into general election in town were public safety agency records and thus not available to organization or individual which participated in the election, regardless of the status of investigation by the State Commission on Government Integrity into the same election. *Building a Better New York Committee v. New York State Com'n. on Government Integrity*, 1988, 138 Misc.2d 829, 525 N.Y.S.2d 488.

3. Law enforcement investigations

Document concerning criminal undercover investigation by State Police of suspected illegal drug use and drug sales by staff members at state psychiatric center fell within law enforcement exception set

McKinney's Forms

Consolidated Laws under Public Officers Law

renewal of motion to dismiss action to preliminarily from posting disciplinary dispositions of authority § 91 et seq., Form 1.

argument and renewal of motion to dismiss action anait authority from posting disciplinary disposi- see SCL, PUB OFF § 91 et seq., Form 2.

Volume for (1) to (7)]

The term "public safety agency record" of correction, the temporary state commis- ent of correctional services, the division for crime victims board, the division of probation e division of state police or of any agency or y function is the enforcement of civil or pertains to investigation, law enforcement, ctional facilities or supervision of persons court order, and any records maintained by ervices pursuant to sections eight hundred seven-a, eight hundred thirty-seven-b, eight red thirty-eight, eight hundred thirty-nine, nt hundred forty-five-a of the executive law e pursuant to section ninety-nine of the

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for (a) to (f); (10) and (11)]

92, c. 336, § 11.)

and Statutory Notes

1992, cal form or technology used to maintain d such personal information" following "the data subject".

§ 99 Effective Date of Amendment by L.1992, c. 336. Amendment by L.1992, c. 336, to take effect 360 days after July 17, 1991, 1992, [eff. July 12, 1993] pursuant to L.1992, c. 336, § 12, set out as a note under Executive Law § 841-a.

Legislative Histories

the State Executive Department, see McKinney's p. 2984.

Notes of Decisions

Personal information 1
Record 2

1. Personal information

References to political candidate in campaign financing investigation file of State Election Board, which contained manually compiled paper records that were not electronically indexed in any fashion and did not permit retrieval under candidate's name or other identifier, were not "personal information" for purposes of Personal Privacy Protection Law which protected against invasions of personal privacy by computerized data collection and retrieval systems, so that law did not bar public disclosure of file. *Spargo v. New York State Com'n on Government Integrity* (3 Dept. 1988) 140 A.D.2d 26, 531 N.Y.S.2d

§ 95. Access to records

mates, information regarding 1
Law enforcement investigations 3
Material prepared for litigation 4
Public safety agency records 2

2. Public safety agency records

Records relating to application for position of state trooper consisted of "public safety agency records" to which personal privacy protection law (PPPL) did not apply. *O'Shaughnessy v. New York State Div. of State Police* (2 Dept. 1994) 202 A.D.2d 508, 609 N.Y.S.2d 18, leave to appeal denied 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216.

Records compiled by State Election Board in investigation into general election in town were public safety agency records and thus not available to organization or individual which participated in the election, regardless of the status of investigation by the State Commission on Government Integrity into the same election. *Building a Better New York Committee v. New York State Com'n. on Government Integrity*, 1988, 138 Misc.2d 829, 525 N.Y.S.2d 488.

3. Law enforcement investigations

Document concerning criminal undercover investigation by State Police of suspected illegal drug use and drug sales by staff members at state psychiatric center fall within law enforcement exception set

417, appeal denied 72 N.Y.2d 809, 534 N.Y.S.2d 667, 531 N.E.2d 299.

2. Record

Campaign financing investigative file of State Election Board which contained manually compiled paper records that were not electronically indexed in any fashion and which did not permit retrieval under political candidate's name or other identifier was not "record" for purposes of Personal Privacy Protection Law which protected against invasions of personal privacy by computerized data collection and retrieval systems, so that statute did not bar public disclosure of file. *Spargo v. New York State Com'n on Government Integrity* (3 Dept. 1988) 140 A.D.2d 26, 531 N.Y.S.2d 417, appeal denied 72 N.Y.2d 809, 534 N.Y.S.2d 667, 531 N.E.2d 299.

Notes of Decisions

forth in Public Officers Law, and employee who was under investigation was not entitled to review that document under Personal Privacy Protection Law; disclosure of that document to employee would interfere with pending judicial proceedings and reveal nonroutine criminal investigative techniques or procedures. *Lochner v. Surles*, 1990, 149 Misc.2d 243, 564 N.Y.S.2d 673.

4. Material prepared for litigation

Documents in possession of Office of Mental Health which summarized proposed course of action which state psychiatric center management planned to take concerning seven employees questioned in connection with undercover investigation into suspected illegal drug use and drug sales by psychiatric center staff members, and which specifically concerned employee's pending lawsuit against State arising out of her detention and interrogation, fell within exception set forth in Public Officers Law for material prepared for litigation and were thus not required to be disclosed to employee; however, three pages attached to one document (time sheet for period during which investigation was conducted, overtime voucher, and payroll and personnel transaction form) did not constitute material prepared for litigation and were required to be disclosed. *Lochner v. Surles*, 1990, 149 Misc.2d 243, 564 N.Y.S.2d 673.

§ 96. Disclosure of records

Notes of Decisions

Agency 2
 Court order 7
 Disclosure to another agency 1
 Medical records 6
 Necessary to internal functioning 4
 Other compulsory legal process 3
 Unwarranted invasion of personal privacy 5

1. Disclosure to another agency

Statute limiting agency disclosure of records or personal information of public employees to situations when disclosure is necessary to performance of official duties pursuant to purpose of agency required to be accomplished by statute, or necessary to operate program as specifically authorized by law, was not violated by disclosure to division of tax enforcement of identities of Department of Taxation and Finance employees who had failed to file income tax returns; discipline of nonfiling employees was necessary to effectuate Department's function of collecting taxes and insuring compliance with tax laws. *Kooi v. Chu* (3 Dept. 1987) 129 A.D.2d 393, 517 N.Y.S.2d 601.

Records concerning State Election Board's investigation into general election in town were germane to Governor's mandate in creating State Commission on Government Integrity and thus could be disclosed to the Commission as part of its investigation into the same election. *Building a Better New York Committee v. New York State Com'n. on Government Integrity*, 1988, 138 Misc.2d 829, 525 N.Y.S.2d 488.

2. Agency

Term "agency" as used in statute authorizing disclosure of government records to another agency if the records sought to be disclosed are necessary for the receiving agency to comply with the mandate of an executive order includes any commission performing a governmental or proprietary function for the state. *Building a Better New York Committee v. New York State Com'n. on Government Integrity*, 1988, 138 Misc.2d 829, 525 N.Y.S.2d 488.

3. Other compulsory legal process

The term "other compulsory legal process" as used in statute providing that agency may not disclose certain records or personal information unless the disclosure is pursuant to a court ordered subpoena

or other compulsory legal process does not include subpoenas issued by the State Commission on Government Integrity. *Building a Better New York Committee v. New York State Com'n. on Government Integrity*, 1988, 138 Misc.2d 829, 525 N.Y.S.2d 488.

4. Necessary to internal functioning

Even if applicable, Personal Privacy Protection Law would not bar proposed postings of disciplinary dispositions of transit authority police officers where disclosures would only be to departmental personnel in departmental bulletins and would be necessary to performance of official duties pursuant to purpose of authority by acting to deter officers from violating proper police procedure. *Reale v. Kiepper* (1 Dept. 1994) 204 A.D.2d 72, 611 N.Y.S.2d 175, leave to appeal denied 84 N.Y.2d 813, 622 N.Y.S.2d 915, 647 N.E.2d 121.

School board did not engage in unwarranted invasion of teacher's privacy rights through disclosure of teacher's unfitness for duty, as that disclosure was necessary for board's internal functioning in performance of its duties and was therefore protected. *Levine v. Board of Educ. of City of New York* (2 Dept. 1992) 186 A.D.2d 743, 589 N.Y.S.2d 181, leave to appeal denied 81 N.Y.2d 710, 599 N.Y.S.2d 804, 616 N.E.2d 159.

5. Unwarranted invasion of personal privacy

Disclosure by Department of the Lottery of lists of lottery jackpot winners who were already subject of publicly disseminated press release and their cities of residence is not unwarranted invasion of personal privacy of winners in violation of personal privacy protection law, and thus, such lists are discoverable under Freedom of Information Law (FOIL); expectation of privacy on part of lottery participants is tempered by acknowledgement on ticket that they agree to be subject to lottery rules, one of which requires winners to allow use of his or her name and city of residence to publicize winnings. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

What constitutes unwarranted invasion of personal privacy for purposes of personal privacy protection law is measured by what would be offensive and objection-

able to reasonable person of ord sensibilities, and determination req balancing competing interests of p access and individual privacy. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

6. Medical records

Under Freedom of Information (FOIL), newspapers were entitled to disclosure of physician identifier information, statewide centralized health care system, despite Department of Health (DOH) claim that disclosure would be identification of patients. *New Times Co. v. New York State Dep. Health*, 1997, 173 Misc.2d 310, N.Y.S.2d 810, affirmed 674 N.Y.S.2d Department of Health's (DOH) claims and/or limitations on disclosure health care data under Freedom of I

§ 97. Civil remedies

Data subject 1

Data subject

Organization had no statutory standing to object to disclosure of State Ele

ARTICLE 7--

Exception for state land acquisition ac

§ 100. Legislative declarati

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Keeping the faith: A model local ethi 21 *Fordham Urb.L.J.* 61 (1993).

Note

1. Construction

Open Meetings Law was intended open decision-making process of ele officials to public while at same time tecting ability of government to carry its responsibilities, and provisions of Meetings Law are to be liberally construed in accordance with statute's poses. *Gordon v. Village of Montic Inc.*, 1995, 87 N.Y.2d 124, 637 N.Y. 661, 661 N.E.2d 691.

Cornerstone of Open Meetings La that decisions made by public be

Decisions

or other compulsory legal process does not include subpoenas issued by the State Commission on Government Integrity. *Building a Better New York Committee v. New York State Com'n. on Government Integrity*, 1988, 138 Misc.2d 829, 525 N.Y.S.2d 488.

4. Necessary to internal functioning

Even if applicable, Personal Privacy Protection Law would not bar proposed postings of disciplinary dispositions of transit authority police officers where disclosures would only be to departmental personnel in departmental bulletins and would be necessary to performance of official duties pursuant to purpose of authority by acting to deter officers from violating proper police procedure. *Reale v. Klepper* (1 Dept. 1994) 204 A.D.2d 72, 611 N.Y.S.2d 175, leave to appeal denied 84 N.Y.2d 813, 622 N.Y.S.2d 915, 647 N.E.2d 121.

School board did not engage in unwarranted invasion of teacher's privacy rights through disclosure of teacher's unfitness for duty, as that disclosure was necessary for board's internal functioning in performance of its duties and was therefore protected. *Levine v. Board of Educ. of City of New York* (2 Dept. 1992) 186 A.D.2d 743, 589 N.Y.S.2d 181, leave to appeal denied 81 N.Y.2d 710, 599 N.Y.S.2d 804, 616 N.E.2d 159.

5. Unwarranted invasion of personal privacy

Disclosure by Department of the Lottery of lists of lottery jackpot winners who were already subject of publicly disseminated press release and their cities of residence is not unwarranted invasion of personal privacy of winners in violation of personal privacy protection law, and thus, such lists are discoverable under Freedom of Information Law (FOIL); expectation of privacy on part of lottery participants is tempered by acknowledgement on ticket that they agree to be subject to lottery rules, one of which requires winners to allow use of his or her name and city of residence to publicize winnings. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

What constitutes unwarranted invasion of personal privacy for purposes of personal privacy protection law is measured by what would be offensive and objection-

able to reasonable person of ordinary sensibilities, and determination requires balancing competing interests of public access and individual privacy. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

6. Medical records

Under Freedom of Information Law (FOIL), newspapers were entitled to disclosure of physician identifier information in statewide centralized health care system, despite Department of Health's (DOH) claim that disclosure would lead to identification of patients. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826. Department of Health's (DOH) conditions and/or limitations on disclosure of health care data under Freedom of Infor-

97. Civil remedies

Data subject 1

Data subject
Organization had no statutory standing to object to disclosure of State Election

Notes of Decisions

Board's investigatory file containing information about the organization. *Building a Better New York Committee v. New York State Com'n. on Government Integrity*, 1988, 138 Misc.2d 829, 525 N.Y.S.2d 488.

ARTICLE 7--OPEN MEETINGS LAW

Cross References

Exception for state land acquisition advisory council, see ECL 49-0211.

100. Legislative declaration

Law Review and Journal Commentaries

Keeping the faith: A model local ethics law—Content and commentary. Mark Davies, 21 *Fordham Urb.L.J.* 61 (1993).

Notes of Decisions

1. Construction

Open Meetings Law was intended to open decision-making process of elected officials to public while at same time protecting ability of government to carry out its responsibilities, and provisions of Open Meetings Law are to be liberally construed in accordance with statute's purposes. *Gordon v. Village of Monticello, Inc.*, 1995, 87 N.Y.2d 124, 637 N.Y.S.2d 661, 661 N.E.2d 691.

Cornerstone of Open Meetings Law is that decisions made by public bodies

information Law (FOIL), which conditions related to identity of applicant and intended use for information sought, would not be countenanced. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

7. Court order

Mental patient claiming she was sexually assaulted had access to employment file of hospital employee who was alleged assailant, under court order exception to Personal Privacy Protection Act, subject to redaction of names of other patients mentioned in file and with proviso that no searches could be undertaken using social security or department of motor vehicles identification numbers without further court authorization. *Feliciano v. State*, 1997, 175 Misc.2d 671, 669 N.Y.S.2d 457.

Board's investigatory file containing information about the organization. *Building a Better New York Committee v. New York State Com'n. on Government Integrity*, 1988, 138 Misc.2d 829, 525 N.Y.S.2d 488.

should be made publicly. *MCI Telecommunications Corp. v. Public Service Com'n of the State of N.Y.* (3 Dept. 1997) 231 A.D.2d 284, 659 N.Y.S.2d 563.

2. Purpose

Purpose of Open Meetings Law is to prevent municipal governments from debating and deciding in private what they are required to debate and decide in public. *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 1996, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226.

taken oath, and had executed and filed official bond. *Becraft v. Strobel*, 1936, 158 Misc. 844, 287 N.Y.S. 22, affirmed 248 App.Div. 810, 290 N.Y.S. 556, affirmed 274 N.Y. 577, 10 N.E.2d 560.

Fact that successful candidate for office of county commissioner of public welfare was supervisor of town on election day created reasonable doubt as to legality of his claim to office of county commissioner, precluding him from obtaining delivery of books pertaining to such office under this section, notwithstanding he resigned office of supervisor on day following election. *Harris v. Wells*, 1936, 158 Misc. 87, 286 N.Y.S. 9.

Evidence that applicant for order directing predecessor town supervisor to deliver to applicant books, papers, money, and property in his possession received highest number of votes cast at election for town supervisor, considered with certificate of county clerk that town clerk had filed statement that applicant was duly elected was prima facie proof of such election. *In re Kilburn*, 1936, 157 Misc. 761, 284 N.Y.S. 748.

Where an officer is not legally appointed he is not entitled to invoke the powers conferred upon the justices of the Supreme Court under the provisions of this section and his petition must be denied. *Matter of Jannicky*, 1913, 79 Misc. 554, 140 N.Y.S. 308, affirmed 157 App.Div. 929, 142 N.Y.S. 1124, affirmed 209 N.Y. 413, 103 N.E. 715. See, also, *Close v. Burden*, 1914, 163 App.Div. 83, 148 N.Y.S. 773.

Where there is a decided conflict between the affidavit of the two parties and it does not appear clearly and beyond a reasonable doubt that the person signing the certificate of election is entitled to make the required certificate, the order for the delivery of the books and papers should not be granted. *Matter of Bogaskie*, 1908, 59 Misc. 541, 111 N.Y.S. 922.

A mere denial of title is insufficient to defeat the proceeding under this section, and the court will look into the question far enough to determine whether or not the petitioner has a prima facie title. *Matter of Brearton*, 1904, 44 Misc. 247, 89 N.Y.S. 893.

ARTICLE 6—FREEDOM OF INFORMATION LAW

Section

84. Legislative declaration.
85. Short title.
86. Definitions.
87. Access to agency records.
88. Access to state legislative records.
89. General provisions relating to access to records; certain cases.
90. Severability.

Historical Note

Former Article 6. Renumbered article 7, L.1974, c. 578, § 2; renumbered article 8, L.1976, c. 511, § 1.

Cross References

Discovery and production of documents and things for inspection, testing, copying or photographing, see CPLR 3120.
Division of history and public records, see Arts and Cultural Affairs Law § 57.01 et seq.
Open Meetings Law, see section 100 et seq.

Law Review Commentaries

Codification of government privileges in New York: official information and identity of informers. 14 Albany L.Rev. 279 (1980).
Legitimizing the use of New York's Freedom of Information Law as a discovery device in civil litigation: *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.* 36 Syracuse L.Rev. 1125 (1985).
New York's Freedom of Information Law, disclosure under the CPLR, and the common-law privilege for official information: conflict and confusion over "the people's right to know". 33 Syracuse L.Rev. 615 (1982).
The New York Freedom of Information Law, 43 Fordham L.Rev. 83 (1974).
1984 survey of New York law: local government. Stevenson. 36 Syracuse L.Rev. 461 (1985).

United States Code Annotated

Public information; agency rules, opinions, orders, records, and proceedings, see section 552 of Title 5, Government Organization and Employees.

WESTLAW ELECTRONIC RESEARCH

WESTLAW supplements McKinney's. Consolidated Laws and is useful for additional research. Enter a citation in INSTA-CITE for display of any parallel citations and case history. Enter a constitution or statute citation in a case law database for cases of interest.

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N.Y.Const. Const. Constitution /s 6 VI +3 3

Example query for statute: "Public Officers" /5 100
Also, see the WESTLAW Electronic Research Guide following the Explanation.

§ 84. Legislative declaration

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

The legislature therefore declares 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 in accordance with the provisions of this article.

(Added L.1977, c. 933, § 1.)

Historical Note

Effective Date. Section effective Jan. 1, 1978, pursuant to L.1977, c. 933, § 8.
Derivation. Former section 85, added L.1974, c. 578, § 2; amended L.1974, c. 579, § 1; repealed by L.1977, c. 933, § 1.

Library References

American Digest System

Freedom of information laws in general, see Records ¶50 et seq.

Encyclopedia

Access to and right to use records, see C.J.S. Records § 35.

Notes of Decisions

Construction 1
Construction with other laws 2
Public interest privilege 4
Purpose 3
Relation of data to agency 5

1. Construction

Public disclosure laws are liberally construed to allow maximum access to documents and statutory exemptions are narrowly construed. *Miracle Mile Associates v. Yudelson*, 1979, 68 A.D.2d 176, 417 N.Y.S.2d 142, appeal denied 48 N.Y.2d 706, 422 N.Y.S.2d 68, 397 N.E.2d 758. See, also, *Clegg v. Bon Temps, Ltd.*, 1982, 114 Misc.2d 805, 452 N.Y.S.2d 825; *Szikszay v. Buelow*, 1981, 107 Misc.2d 886, 436 N.Y.S.2d 558; *American Broadcasting Companies, Inc. v. Siebert*, 1981, 110 Misc.2d 744, 442 N.Y.S.2d 855; *Pooler v. Nyquist*, 1976, 89 Misc.2d 705, 392 N.Y.S.2d 948.

2. Construction with other laws

This article may not be used by party in litigation as a substitute for the liberal and varied discovery techniques provided by the Civil Practice Laws and Rules. *Hawkins v. Kurlander*, 1983, 98 A.D.2d 14, 469 N.Y.S.2d 820. See, also, *Moussa v. State*, 1983, 91 A.D.2d 863, 458 N.Y.S.2d 377.

Disclosure provisions of section 2805-a of the Public Health Law were not impliedly repealed by the enactment of the Freedom of Information Law in this article; nor did the legislature impliedly repeal section 2805-a when it enacted Public Health Law § 2803-b, since the sections are not in irreconcilable conflict, though both require submission of financial information. *St. Joseph's Hospital Health Center v. Axelrod*, 1980, 74 A.D.2d 698, 425 N.Y.S.2d 669, appeal denied 49 N.Y.2d 706, 428 N.Y.S.2d 1026, 405 N.E.2d 711.

The Freedom of Information Law, this article, did not abolish the common-law privilege for official information. *Delaney v. Del Bello*, 1978, 62 A.D.2d 281, 405 N.Y.S.2d 276.

Discovery provisions of CPLR Article 31 do not restrict disclosure of records made public under this article; if documents are available to the public under the latter, they are not restricted ipso

facto solely because the applicant is also a litigant. *Burke v. Yudelson*, 1976, 51 A.D.2d 673, 378 N.Y.S.2d 165.

Parallel federal case law construing Freedom of Information Act [5 U.S.C.A. § 552 et seq.], which is statutory model of Freedom of Information Law [McKinney's Public Officers Law § 84 et seq.], is instructive in construing Freedom of Information Law. *Michael v. Communications Workers of America AFL-CIO*, 1985, 130 Misc.2d 424, 495 N.Y.S.2d 569. See, also, *Fink v. Lefkowitz*, 1979, 47 N.Y.2d 567, 419 N.Y.S.2d 467, 393 N.E.2d 463; *Hawkins v. Kurlander*, 1983, 98 A.D.2d 14, 469 N.Y.S.2d 820; *Burke v. Yudelson*, 1975, 81 Misc.2d 870, 368 N.Y.S.2d 779, affirmed 51 A.D.2d 673, 378 N.Y.S.2d 165.

Distinction between Federal Information Act, 5 U.S.C.A. § 552, and this article is that the federal statute is not based upon a fundamental finding that the public should have unimpaired access to records. *Polansky v. Regan*, 1980, 103 Misc.2d 696, 427 N.Y.S.2d 161, modified on other grounds 81 A.D.2d 102, 440 N.Y.S.2d 356.

This article broadens category of those to whom records are required to be made available, by school district beyond disclosure required by the Education Law § 2116. *Matter of Duncan*, 1977, 90 Misc.2d 282, 394 N.Y.S.2d 362.

This section does not abolish prior and common-law privilege for official information, but use of the privilege requires more than mere assertion thereof; it requires determination of the public interest. *Application of Dwyer*, 1975, 85 Misc.2d 104, 378 N.Y.S.2d 894.

3. Purpose

Purpose of this article 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. *Fink v. Lefkowitz*, 1979, 47 N.Y.2d 567, 419 N.Y.S.2d 467, 393 N.E.2d 463.

Purpose of freedom of information law [McKinney's Public Officers Law § 84 et seq.] is to promote people's right to known process of governmental decision making and law must be liberally construed to grant maximum public access to governmental records. *Lucas v.*

Pastor, 1986, 117 A.D.2d 736, 498 N.Y.S.2d 461.

Legislative purpose behind enactment of this article is "people's right to know." *Miracle Mile Associates v. Yudelson*, 1979, 68 A.D.2d 176, 417 N.Y.S.2d 142, appeal denied 48 N.Y.2d 706, 422 N.Y.S.2d 68, 397 N.E.2d 758. See, also, *United Federation of Teachers v. New York City Health and Hospitals Corp.*, 1980, 104 Misc.2d 623, 428 N.Y.S.2d 823.

Broad access to government records granted by this article is not conditioned on purpose other than to acquaint applicant with "the process of governmental decision making." *Glantz v. Scopetta*, 1978, 66 A.D.2d 716, 411 N.Y.S.2d 295.

Legislature intent, as embodied in this section was to increase understanding and participation of public and government and to extend public accountability by giving public unimpaired access to records of government and its process of decision making; governmental material which is prepared solely for purposes of litigation is simply not the type of governmental record to which public has been given access. *Westchester Rockland Newspapers, Inc. v. Mosczydlowski*, 1977, 58 A.D.2d 234, 396 N.Y.S.2d 857.

Goal of this article is to give the public full access to the documents involved in government decision making, not to ease the research burden of private litigants, although this may well have been the intention of the separate federal sanction, under the federal Freedom of Information Act, 5 U.S.C.A. § 552, for the failure to index final opinions. *D'Alessandro v. Unemployment Ins. Appeal Bd.*, 1977, 56 A.D.2d 762, 392 N.Y.S.2d 433.

Purpose of this article is to allow maximum access to documents and agency has burden of proving that requested records are exempt from disclosure if it denies access to them. *Steele v. New York State Dept. of Health*, 1983, 119 Misc.2d 963, 464 N.Y.S.2d 925. See, also, *Herald Co. v. School Dist. of City of Syracuse*, 1980, 104 Misc.2d 1041, 430 N.Y.S.2d 460.

This article was enacted to enhance, to fullest permissible extent, access of public and news media to records and information in possession of state and local governmental agencies. *American*

PUBLIC OFFICERS LAW

Art. 6

Broadcasting Companies, Inc. v. Siebert, 1981, 110 Misc.2d 744, 442 N.Y.S.2d 855.

This article is designed to make available to the public documents generated by and in the possession of government unless a compelling reason requires their confidentiality. *Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, Division of Substance Abuse Services*, 1979, 99 Misc.2d 235, 415 N.Y.S.2d 780.

Legislative intent in enacting this article was to make available, on demand, any information in possession of any governmental agency in state, subject to limitation only when agency could prove the legitimate public interest or a recognizable private right justifying refusal to disclose the information. *New York Teachers Pension Ass'n, Inc. v. Teachers' Retirement System of City of New York*, 1979, 98 Misc.2d 1118, 415 N.Y.S.2d 561, affirmed 71 A.D.2d 250, 422 N.Y.S.2d 389.

4. Public interest privilege

See, also, annotations relating to denial of access to agency records set out under section 87.

"Public interest" privilege attached only to certain confidential communications between public officers in performance of their duties, and was not applicable in employee's action against private employer for alleged wrongful discharge in which no public official or governmental agency was involved. *Zampatori v. United Parcel Service*, 1983, 94 A.D.2d 974, 463 N.Y.S.2d 977, on remand 125 Misc.2d 405, 479 N.Y.S.2d 470.

Police personnel records used to evaluate performance toward continued employment or promotions are exempt from this article and common-law public interest privilege against disclosure, as recognized in *Cirale*, continues with respect to such records. *Wunsch v. City of Rochester*, 1981, 108 Misc.2d 854, 438 N.Y.S.2d 896.

Common-law public interest privilege, which is available to public agencies to prevent disclosure when public interest would be harmed if material sought were to lose its cloak of confidentiality, was not abolished by this article. *Young v. Town of Huntington*, 1976, 88 Misc.2d 632, 388 N.Y.S.2d 978.

FREEDOM OF INFORMATION LAW

Art. 6

5. Relation of data to agency

In applying this article, no distinction is to be made between volunteer organization on which local government relies for performance of essential public service and organic arm of government, when that is the channel through which such services are delivered. *Westchester Rockland Newspapers, Inc. v. Kimball*,

1980, 50 N.Y.2d 575, 430 N.Y.S.2d 574, 408 N.E.2d 904.

Nothing in this section or section 87 requires that agency from which information is sought be agency making decision to which information relates. *Doolan v. Board of Co-op Educational Services, Second Supervisory Dist. of Suffolk County*, 1979, 48 N.Y.2d 341, 422 N.Y.S.2d 927, 398 N.E.2d 533.

§ 85. Short title

This article shall be known and may be cited as the "Freedom of Information Law."

(Added L.1977, c. 933, § 1.)

Historical Note

Effective Date. Section effective Jan. 1, 1978, pursuant to L.1977, c. 933, § 8.

Derivation. Former section 86, added L.1974, c. 578, § 2; repealed by L.1977, c. 933, § 1.

Former Section 85. Section, which related to legislative intent, was added L.1974, c. 578, § 2; amended L.1974, c. 579, § 1; repealed by L.1977, c. 933, § 1; and is now covered by section 84.

Library References

American Digest System

Freedom of information laws in general, see Records ¶50 et seq.

Encyclopedia

Access to and right to use records, see C.J.S. Records § 35.

§ 86. Definitions

As used in this article, unless the context requires otherwise:

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

2. "State legislature" means the legislature of the state of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof.

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

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

books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

(Added L.1977, c. 933, § 1.)

Historical Note

Effective Date. Section effective Jan. 1, 1978, pursuant to L.1977, c. 933, § 8.

Derivation. Former section 87, added L.1974, c. 578, § 2, and repealed by L.1977, c. 933, § 1.

Former Section 86. Section, which related to short title, was added L.1974, c. 578, § 2; repealed by L.1977, c. 933, § 1; and is now covered by section 87.

Library References

American Digest System

Freedom of information laws in general, see Records ¶50 et seq.

Encyclopedia

Access to and right to use records, see C.J.S. Records § 35.

Notes of Decisions

Agency 2

Court 1

Judiciary 1

Record

Generally 3

Assessment records 4

Personal papers 5

1. Judiciary

State Board of Law Examiners exercised judicial function in discharge of its duties and, therefore, was part of "judiciary" exempt from disclosure requirements of this article. *Pasik v. State Bd. of Law Examiners*, 1984, 102 A.D.2d 395, 478 N.Y.S.2d 270.

Legislature, in enacting this article, intended the phrase "courts of the state" to have its commonly understood meaning, viz., tribunals adjudicating rights and status. *Quirk v. Evans*, 1982, 116 Misc.2d 554, 455 N.Y.S.2d 918.

Office of court administration is not a "court" within meaning of this section and therefore this article applied to it. *Babigian v. Evans*, 1980, 104 Misc.2d 136, 427 N.Y.S.2d 688.

2. Agency

City, which was holding former mayor's personal correspondence, was "governmental entity" and, therefore, "agency" for purposes of Freedom of Informa-

tion Law. *Capital Newspapers v. Whalen*, 1987, 69 N.Y.2d 246, 513 N.Y.S.2d 367, 505 N.E.2d 932.

Public authority is not subject to general provisions of law applicable to inspection of public records of government, and in absence of provision authorizing tollpayer or citizen to examine papers of authority, there is no such right. *New York Post Corp. v. Moses*, 1961, 10 N.Y.2d 199, 219 N.Y.S.2d 7, 176 N.E.2d 709.

City was an agency as defined in section 86 and documents of "Homestead Committee," which was composed of several members of the common council and representatives of city departments and engaged in selecting among interested applicants for purchase of residential properties for nominal consideration, and of the "Mayor's Task Force on Abandoned Housing," which determined whether abandoned housing should be referred to the homestead program, constituted records kept and held by the city within meaning of this article, despite contention that the committees had no governmental capacity and were advisory only and were not created by the city. *Syracuse United Neighbors v. City of Syracuse*, 1981, 80 A.D.2d 984, 437 N.Y.S.2d 466, appeal dismissed 55 N.Y.2d 995, 449 N.Y.S.2d 201, 434 N.E.2d 270.

Office of Court Administration is an agency, not a court, and is therefore

subject to this article; however, this does not mean that OCA must make all records in its possession available to the public; in its discretion, OCA may, for example, withhold records protected from disclosure by state or federal statute, records which, if disclosed, would constitute an unwarranted invasion of the privacy of an individual, or records compiled for law enforcement purposes, where the release of such records would interfere with law enforcement investigations, judicial proceedings, or the confidential rights of a defendant. *Quirk v. Evans*, 1982, 116 Misc.2d 554, 455 N.Y.S.2d 918.

Under the definition of "agency," the Division of the Budget came within application of this article. *Dunlea v. Goldmark*, 1975, 85 Misc.2d 198, 380 N.Y.S.2d 496, modified on other grounds 54 A.D. 446, 389 N.Y.S.2d 423.

3. Record—Generally

Minutes of insurance company meetings given by the companies to Insurance Department for its examination constituted "records" within meaning of this article and thus were subject to public review. *Washington Post Co. v. New York State Ins. Dept.*, 1984, 61 N.Y.2d 557, 475 N.Y.S.2d 263, 463 N.E.2d 604.

Stenographer's original stenographic notes are "records or other papers" within meaning of former section 66. *New York Post Corp. v. Leibowitz*, 1957, 2 N.Y.2d 677, 163 N.Y.S.2d 409, 143 N.E.2d 256.

Freedom of Information Law was not applicable to complaint of unsuccessful bidder on contract to transport and deliver voting machines, for unauthorized use and release of its prior "route list" by defendants in solicitation for bids, because "route list" prepared by plaintiff was not document within statutory definition of "record." *P.J. Garvey Carting & Storage, Inc. v. Erie County*, 1986, 125 A.D.2d 972, 510 N.Y.S.2d 365.

Urban renewal correspondence, data and valuations are not to be deemed "public records" within former section 66. *Sorley v. Clerk, Mayor and Bd. of Trustees of Incorporated Village of Rockville Centre*, 1968, 30 A.D.2d 822, 292 N.Y.S.2d 575.

Files in possession of Clerk of Criminal Court of city of New York are "public records" which may be fully examined by any person, unless papers have been sealed from public scrutiny by court by terms of a statute. *Werfel v. Fitzgerald*, 1965, 23 A.D.2d 306, 260 N.Y.S.2d 791.

Retention of physician of The New York State Institute for B. Research in Mental Retardation as a private examining physician did not confer upon physician's report an "official state agency" status which would permit, solely on such ground, disclosure of report to parties in medical malpractice action. *Ravo v. Ravo v. Rogatnick*, 1982, 117 Misc.2d 1041, 459 N.Y.S.2d 662.

Notes made by Secretary of State Board of Regents during the course of open and public meetings were records of the Board of Regents or the Education Department and were subject to compulsory disclosure under this article. *Warder v. Board of Regents of University of State of N.Y.*, 1978, 97 Misc.2d 86, 410 N.Y.S.2d 742.

4. — Assessment records

Applications for exemption pursuant to section 467 of the Real Property Tax Law are public records. 4 Op.Counsel S.B.E.A. No. 102.

Real property assessment revaluation data being compiled by an independent appraisal company for eventual use in a county-wide reassessment program are not "records" subject to public rights to access within this article. 7 Op.Counsel S.B.E.A. No. 68.

Assessors' workbooks or field books constitute public records which may be inspected or copied. 4 Op.Counsel S.B.E.A. No. 25.

5. — Personal papers

Former mayor's correspondence, which concerned matters of personal nature, and his correspondence, which concerned activities of county Democratic committee, constituted information in physical form that was kept or held by city and, therefore, constituted "record" that was subject to disclosure under Freedom of Information Law absent specific statutory exemption. *Capital Newspapers v. Whalen*, 1987, 69 N.Y.2d 246, 513 N.Y.S.2d 367, 505 N.E.2d 932.

§ 87. Access to agency records

1. (a) Within sixty days after the effective date of this article, 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.

(b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, 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:

- i. the times and places such records are available;
- ii. the persons from whom such records may be obtained, and
- iii. the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute.

2. ~~Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:~~

SEE ATTACHED AMENDMENTS

(a) are specifically exempted from disclosure by state or federal statute;

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

~~(d) are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise;~~

(e) are compiled for law enforcement purposes and which, if disclosed, would:

- i. interfere with law enforcement investigations or judicial pro-

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;

(f) if disclosed would endanger the life or safety of any person;

(g) ~~are inter-agency or intra-agency materials~~ which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

(h) are examination questions or answers which are requested prior to the final administration of such questions.

(i) are computer access codes.

3. Each agency shall maintain:

(a) a record of the final vote of each member in every agency proceeding in which the member votes;

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

(c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article.

4. (a) Each state agency which maintains records containing trade secrets, to which access may be denied pursuant to paragraph (d) of subdivision two of this section, shall promulgate regulations in conformity with the provisions of subdivision five of section eighty-nine of this article pertaining to such records, including, but not limited to the following:

(1) the manner of identifying the records or parts;

(2) the manner of identifying persons within the agency to whose custody the records or parts will be charged and for whose inspection and study the records will be made available;

(3) the manner of safeguarding against any unauthorized access to the records.

(b) As used in this subdivision the term "agency" or "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.

(Added L.1977, c. 933, § 1; amended L.1981, c. 890, § 1; L.1982, c. 73, § 1; L.1983, c. 80, § 1; L.1984, c. 283, § 1; L.1987, c. 814, § 12.)

Historical Note

1987 Amendment. Subd. 2, par. (g). cl. (iv). L.1987, c. 814, § 12, added cl. (iv).

1984 Amendment. Subd. 2, par. (i). L.1984, c. 283, § 1, eff. June 26, 1984, added par. (i).

1983 Amendment. Subd. 1, par. (a). L.1983, c. 80, § 1, eff. May 10, 1983, substituted "open government" for "public access to records".

Subd. 1, par. (b), opening clause. L.1983, c. 80, § 1, eff. May 10, 1983, substituted "open government" for "public access to records".

1982 Amendment. Subd. 1, par. (b). L.1982, c. 73, § 1, in subpar. (iii) substituted "statute" for "law".

1981 Amendment. Subd. 4. L.1981, c. 890, § 1, eff. July 31, 1981, added subd. 4.

Effective Date of Amendment by L.1987, c. 814; Expiration. Amendment by L.1987, c. 814, § 12, effective Aug. 7, 1987, and shall remain in full force and effect until Jan. 1, 1994, at which time L.1987, c. 814 shall be deemed repealed, pursuant to section 14 of L.1987, c. 814, set out as a note under section 88.

Effective Date and Applicability of Amendment by—L.1984, c. 283. Section 2 of L.1984, c. 283, provided: "This act [amending this section] shall take effect immediately [June 26, 1984] and shall apply to any request pursuant to article six of the public officers law for which there is no final determination."

—**L.1982, c. 73.** Amendment by section 1 of L.1982, c. 73, eff. Oct. 15, 1982, and applicable after that date, pursuant to section 3 of L.1982, c. 73, set out as a note under section 89.

—**L.1981, c. 890.** Amendment by section 1 of L.1981, c. 890, eff. July 31, 1981, and applicable as provided by section 4 of L.1981, c. 890, set out as a note under section 89.

Effective Date. Section effective Jan. 1, 1978, pursuant to L.1977, c. 933, § 8.

Derivation. Former section 88, in part, added L.1974, c. 578, § 2; amended L.1974, c. 579, §§ 2 to 4; L.1974, c. 580, § 1; repealed by L.1977, c. 933, § 1.

Former Section 87. Section, which related to definitions, was added L.1974, c. 578, § 2; repealed by L.1977, c. 933, § 1; and is now covered by section 86.

Cross References

Confidentiality of personnel records of police officers, firefighters and correction officers, see Civil Rights Law § 50-a.

Division of criminal justice services, duties regarding data and statistics, see Executive law § 837.

Official compilations of codes, rules and regulations, see Executive Law § 102.

Rule-making procedure of state agencies, see generally, State Administrative Procedure Act § 201 et seq.

New York Codes, Rules and Regulations

Confidentiality of documents submitted to the Department of Environmental Conservation regarding—

Air pollution control, see 6 NYCRR 200.2.

Mined land reclamation, see 6 NYCRR 420.3.

Solid waste management facilities, see 6 NYCRR 360.1.

Taxation of forest lands, see 6 NYCRR 199.3.

Public access to records—

Adirondack park agency, see 9 NYCRR Part 587.

Public access to records—Continued

Banking department records, see 3 NYCRR Supervisory Procedure G106.

Board of—

Elections, see 9 NYCRR Part 6202, set out in the Appendix to Bk. 17, Election Law.

Equalization and assessment, see 9 NYCRR Part 185-1.

Social welfare, see 18 NYCRR Part 226.

Commission of investigation, see 21 NYCRR Part 700.

Commission on—

Cable television, see 9 NYCRR Part 589.

Judicial conduct, see 22 NYCRR Part 700¹, set out in McKinney's New York Rules of Court pamphlet.

Council on children and families, see 9 NYCRR Part 8201.

Crime victims board, see 9 NYCRR 525.15.

Department of—

Agriculture and Markets, see 1 NYCRR Part 360.

Civil Service, see 4 NYCRR Part 80, set out in the Appendix to Bk. 9, Civil Service Law.

Commerce, see 5 NYCRR Part 1.

Correction, see 7 NYCRR Part 5.

Education, see 8 NYCRR Part 187.

Environmental Conservation, see 6 NYCRR Part 616.

Health, see 10 NYCRR Part 50.

Insurance, see 11 NYCRR Part 241.

Labor, see 12 NYCRR Part 700.

Law, see 13 NYCRR Part 120.

Mental Hygiene and its facilities, see 14 NYCRR Part 8.

Motor Vehicles, see 15 NYCRR Part 160.

Social Services, see 18 NYCRR Part 340.

State, see 19 NYCRR Part 80.

Taxation and Finance and the State Tax Commission, see 20 NYCRR Part 800.

Transportation, see 17 NYCRR Part 1.

Division of—

Budget, see 9 NYCRR Part 145-1.

Criminal justice services, see 9 NYCRR Part 6150.

Housing and Community renewal, see 9 NYCRR Part 2650.

Human rights, see 9 NYCRR 466.6.

Parole, see 9 NYCRR Part 8008.

Probation, see 9 NYCRR Part 368.

Substance abuse services, see 14 NYCRR Part 1060.

Veterans' affairs, see 9 NYCRR Part 8450.

Youth, see 9 NYCRR Part 166-2.

Higher education services corporation, see 8 NYCRR Part 2002.

Industrial Board of Appeals, see 12 NYCRR Part 73.

Medical care facilities finance agency, see 21 NYCRR Part 2200.

Metropolitan transportation authority, see 21 NYCRR Part 1090.

Municipal assistance corporation for the city of New York, see 21 NYCRR Part 5400.

New York city transit authority, see 9 NYCRR Part 1053.

Office for local government, see 9 NYCRR Part 207.

Office for the aging, see 9 NYCRR Part 6650.

Office of general services, see 9 NYCRR Part 330.

Public access to records—Continued

Office of parks, recreation and historic preservation, see 9 NYCRR Part 461 et seq.

Permanent commission on public employee pension and retirement systems, see 9 NYCRR Part 6700.

Public authorities control board, see 21 NYCRR Part 2700.

Public Service Commission, see 16 NYCRR Part 6.

State and local agencies, including counties, cities, towns, villages, school districts and fire districts, see 21 NYCRR Part 1401.

State—

Athletic commission, see 19 NYCRR Part 211.

Cemetery board, see 19 NYCRR Part 201.

Consumer protection board, see 21 NYCRR Part 4600.

Dormitory authority, see 21 NYCRR Part 4700.

Energy office, see 9 NYCRR Part 7801, set out in the Appendix to Bk. 17¼, Energy Law.

Housing finance agency, see 21 NYCRR Part 2150.

Insurance Fund, see 12 NYCRR 450.11.

Liquor Authority, see 9 NYCRR Part 95, set out in the Appendix to Bk. 3, Alcoholic Beverage Control Law.

Police, see 9 NYCRR Part 483.

Power authority, see 21 NYCRR Part 453.

Racing and wagering board, see 9 NYCRR Part 5400.

Register of historic places, see 9 NYCRR 427.8.

Thruway authority, see 21 NYCRR Part 108.

University of New York, see 8 NYCRR Part 311.

Teachers' retirement system, see 21 NYCRR Part 5019.

Urban development corporation, see 21 NYCRR Part 4201.

Workers' Compensation Board, see 12 NYCRR Part 425, set out in the Appendix to Bk. 64, Workers' Compensation Law.

Submission of notices and filings in relation to agency rulemaking action, see generally, 19 NYCRR Part 260 et seq.

Unemployment insurance and employment service records not subject to this section, see 12 NYCRR 700.4.

West's McKinney's Forms

The following forms appear in Selected Consolidated Laws Forms under section 87 of the Public Officers Law:

Judgment in Article 78 Proceeding Granting Petition to Compel Power Authority to Disclose Names and Addresses of Property Owners Over Whose Land Proposed Power Transmission Lines Will Pass, see Form 1.

Notice of Petition in Article 78 Proceeding to Compel Power Authority to Disclose Names and Addresses of Property Owners Over Whose Land Proposed Power Transmission Lines Will Pass, see Form 2.

Petition in Article 78 Proceeding to Compel Power Authority to Disclose Names and Addresses of Property Owners Whose Land Proposed Power Transmission Lines Will Pass, see Form 3.

Petition in Article 78 Proceeding to Annul Determination of Budget Director that Files and Work Sheets Prepared for State Commission on Cable Television Were Not Discoverable, see Form 4.

Judgment in Article 78 Proceeding Annulling Determination of Budget Director that Files and Work Sheets Prepared for State Commission on Cable Television Were Not Discoverable, see Form 5.

Law Review Commentaries

Codification of government privileges in New York: official information and identity of informers. 44 Albany L.Rev. 279 (1980).

New York's Freedom of Information Law, disclosure under the CPLR, and the common-law privilege for official information: conflict and confusion over "the people's right to know". 33 Syracuse L.Rev. 615 (1982).

Library References

American Digest System

Matters subject to disclosure, see Records §54 et seq.

Encyclopedia

Records subject to inspection, see C.J.S. Records § 36.

WESTLAW Electronic Research

See WESTLAW guide following the Explanation pages of this volume.

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I. GENERALLY

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1. Construction

Construction of statutory exception from disclosure under Freedom of Information Law, i.e., exception dealing with unwarranted invasion of privacy

[McKinney's Public Officers Law § 87, subd. 2(b)], involves pure statutory reading and analysis, and there is no basis to rely on any special expertise of the police department and thereby accord its statutory interpretation any particular deference. Capital Newspapers Div. of Hearst Corp. v. Burns, 1985, 109 A.D.2d 92, 490 N.Y.S.2d 651, affirmed 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665.

Purpose of this article is to provide public with access to information with respect to manner in which the governmental decision-making process is conducted and that, in furtherance of that purpose, provisions exempting governmental documents are to be narrowly construed. Hawkins v. Kurlander, 1983, 98 A.D.2d 14, 469 N.Y.S.2d 820. See, also, Polansky v. Regan, 1981, 81 A.D.2d 102, 440 N.Y.S.2d 356; Zuckerman v. New York State Bd. of Parole, 1976, 53 A.D.2d 405, 385 N.Y.S.2d 811.

In regard to determining whether records are "specifically exempted" by this section so as to permit agency to deny access to the records, the exemption must be clearly delineated and this section narrowly construed; the statutory language need not contain a specific denial of disclosure, but, rather, it is sufficient that the clear intent of this section mandates confidentiality of the

proceedings or material. *Herald Co. v. School Dist. of City of Syracuse*, 1980, 104 Misc.2d 1041, 430 N.Y.S.2d 460.

2. Construction with other laws

See, also, *Notes of Decisions under section 84*.

Requirement of Insurance Law §§ 26-a, 29 for insurance companies to maintain certain records, including minutes of insurance company meetings, and to provide reasonable access to those records for examination by State Insurance Department and its examiners did not render those records confidential and thus exempt from disclosure under Freedom of Information Law where Insurance Law did not include any references to confidentiality or prohibit access by others to the records. *Washington Post Co. v. New York State Ins. Dept.*, 1984, 61 N.Y.2d 557, 475 N.Y.S.2d 263, 463 N.E.2d 604.

Minutes of business meeting of Parole Board were not per se exempt from disclosure either under Correction Law § 29 as unwarranted invasion of personal privacy, under investigatory files compiled for law enforcement purposes exemption to this article or under common-law privilege for official information; and Supreme Court would be required to inspect minutes in camera to determine to what extent, if any, minutes were exempt from disclosure for those reasons. *Zuckerman v. New York State Bd. of Parole*, 1976, 53 A.D.2d 405, 385 N.Y.S.2d 811.

Ban on disclosure imposed by Civil Rights Law § 50-a governing confidentiality of police personnel records could not be avoided on ground that for purpose of disclosure provision of Civil Rights Law § 50-a the records requested were "relevant and material" in proceeding brought under this article seeking their disclosure; such records, exempt from provisions of this article, could not be "relevant and material" in a proceeding to require compliance with this article. *Gannett Co., Inc. v. James*, 1981, 108 Misc.2d 862, 438 N.Y.S.2d 901, affirmed 86 A.D.2d 744, 447 N.Y.S.2d 781, appeal denied 56 N.Y.2d 502, 450 N.Y.S.2d 1023, 435 N.E.2d 1099.

Mere fact that a hospital, licensed and operated in State, may be qualified to receive federal medicare funds by virtue

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of its accreditation by the Joint Commission on Accreditation of Hospitals does not mean that confidentiality, accorded to its Joint Commission on Accreditation of Hospital survey report by virtue of section of the federal Social Security Act, 42 U.S.C.A. § 1395bb, providing that Joint Commission may release to Secretary of Health, Education and Welfare or state agency a copy of most current accreditation survey and thereby be eligible for medicare, creates a similar immunity from disclosure under state law. *Nassau-Suffolk Hospital Council, Inc. v. Whalen*, 1977, 89 Misc.2d 304, 390 N.Y.S.2d 995.

Discovery provisions of CPLR 3101 et seq. do not restrict disclosure of records made public under this section; if documents are available to public under this section, they are not restricted ipso facto solely because applicant is also a litigant. *Novack v. Schuler*, 1976, 88 Misc.2d 796, 389 N.Y.S.2d 221.

3. Mandatory nature of section

Freedom of Information Law obligates an agency to hold its records open to the public unless they fall within one of the eight specific exempt categories set forth in the statute. *De Zimm v. Connelie*, 1984, 102 A.D.2d 668, 479 N.Y.S.2d 871, affirmed 64 N.Y.2d 860, 487 N.Y.S.2d 320, 476 N.E.2d 646.

Disclosure requirements of this article are mandatory, and as to those items required to be disclosed the agency must comply; if from experience it is determined that this article needs revision it should be directed to the attention of the legislature. *Dunlea v. Goldmark-3d*, 1976, 54 A.D.2d 446, 389 N.Y.S.2d 423, affirmed 43 N.Y.2d 754, 401 N.Y.S.2d 1010, 372 N.E.2d 798.

4. Records within section

See, also, *annotations relating to definition of record under section 86*.

Under this article, access to all files of Commissioner of Mental Hygiene and Attorney General concerning petitioner corporation, its affiliates and its leadership was granted. *Church of Scientology of New York v. State*, 1979, 46 N.Y.2d 906, 414 N.Y.S.2d 900, 387 N.E.2d 1216.

Where petitioners presented appeal to "head" of agency, petitioners did all they were required to do under law and were

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entitled to documents sought, including copies of check allegedly made out to administrator of methadone maintenance program in county and computer printout for check, pursuant to this article. *Vent v. Bates*, 1982, 89 A.D.2d 567, 452 N.Y.S.2d 98.

Disclosure of lottery records is in accord with declared purpose of this article. *Westchester Rockland Newspapers, Inc. v. Kimball*, 1979, 72 A.D.2d 606, 421 N.Y.S.2d 112, affirmed 50 N.Y.2d 575, 430 N.Y.S.2d 574, 408 N.E.2d 904.

Ballots in referendum on extension of dairy promotion order and cooperative milk producer lists related thereto were subject to disclosure. *Gates v. Dyson*, 1976, 55 A.D.2d 705, 389 N.Y.S.2d 154.

Budget examiner's files and work sheets for Cable Television Commission were subject to discovery under this section; however, the agency was entitled to an opportunity to establish specific exemptions, preferably by a sufficiently detailed affidavit to enable special term to determine the validity of the exemption claimed. *Dunlea v. Goldmark*, 1976, 54 A.D.2d 446, 389 N.Y.S.2d 423, affirmed 43 N.Y.2d 754, 401 N.Y.S.2d 1010, 372 N.E.2d 798.

This section entitled petitioner and other bona fide members of news media to inspect and copy village payroll records. *Miller v. Incorporated Village of Freeport*, 1976, 51 A.D.2d 765, 379 N.Y.S.2d 517.

Tenured teachers whose positions as department heads had been abolished were entitled to inspect, pursuant to this article official minutes of school board's meetings pertaining to its decision to eliminate the teachers' positions and pertaining to the teachers' competency, but board was not obliged to disclose minutes of its executive sessions. *Gabriel v. Turner*, 1975, 50 A.D.2d 889, 377 N.Y.S.2d 527.

Labor Department forms which were used by employers to report information to the Unemployment Insurance Division and which contained information which was available elsewhere on records which were not claimed to be exempt from disclosure were not themselves exempt from disclosure under the Freedom of Information Law. *Banigan v. Roberts*, 1986, 135 Misc.2d 614, 515 N.Y.S.2d 944.

Public Officers Law § 84 et seq. applies to county tax maps. *Szikszay v. Buelow*, 1981, 107 Misc.2d 886, 436 N.Y.S.2d 558.

Under this section, all Joint Commission on Accreditation of Hospitals survey reports delivered in confidence to the State Department of Health, whether submitted in lieu of a Public Health Law survey or in connection with such survey, shall not be available for public disclosure; however, all Joint Commission on Accreditation of Hospitals survey reports delivered to the State Department of Health without such agreement of confidentiality may be available for public disclosure. *Nassau-Suffolk Hospital Council, Inc. v. Whalen*, 1977, 89 Misc.2d 304, 390 N.Y.S.2d 995.

5. Rules and regulations

This article does not require an agency to develop a body of written law or policy. *McAulay v. Board of Ed. of City of New York*, 1978, 61 A.D.2d 1048, 403 N.Y.S.2d 116, affirmed 48 N.Y.2d 659, 421 N.Y.S.2d 560, 396 N.E.2d 1033.

Resolution of town board requiring that town financial records and account books be kept in town offices was not in compliance with statute requiring governing body of town to promulgate uniform regulations requiring each town agency to make its records available at specified times and places [McKinney's Public Officers Law § 87, subd. 1(b)], as no uniform regulations were promulgated, and resolution in question was aimed solely at town supervisor and town bookkeeper. *Town of Northumberland v. Eastman*, 1985, 129 Misc.2d 447, 493 N.Y.S.2d 93.

Exemption from disclosure may be expressed in a rule or regulation and still be within ambit of a specific exemption by this article. *Herald Co. v. School Dist. of City of Syracuse*, 1980, 104 Misc.2d 1041, 430 N.Y.S.2d 460.

6. Fees

Resolution of equalization committee of county legislature setting tax map copying fee of \$4 per map was not a legislative act but was a ministerial act and was not the type of action included within "prescribed by law" language of this section that records are exempt from fee schedule contained in the Law

if "a different fee is otherwise prescribed by law." *Szikszay v. Buelow*, 1981, 107 Misc.2d 886, 436 N.Y.S.2d 558.

A fee of one dollar per copy of photographs taken by village police department may be charged, or where that is determined to be inadequate, a different fee may be established by local law. 23 Op.State Compt. 569, 1967.

A town police department may charge a fee for supplying certified copies of police reports of accidents. 16 Op.State Compt. 296, 1960.

Where a town uses an I.B.M. punch card file for chattel mortgages and conditional sales contracts instead of the ordinary indices, the fees for preparing and furnishing lists of chattel mortgages and conditional sales filed during a particular period should be the fees for preparing certified copies of records. 12 Op.State Compt. 118, 1956.

A \$25 per page charge for copying school board election records is not unreasonable. Op.Commissioner Educ. Dept., 1979, 18 Educ.Dept.Rep. 276.

7. Recordkeeping requirements—Generally

This article was perverted by contract under which state granted corporation exclusive right to publish lists upon which formula for medicaid reimbursement for prescriptions was based. *S-P Drug Co., Inc. v. Smith*, 1978, 96 Misc.2d 305, 409 N.Y.S.2d 161.

8. — Votes of members

Use of secret ballot vote to dismiss member of city housing authority board though in violation of statutes requiring open voting and record of manner in which each member voted, did not warrant annulment of board's determination and reinstatement of member in that board had authority to determine employment issue. *Smithson v. Ilion Housing Authority*, 1987, 516 N.Y.S.2d 564, affirmed 516 N.Y.S.2d 613.

9. — Name, etc., of officers and employees

Since tax dollars are spent to pay public employees, public has right to know certain facts relating to such employment, and, though public employees are not without right of privacy, acceptance of public employment carries with it re-

alization that certain facts relating to such employment must be public knowledge, including, e.g., public employee's name, public office address, title and salary. *Capital Newspapers Div. of Hearst Corp. v. Burns*, 1985, 109 A.D.2d 92, 490 N.Y.S.2d 651, affirmed 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665.

If county had never compiled a list of names of terminated employees sought, this article did not require that one be prepared, but applicant was required to be granted access to those lists and documents which specifically identify the employees to be terminated and which effectuate their removal. *Gannett Co., Inc. v. Monroe County*, 1977, 59 A.D.2d 309, 399 N.Y.S.2d 534, affirmed 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151.

10. — List of records

The New York State Employees' Retirement System was not required to create a detailed listing by subject matter of its final opinions or conduct a search of its records and produce all documents referring, reflecting, or relating to a retirement applicant's deadline for changing a retirement option. *Wattenmaker v. New York State Employees' Retirement System*, 1983, 95 A.D.2d 910, 464 N.Y.S.2d 52, appeal denied 60 N.Y.2d 555, 467 N.Y.S.2d 1030, 455 N.E.2d 487.

It would be an unwarranted enlargement of the purpose of this article to require every agency to break down every final order into component topics and index it topically; accordingly, the Unemployment Insurance Appeal Board conformed to the spirit and letter of the law by labeling and separately listing by each label the broad variety of records it maintains, and by making them available for public inspection. *D'Alessandro v. Unemployment Ins. Appeal Bd.*, 1977, 56 A.D.2d 762, 392 N.Y.S.2d 433.

Under this article petitioner was entitled to various requested records relating to fall/winter 1982 drilling into areas adjacent to Hyde Park landfill in towns of Niagara and Lewiston, New York, including handwritten field logs, drafts of air monitoring report relating to airborne chemical contaminants and a certain memorandum where Department of Health failed to establish that such records were exempt; however, to be certain that Department would inform

petitioner of all records which were in existence, Department would be required to submit a list to petitioner of the documents in its possession which related to petitioner's demand. *Steele v. New York State Dept. of Health*, 1983, 119 Misc.2d 963, 464 N.Y.S.2d 925.

In response to petitioner's request for information and documents relating to incidents of violence at particular correctional facility, Commissioner of Correction chairman would be permitted to prepare complete list of each document in his possession on subject of incidents of violence involving inmates at the correctional facility during years in question, using Commission employees to perform such work, or would be required to permit petitioner access to the Commission records for purpose of selecting documents which she desired to have copied at her expense. *Zanger v. Chinlund*, 1980, 106 Misc.2d 86, 430 N.Y.S.2d 1002.

11. Litigation—Generally

Access to records of government agency is not affected by fact that there is pending or potential litigation between person making request and the agency. *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 1984, 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437.

Fact that petitioner was in litigation with village did not affect propriety of petitioner's request for materials from village pursuant to freedom of information law [McKinney's Public Officers Law § 84 et seq.]. *Lucas v. Pastor*, 1986, 117 A.D.2d 736, 498 N.Y.S.2d 461.

Fact that city was in litigation with one of its contractors did not bar contractor from availing himself of right granted by this section to inspect and copy audits with respect to the contracts at issue; contractor was not required to resort to discovery rules to attain such material; absent any proof that documents were not exempt from disclosure by this article petition for access to such record was properly granted. *Burke v. Yudelsohn*, 1976, 51 A.D.2d 673, 378 N.Y.S.2d 165.

Agents of plaintiffs who had claim against city, had a right to inspect department of public works' records concerning prior written notice of defects in

sidewalk, despite pendency of litigation and its place on trial calendar, under Freedom of Information Law. *Fusco v. City of Albany*, 1986, 134 Misc.2d 98, 509 N.Y.S.2d 763.

"Chief's Report" about fire was within purview of this section and was discoverable, and city did not have right to refuse to disclose unless applicant would sign affirmation that notice of claim was not filed and would not be filed and that cause of action was not and would not be brought against city. Application of *Dwyer*, 1975, 85 Misc.2d 104, 378 N.Y.S.2d 894.

12. — Materials prepared for

Report of independent counsel, retained by county to evaluate possibility of recovery in a particular civil lawsuit, was not specifically exempted from disclosure by state or federal freedom of information laws. *Austin v. Purcell*, 1984, 103 A.D.2d 827, 478 N.Y.S.2d 64.

Material which is exempt from disclosure pursuant to CPLR 3101(d) governing scope of disclosure because prepared solely for purposes of litigation is similarly exempt from disclosure under this article. *Westchester Rockland Newspapers, Inc. v. Mosczydlowski*, 1977, 58 A.D.2d 234, 396 N.Y.S.2d 857.

Broad policy in favor of disclosure mandated rejection of argument that town building department records compiled during investigation of complaint that construction work at certain town facilities was performed improperly and in violation of town code were not public records under the law. *Young v. Town of Huntington*, 1976, 88 Misc.2d 632, 388 N.Y.S.2d 978.

Engineer's report, which contained opinion of a potential expert witness who might be called on behalf of county upon a trial to resist contractor's claim for additional compensation to repair a break in sewer line, and which had been obtained by county for such express purpose, was not subject to disclosure under this article. *Fitzpatrick v. Nassau County, Dept. of Public Works*, 1975, 83 Misc.2d 884, 372 N.Y.S.2d 939.

II. DENIAL OF ACCESS

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31. Statutory exemptions

Disclosure of 29 medical records, as well as interagency memorandum, except as to statistical or factual tabulations or data, was denied since records were not "otherwise available" inasmuch as they were specifically exempted from disclosure by state or federal law wholly without reference to invasion of privacy. *Short v. Board of Managers of Nassau County Medical Center*, 1982, 57 N.Y.2d 399, 456 N.Y.S.2d 724, 442 N.E.2d 1235.

Information "specifically exempted by statute" from disclosure under this section does not contemplate exemptions of CPLR 3101 et seq. governing disclosure, but rather refers to such information as income tax and juvenile and youthful offender proceedings. *Burke v. Yudel-son*, 1975, 81 Misc.2d 870, 368 N.Y.S.2d 779, affirmed 51 A.D.2d 673, 378 N.Y.S.2d 165.

32. Personal privacy, invasion of

See, also, Notes of decisions under section 89.

Disclosure of "releasable copy" of offense report may not be denied as matter of law pursuant to McKinney's Public Officers Law § 87, subd. 2(b), as constituting "unwarranted invasion of personal privacy" solely because person reporting offense initialed box on form indicating preference that incident not be released to media except for police investigative purposes or following arrest. *Johnson Newspaper Corp. v. Call*, 1985, 115 A.D.2d 335, 495 N.Y.S.2d 813.

Conclusory allegation that tapes containing information divulged through an undercover law enforcement officer by incarcerated criminals should be exempt from the freedom of information law, McKinney's Public Officers Law § 84 et seq., due to the application of McKinney's Public Officers Law § 87, subd. 2(b), which permits withholding of records that if disclosed could constitute an unwarranted invasion of personal privacy, were insufficient to meet the government's burden of proof of the exemption. *Journal Pub. Co. v. Office of Special Prosecutor*, 1986, 131 Misc.2d 417, 500 N.Y.S.2d 919.

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Names of city employees, departments for which they worked and number of sick time hours accumulated by each employee were exempt from disclosure to newspaper publisher under this section's exception for disclosure which would result in unwarranted invasion of personal privacy. *Bahlman v. Brier*, 1983, 119 Misc.2d 110, 462 N.Y.S.2d 381.

33. Contract awards, impairment of

Reports by independent appraiser on potential use and value of certain buildings which were owned by urban renewal agency and which agency planned to offer for sale to the public fell within provision of this section excepting from disclosure those materials that, if disclosed, would impair present or imminent contract awards. *Murray v. Troy Urban Renewal Agency, Inc.*, 1982, 56 N.Y.2d 888, 453 N.Y.S.2d 400, 438 N.E.2d 1115.

Contents of successful bid proposal and basis for determination to accept successful bid proposal by agency together with its findings, reports and memoranda were subject to disclosure pursuant to this article. *Contracting Plumbers Co-Op. Restoration Corp. v. Ameruso*, 1980, 105 Misc.2d 951, 430 N.Y.S.2d 196.

34. Collective bargaining, impairment of

Salary and fringe benefit data compiled by board of cooperative educational services as part of a subscription service for member school districts was not excepted from disclosure requirement of this article and, hence was subject to being disclosed, notwithstanding that agency from which information was sought was not agency making decision to which information related, where there was no evidence that disclosure of information would impair present or imminent collective bargaining. *Doolan v. Board of Co-op Educational Services, Second Supervisory Dist. of Suffolk County*, 1979, 48 N.Y.2d 341, 422 N.Y.S.2d 927, 398 N.E.2d 533.

Record failed to support unsubstantiated contention that disclosure to union of grievances filed by registered nurses represented by a competing union would impair imminent contract awards or collective bargaining negotiations so as to be exempt from disclosure under this

article. *United Federation of Teachers v. New York City Health and Hospitals Corp.*, 1980, 104 Misc.2d 623, 428 N.Y.S.2d 823.

Office of court administration failed to justify nondisclosure of list of employees paid \$15,000 to \$20,000 in back pay as result of reclassification on ground that such list would impair imminent collective bargaining negotiations; furthermore, list could not be withheld solely on ground that the information, which was on computer and readily available, was not available in printed form. *Babigian v. Evans*, 1980, 104 Misc.2d 136, 427 N.Y.S.2d 688.

Where report sought to be disclosed pursuant to this section was one obtained by school districts on a shared cost basis and was designed to assist participating school districts in their collective bargaining agreements with their respective public employee unions, it was exempt from disclosure on ground that disclosure would impair collective bargaining negotiations, as well as harming declared policy of regional cooperative shared services. *Trauernicht v. Board of Co-op Educational Services of Nassau County*, 1978, 95 Misc.2d 394, 407 N.Y.S.2d 396.

35. Trade secrets

Minutes of insurance company meetings given by companies to State Insurance Department for its examination were not exempt from disclosure under this article as information maintained for commercial enterprise which would cause injury to competitive position if disclosed where there was no evidentiary support for the position that disclosure would ruin insurance companies' competitive edge. *Washington Post Co. v. New York State Ins. Dept.*, 1984, 61 N.Y.2d 557, 475 N.Y.S.2d 263, 463 N.E.2d 604.

Where no state or federal statutes specifically exempted from disclosure volunteer fire department's records of public lottery sponsored by the department, there was no danger of impairment of contract awards or collective bargaining negotiations, the records were not trade secrets where compiled for law enforcement purposes, their disclosure would not endanger the life or safety of any person, they were not inter or intraagency materials, and they were not exami-

nation questions or answers, such records fell within none of the enumerated exemptions listed in this section and could properly be disclosed. *Westchester Rockland Newspapers, Inc. v. Kimball*, 1980, 50 N.Y.2d 575, 430 N.Y.S.2d 574, 408 N.E.2d 904.

Insurance company's documents consisting of computer programs, mathematical models, procedures and statistical assumptions used in pricing newly issued insurance policies constituted "trade secrets" under this article. *Belth v. Insurance Dept.*, 1977, 95 Misc.2d 18, 406 N.Y.S.2d 649.

Disclosure of drop-out and placement rates of private schools and private business schools would not permit an unfair advantage to competitors so as to exempt such information from disclosure under this article. *Pooler v. Nyquist*, 1976, 89 Misc.2d 705, 392 N.Y.S.2d 948.

36. Law enforcement records—Generally

Records of law enforcement agency have traditionally been exempted from public disclosure. *Westchester Rockland Newspapers, Inc. v. Mosczydlowski*, 1977, 58 A.D.2d 234, 396 N.Y.S.2d 857.

This section does not entitle a member of the public to obtain a criminal investigation file. *Wunsch v. City of Rochester*, 1981, 108 Misc.2d 854, 438 N.Y.S.2d 896.

With respect to exemption from disclosure for records which are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations, deprive person of right to fair trial, identify confidential source or disclose confidential information relating to criminal investigation, or reveal nonroutine criminal investigative techniques or procedures, there was no requirement that records be compiled or held by law enforcement agency, but, rather, only requirement was that records in possession of public agency were compiled for law enforcement purposes. *City of New York v. BusTop Shelters, Inc.*, 1980, 104 Misc.2d 702, 428 N.Y.S.2d 784.

37. — Interference with investigation or proceeding

Licensed psychiatrist charged with professional misconduct had no right to

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disclosure, under this article of statements of complaining witnesses, names and addresses of witnesses, lay and expert, copy of report of screening committee that gave rise to charges or other information which did not interfere with the proceedings or investigation. *Marshall v. State Bd. for Professional Medical Conduct*, 1979, 73 A.D.2d 798, 423 N.Y.S.2d 721, appeal denied 49 N.Y.2d 709, 429 N.Y.S.2d 1026, 406 N.E.2d 1354.

Records of police department and county district attorney concerning investigation of married daughter's death, which records were sought by surviving parents under Freedom of Information Law to counter surviving husband's petition for letters of administration, fell within exemption from disclosure for matters that interfere with law enforcement investigation or with judicial proceedings or that would identify a confidential source or disclose confidential information relating to the death. *Matter of Estate of Schwartz*, 1986, 130 Misc.2d 786, 497 N.Y.S.2d 834.

Although report compiled on petitioner at request of New York City Economic Development Administration was not requested in a criminal investigation, but rather in relation to petitioner's proposal to construct and operate an amusement park, such report was exempt from disclosure under this section where contents of report revealed numerous criminal activities of alleged organized crime figures since the investigation of organized crime is an ongoing police investigation. *Glantz v. Lupkin*, 1979, 100 Misc.2d 453, 419 N.Y.S.2d 34.

38. — Fair trial considerations

Publisher had a right to have access to tapes made by undercover police officer in investigation of organized crime, which constituted the only available source of evidence which the publisher required to defend a libel action, where the tapes were unsealed, and had not been used in trial resulting in acquittal. *Journal Pub. Co. v. Office of Special Prosecutor*, 1986, 131 Misc.2d 417, 500 N.Y.S.2d 919.

39. — Confidential source or information

Names, addresses, and statements of confidential witnesses compiled during criminal investigation are exempt from

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disclosure under the Freedom of Information Law. *Allen v. Strojnowski*, 1987, 129 A.D.2d 700, 514 N.Y.S.2d 463.

Portions of police record consisting of names and statements of confidential police witnesses and name of suspect identified by infant victim from police photographs were properly exempted from disclosure under law enforcement exemption of the Freedom of Information Law. *Application of Radio City Music Hall Productions, Inc.*, 1986, 121 A.D.2d 230, 503 N.Y.S.2d 722.

General assertion by superintendent of state police that exemption from disclosure was necessary to protect confidentiality of investigative sources and to encourage prospective witnesses to come forward in future was insufficient to sustain superintendent's burden of demonstrating entitlement to exemption from disclosure, under Public Officers Law, of documents sought by railroad policeman in judicial proceeding challenging superintendent's refusal to reappoint policeman, absent showing of any factual basis on which to determine whether stated objectives would be impeded by disclosure of items requested. *Mooney v. Superintendent of New York State Police*, 1986, 117 A.D.2d 445, 502 N.Y.S.2d 828.

Major purpose of "law enforcement exemption" of this article is to encourage private citizens to furnish controversial information to government agencies by assuring confidentiality under certain circumstances. *Hawkins v. Kurlander*, 1983, 98 A.D.2d 14, 469 N.Y.S.2d 820.

Right of discovery to enable citizen to obtain information essential for prosecution of civil action must be subordinated to public interest privilege which exists to protect people who confide in state police and thus assist the police in their investigations of criminal activity. *State Division of State Police v. Boehm*, 1979, 71 A.D.2d 810, 419 N.Y.S.2d 23.

Requested document or "complaint" of CB radio theft was a field officer's report and, as such, might well include hearsay, reports and names of confidential informants, suspicions or rumors; and since no reasonable definition of "police blotter," as enumerated in this article, would call for the inclusion of such information thereon, the requested document was not subject to disclosure under the

Law, and its availability should have been denied. *Sheehan v. City of Binghamton*, 1977, 59 A.D.2d 808, 398 N.Y.S.2d 905.

In view of facts that one of primary purposes of state commission investigating prisoner take-over of portion of Attica Correctional Facility was to determine circumstances which resulted in tragedy at Attica, that its effectiveness was dependent upon assurances of confidentiality, and that disclosure of information that commission obtained would undoubtedly imperil any future investigation of similar catastrophe, public interest in right of litigant to obtain records of commission had to in these circumstances give way to public interest in enabling government effectively to conduct sensitive investigations involving matters of demonstrably important public concern. *Jones v. State*, 1977, 58 A.D.2d 736, 395 N.Y.S.2d 862.

County district attorney's trial sheet and witnesses' statements obtained by his office in course of preparing criminal case for trial were exempt from disclosure under this article, as information which was part of investigatory files compiled for law enforcement purposes, and were exempt from disclosure under common-law privilege. *Knight v. Gold*, 1976, 53 A.D.2d 694, 385 N.Y.S.2d 123, appeal dismissed 43 N.Y.2d 841, 402 N.Y.S.2d 811, 373 N.E.2d 991.

Where confidentiality is important to a complainant or informer or witness, a promise of confidentiality by an agency will be honored and disclosure of identity denied. *MacHacek v. Harris*, 1980, 106 Misc.2d 388, 431 N.Y.S.2d 927.

40. — Investigative techniques

Manual of special prosecutor providing graphic illustration of the confidential techniques used in successful nursing home prosecutions, which procedures were not routine in the sense of fingerprinting or ballistic tests, and setting forth detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance of the law had been less than exemplary, the release of which might enable miscreants to alter their books and activities to minimize the possibility of being brought to task for criminal activities, were exempt from disclosure under this article. *Fink*

v. Lefkowitz, 1979, 47 N.Y.2d 567, 419 N.Y.S.2d 467, 393 N.E.2d 463.

Portions of special prosecutor's manual relating to investigating technique in the nursing home area which was merely a statement that auditors should pay particular attention to requests by nursing homes for medicaid reimbursement rate increases based upon projected increases in cost referred to a routine technique which would be used in any audit so that the provisions were subject to disclosure under this article. *Fink v. Lefkowitz*, 1979, 47 N.Y.2d 567, 419 N.Y.S.2d 467, 393 N.E.2d 463.

Reports of criminal investigation which would reveal nonroutine criminal investigative techniques for processing homicide scene were exempt from disclosure under Freedom of Information Law. *Allen v. Strojnowski*, 1987, 129 A.D.2d 700, 514 N.Y.S.2d 463.

Portions of administrative manual of New York State Police concerning procedures followed when employing electronic surveillance and monitoring devices during criminal investigations was exempt from disclosure under Freedom of Information Law exemption for records compiled for law enforcement purposes which, if disclosed, would reveal criminal investigative techniques or procedures except routine techniques and procedures. *De Zimm v. Connelie*, 1984, 102 A.D.2d 668, 479 N.Y.S.2d 871, affirmed 64 N.Y.2d 860, 487 N.Y.S.2d 320, 476 N.E.2d 646.

41. — Civil Investigations

City failed to demonstrate that materials sought for discovery, namely, entire investigatory file prepared by fire marshal's office in connection with fire in question, were exempt under this article. *Sciascia v. City of New York*, 1983, 96 A.D.2d 901, 466 N.Y.S.2d 74.

Sole beneficiaries of exemption provided under this section, which was intended to provide unimpaired access to governmental information, for information that is part of investigatory files compiled for law enforcement purposes are criminal law enforcement authorities, and thus building department could not predicate its refusal to permit examination of records compiled during investigation of complaint that construction work at certain town facilities was per-

formed improperly and in violation of town code on such exemption. *Young v. Town of Huntington*, 1976, 88 Misc.2d 32, 388 N.Y.S.2d 978.

42. — Particular records

Sealed records were required to be exempted from order which permitted newspaper reporter to inspect police records of traffic tickets issued and of lists of violations of traffic law. *Johnson Newspaper Corp. v. Stainkemp*, 1984, 61 N.Y.2d 958, 475 N.Y.S.2d 272, 463 N.E.2d 613.

Where, although Attorney General had commenced investigation of church based on letters of complaint received by it, such investigation resulted in no further action and there existed no present intention to commence any such further action, official records relating to church were not exempt from disclosure under this article as being documents compiled for law enforcement purposes. *Church of Scientology of New York v. State*, 1978, 61 A.D.2d 942, 403 N.Y.S.2d 224, affirmed 46 N.Y.2d 906, 414 N.Y.S.2d 900, 387 N.E.2d 1216.

Report of investigation made by state police as to cause of certain fire and results of certain polygraph tests constituted part of investigatory files compiled for law enforcement purposes and were therefore exempt from availability for public inspection and copying. *V.F.V. Const. Co., Inc. v. Kirwan*, 1976, 51 A.D.2d 753, 379 N.Y.S.2d 166.

Defendants, charged with prostitution and claimant discriminatory enforcement, were not entitled to discovery and inspection of statistical data relating to arrest and prosecution of persons for prostitution-related offenses since request therefor did not fall in any category of discoverable materials described in discovery rules and were not discoverable under Brady as it was not addressed to guilt or innocence; however, disclosure could be authorized under this article. *People v. Nelson*, 1980, 103 Misc.2d 847, 427 N.Y.S.2d 194.

This section's provision excepting from disclosure documents compiled for law enforcement purposes, disclosure of which would interfere with law enforcement investigations, identify confidential sources or disclose confidential information relating to criminal investigation

applied to statements, records, reports and memoranda made during internal investigation of state policeman who had been accused of receiving stolen property in course of his duties. *Petix v. Connelie*, 1979, 99 Misc.2d 343, 416 N.Y.S.2d 167.

In actions against the State for false arrest, and false imprisonment, the documents sought, viz., personnel records of state parole officer who was responsible for the arrests, were not exempt from disclosure as "compiled for law enforcement purposes," disclosure of which would either "interfere with law enforcement investigations" or have a chilling effect on an investigation by identifying "a confidential source or disclose confidential information relating to a criminal investigation." *Montes v. State*, 1978, 94 Misc.2d 972, 406 N.Y.S.2d 664.

Federal penitentiary inmate's petition to compel state police to furnish inmate with copies of all its files relating to inmate would be denied, in view of indication that such information constituted part of investigatory files compiled for law enforcement purposes and, thus, was exempt from availability for public inspection. *Marshall v. New York State Police*, 1977, 89 Misc.2d 529, 391 N.Y.S.2d 953.

Under this article all records are available to the public except that a municipality may deny access to records within certain categories, and in the case of criminal history records obtained from the New York State Department of Criminal Justice Services, a municipality must determine whether access is restricted by a Use and Dissemination Agreement between the municipality and the Department. 1980, Op. Atty. Gen. (Inf.) 268.

43. Danger to life or safety

Documents in correctional facility inmate's file based upon which it was determined that inmate was escape risk were fully exempted from disclosure under Freedom of Information Law, where all documents were interagency or intraagency materials exempted from disclosure, and some were materials the disclosure of which could endanger lives or safety of certain individuals, that were exempted under another provision. *Nalo v. Sullivan*, 1986, 125 A.D.2d 311,

509 N.Y.S.2d 53, appeal denied 69 N.Y.2d 612, 511 N.E.2d 86.

Correctional facility properly excluded, from the subject matter list of records of the Department of Correctional Services and of the records of correctional facility, material relating to location in facility of documents demanded under this article on basis that revelation would jeopardize prison security. *Fournier v. Fish*, 1981, 83 A.D.2d 979, 442 N.Y.S.2d 823.

Under Freedom of Information Law, public had right of access to names and business addresses of principals of applicants for license to operate check-cashing business and other names by which principals might be known; however, disclosure of home or residence addresses of principals could, in nature of business they conduct, expose applicants and their families to danger to life and safety and would be withheld. *American Broadcasting Companies, Inc. v. Siebert*, 1981, 110 Misc.2d 744, 442 N.Y.S.2d 855.

In light of Penal Law § 400.00, providing that application for any pistol license, if granted, shall be a public record, newspaper reporter was entitled to inspect approved pistol license applications on file with New York City Police Department, since neither executive privilege nor "official information" privilege was applicable, despite contentions that access would violate applicants' rights to privacy and might subject applicants to attacks by criminals for the weapons or valuables the weapons were carried to safeguard. *Kwitny v. McGuire*, 1979, 102 Misc.2d 124, 422 N.Y.S.2d 867, affirmed 77 A.D.2d 839, 432 N.Y.S.2d 149, affirmed 53 N.Y.2d 968, 441 N.Y.S.2d 659, 424 N.E.2d 546.

44. Inter-agency materials—Generally

Policy behind exception to this article for intraagency materials is encouragement of the open exchange of ideas among government policymakers, while still maintaining broad public access to agency records. *Ingram v. Axelrod*, 1982, 90 A.D.2d 568, 456 N.Y.S.2d 146.

While purpose of this article exemption for interagency or intra-agency material is to encourage free exchange of ideas among government policy-makers, it does not authorize an agency to throw a protective blanket over all information

by casting it in the form of an internal memo; question in each case is whether possession of contested document would be injurious to consultative functions of government that the privilege of nondisclosure protects. *Miracle Mile Associates v. Yudelson*, 1979, 68 A.D.2d 176, 417 N.Y.S.2d 142, appeal denied 48 N.Y.2d 706, 422 N.Y.S.2d 68, 397 N.E.2d 758.

Under this article an agency may refuse to produce material integral to agency's deliberative process and which contains opinions, evaluations, deliberations, policy formulations, proposals, conclusions, recommendations or other subjective matter. *Steele v. New York State Dept. of Health*, 1983, 119 Misc.2d 963, 464 N.Y.S.2d 925.

45. — Statistical or factual data

Reference in former section 88 of this article to "tabulations made by or for agency" and limited exception in this section for "inter-agency or intra-agency materials which are not: (i) statistical or factual tabulations" make it clear that relation of information sought to board of cooperative educational services is not a pre-requisite to obtaining data from that agency. *Doolan v. Board of Co-op Educational Services, Second Supervisory Dist. of Suffolk County*, 1979, 48 N.Y.2d 341, 422 N.Y.S.2d 927, 398 N.E.2d 533.

Document prepared as joint study by city department of planning and city department of public safety to aid in planning placement of city fire stations fell within freedom of information law exemption protecting from disclosure interagency or intra-agency materials, predecisional memoranda or other non-final recommendations prepared to assist agency decision maker; however, statistical or factual tabulations or data contained in document had to be disclosed given Public Officers Law section providing that access should be provided to material in such a document that constitutes statistical or factual tabulations or data. *MacRae v. Dolce*, 1987, 515 N.Y.S.2d 295.

Petitioner was entitled to access to those portions of Department of Health-prepared report relating to chronology of events surrounding the death of petitioner's husband, analysis of records, ambulance records, list of interviews,

and reports of interviews, since those portions were strictly factual in nature and were thus disclosable despite the intra-agency materials exception. *Ingram v. Axelrod*, 1982, 90 A.D.2d 568, 456 N.Y.S.2d 146.

Mere fact that some of tabular data might be an estimate of recommendation does not convert it into expression of opinion or naked argument for or against certain position, and such tabular data is not excluded from disclosure under this article. *Polansky v. Regan*, 1981, 81 A.D.2d 102, 440 N.Y.S.2d 356.

Documents relating to city's home-stead program were subject to disclosure under this article, even though constituting interagency or intraagency materials, where documents contained factual data and/or determinations of final policy or decisions. *Syracuse United Neighbors v. City of Syracuse*, 1981, 80 A.D.2d 984, 437 N.Y.S.2d 466, appeal dismissed 55 N.Y.2d 995, 449 N.Y.S.2d 201, 434 N.E.2d 270.

Fact that a recommendation is drafted in statistical form does not result in a magical transformation altering its nature so that it is no longer specifically exempted from the relevant discovery provisions of the Freedom of Information Law, this article, by the regulation, 9 NYCRR 145.1(2), exempting "opinions, policy options and recommendations" from discoverable statistical or factual tabulations. *Delaney v. Del Bello*, 1978, 62 A.D.2d 281, 405 N.Y.S.2d 276.

Mere fact that a statistical or factual tabulation forms the basis for a subsequent opinion does not mean that the tabulation is not subject to discovery under this article; fact that the document is part of the "deliberative" process is irrelevant since this section makes the back up factual or statistical information to a final decision available to the public and there is no statutory requirement that such data be limited to "objective" information. *Dunlea v. Goldmark*, 1976, 54 A.D.2d 446, 389 N.Y.S.2d 423, affirmed 43 N.Y.2d 754, 401 N.Y.S.2d 1010, 372 N.E.2d 798.

Material, consisting of expert appraisal opinions prepared by state and Metropolitan Transportation Authority for negotiation or litigation of condemnation claims, did not fit into any one of categories of information available for inspection

and copying under this section and specifically did not consist of statistical or factual data or internal or external audits and, thus, petitioners, who were litigants in condemnation proceedings, would not be entitled to obtain such appraisal opinions. *Novack v. Schuler*, 1976, 88 Misc.2d 796, 389 N.Y.S.2d 223.

46. — Instructions to staff

Failure of city to establish that records of police radio communications did not contain "instructions to staff that affect the public" entitled broadcasting company to access to tape recordings of police broadcasts relating to investigation of robbery and to arrest of suspect. *Buffalo Broadcasting Co., Inc. v. City of Buffalo*, 1987, 126 A.D.2d 983, 511 N.Y.S.2d 759.

47. — Final policy or determination

Memorandum prepared by a public agency for internal use addressing a position it might take in pending or prospective collective negotiations to which it was a party was not a "final determination" by the agency and therefore it was exempt from access under Freedom of Information Law. *Kheel v. Ravitch*, 1984, 62 N.Y.2d 1, 475 N.Y.S.2d 814, 464 N.E.2d 118.

Panel and subcommittee recommendation and council approval forms, with exception of comments by panel or subcommittee, represented final agency determinations of State Council on the Arts which were required to be furnished to citizen under Freedom of Information Law. *Bray v. Mar*, 1984, 105 A.D.2d 311, 482 N.Y.S.2d 759.

Postdecisional memoranda and reports effectively explain basis for agency policy and action and, thus, are of vital concern to public and are subject to disclosure under Freedom of Information Law. *Kheel v. Ravitch*, 1983, 93 A.D.2d 422, 462 N.Y.S.2d 182, affirmed 62 N.Y.2d 1, 475 N.Y.S.2d 814, 464 N.E.2d 118.

Copies of records on which the director of the temporary release program made his final determination were "intra-agency materials" which were exempt from disclosure provisions of this article. *Schumate v. Wilson*, 1982, 90 A.D.2d 832, 456 N.Y.S.2d 11.

Intra-agency memoranda concerning investigation of probation officer's performance, notes and communications made in preparation of her disciplinary hearing, and transcript of the hearing were predecisional intra-agency memoranda that were not reflective of final agency policy or determinations, and thus such documents were exempt from disclosure under this article. *Sinicropi v. Nassau County*, 1980, 76 A.D.2d 832, 428 N.Y.S.2d 312, appeal denied 51 N.Y.2d 704, 432 N.Y.S.2d 1028, 411 N.E.2d 797.

Where documents prepared by or for hearing panel which heard teacher's appeal from an unsatisfactory rating were not final agency determinations or policy but were prepared to assist the Chancellor in arriving at his decision and where the hearing panel's recommendations and reasoning were not binding on the Chancellor and there was no evidence that he adopted the panel's reasoning when he adopted the panel's conclusion, documents were "predecisional information" which were exempt from disclosure under this article. *McAulay v. Board of Ed. of City of New York*, 1978, 61 A.D.2d 1048, 403 N.Y.S.2d 116, affirmed 48 N.Y.2d 659, 421 N.Y.S.2d 560, 396 N.E.2d 1033.

Claimant, who had brought action against state for conscious pain and suffering and wrongful death alleging that parole of person, who while on parole from state hospital allegedly murdered claimant's father, was negligent, was entitled to discover only final determinations and dissenting opinions of members of governing body of parole board since all other records of board were confidential. *Dowling v. State*, 1975, 49 A.D.2d 982, 374 N.Y.S.2d 148.

Those portions of preliminary draft of Department of Environmental Conservation report which was inadvertently produced in response to Freedom of Information Law request fell within exemption for predecisional intraagency communications containing no final determination, as they did not affect public welfare in critical area of cleaning up of leaking inactive hazardous waste sites. *McGraw-Edison Co. v. Williams*, 1986, 133 Misc.2d 1053, 509 N.Y.S.2d 285.

In view of fact that the Civilian Complaint Review Board does not make final determinations in the matters which

come before it and that this section permits a police department to publish rules denying access to intra-agency records that are not final agency policy or determinations, the New York City Police Department had power to exempt records of proceedings before the CCRB from the operation of this article. *People v. Morales*, 1979, 97 Misc.2d 733, 412 N.Y.S.2d 310.

Under this article, director of the Division of Budget is required to make available for public inspection and copying such things as final opinions and orders made in the adjudication of cases, those statements of policy and interpretations which have been adopted by the agency, any documents or memoranda or data constituting statistical or factual tabulations which lead to formulation of statements of policy, and administrative manuals and instruction to staff which affect members of the public. *Dunlea v. Goldmark*, 1975, 85 Misc.2d 198, 380 N.Y.S.2d 496, modified on other grounds 54 A.D.2d 446, 389 N.Y.S.2d 423, affirmed 43 N.Y.2d 754, 401 N.Y.S.2d 1010, 372 N.E.2d 798.

Records of final disciplinary determinations against professionals licensed by the Education Department are public information under this article. *Op. Atty. Gen.* 84-F14.

48. — Materials prepared outside agency

Report of independent counsel, retained by county to evaluate possibility of recovery on a particular civil lawsuit, was intra-agency material which was exempt from disclosure under the Freedom of Information Law, despite fact that it was prepared by an extragovernmental person. *Austin v. Purcell*, 1984, 103 A.D.2d 827, 478 N.Y.S.2d 64.

49. — Opinions, recommendations, etc.

City was not barred from asserting that assessors' notations in real estate sales data lists furnished by city to State Board of Equalization and Assessment were exempt from disclosure as intra-agency expressions of opinion, despite prior decision directing SBEA to disclose such lists in case in which city had intervened, where city did not intervene until prior case was on appeal and was not afforded opportunity to assert that such

notations were exempt from disclosure. (Per dissenting opinion of Levine, J., in the Appellate Division, 102 A.D.2d 987, 477 N.Y.S.2d 867.) *City of New York v. New York State Bd. of Equalization and Assessment*, 1985, 65 N.Y.2d 656, 491 N.Y.S.2d 610, 481 N.E.2d 242.

State Council on the Arts was entitled to delete, as exempt from disclosure as "intra-agency materials," the subjective opinions, discussions and recommendations of staff, panel of outside experts and committees from materials furnished to petitioner under Freedom of Information Law. *Bray v. Mar*, 1984, 106 A.D.2d 311, 482 N.Y.S.2d 759.

Former owner of property permanently appropriated by the state of New York for highway purposes and subsequently offered to former owner after abandonment of the project was properly denied access to the state's appraisal reports and related data, which clearly constituted intra-agency materials containing expert opinions rendered for the state's use. *124 Ferry St. Realty Corp. v. Hennessy*, 1981, 82 A.D.2d 981, 440 N.Y.S.2d 419.

Memorandums, sent by county budget director to county executive regarding projected condition of county's general fund at end of year and sought to be inspected by county clerk under this article and county freedom of information regulations, were not a statistical or factual tabulation but instead contained only opinions, policy options or recommendations and thus were not subject to inspection by county clerk. *Bartlett v. Nassar*, 1979, 100 Misc.2d 904, 420 N.Y.S.2d 265.

50. — Particular records

The "intra-agency" exemption was not applicable to prohibit petitioner from reaching copies of certain police records, in that copies of speeding tickets and lists of traffic violations are not within category of materials involving subjective matters which are integral to the agency's deliberative process in formulating policy. *Johnson Newspaper Corp. v. Stainkamp*, 1983, 94 A.D.2d 825, 463 N.Y.S.2d 122, affirmed as modified on other grounds 61 N.Y.2d 958, 475 N.Y.S.2d 272, 463 N.E.2d 613.

Request of public education association for access to validity studies and job analysis prepared by board of examiners

of New York City school board in connection with certain specified examinations was properly denied under this section providing for privilege for certain interagency or intra-agency materials. *Public Educ. Ass'n v. Board of Examiners of Bd. of Educ. of City of New York*, 1983, 93 A.D.2d 838, 461 N.Y.S.2d 60.

All records which were prepared by employees of the Department of Health in the course of an investigation of complaint against nursing home, including the confidential medical records annexed to item "D," were "intra-agency materials" regarding the investigation by the Department and were exempt from disclosure under this article. *Miller v. New York State Dept. of Health*, 1983, 91 A.D.2d 975, 457 N.Y.S.2d 564.

"Use of Force" forms, although they were not personnel records used to evaluate performance of law enforcement officers, were exempt from disclosure as intra-agency materials which were not statistical or factual tabulations or data, instruction to staff that affected public or final agency policy or determinations. *Gannett Co., Inc. v. James*, 1982, 86 A.D.2d 744, 447 N.Y.S.2d 781, appeal denied 56 N.Y.2d 502, 450 N.Y.S.2d 1023, 435 N.E.2d 1099.

Under this section, correspondence between town and architects and engineers hired as consultants in connection with town's public improvement project was intra-agency communication not subject to disclosure unless correspondence was statistical or factual tabulation or data, instructions to staff, that might affect public, or final agency policy for determinations. *Sea Crest Const. Corp. v. Stubing*, 1981, 82 A.D.2d 546, 442 N.Y.S.2d 130.

School hockey official who had officiated at varsity level games for two years but was thereafter assigned only to junior varsity games was not entitled to obtain access to individual rating sheets prepared by high school coaches under authority of this article, in that such rating sheets were interagency documents which fell within exception of materials disclosable under this section. *Shaw v. Lerer*, 1982, 112 Misc.2d 260, 446 N.Y.S.2d 855.

Psychiatric reports prepared by Department of Mental Hygiene and provided to Division of Parole were not avail-

able from Division of Parole at request of inmate, being exempt from disclosure under freedom of information disclosure requirements as interagency reports or as materials prepared by another agency. *Jordan v. Hammock*, 1981, 109 Misc.2d 1052, 441 N.Y.S.2d 363, modified on other grounds 86 A.D.2d 725, 447 N.Y.S.2d 44.

Records of name and charges placed against tenured teacher by school district were "inter-agency or intra-agency materials," which were not statistical or factual tabulations or data, instructions to staff or final agency policy or determinations, so as to permit district to deny access to such records pursuant to this section contrary to contention that the materials were no longer intra-agency or interagency materials because the charges had been forwarded to teacher. *Herald Co. v. School Dist. of City of Syracuse*, 1980, 104 Misc.2d 1041, 430 N.Y.S.2d 460.

Residents of town were entitled under this article to have access to and inspection of field auditor's reports and work papers produced in connection with audit of the town despite contention that the materials were interagency materials which were not statistical or factual tabulations of data. *Polansky v. Regan*, 1980, 103 Misc.2d 696, 427 N.Y.S.2d 161, modified on other grounds 81 A.D.2d 102, 440 N.Y.S.2d 356.

Police department's decision with reference to taking action arising out of police officer's use of revolver against escaped prisoner who brought civil action arising out of shooting and data accumulated as basis of that decision were intra-agency materials exempt from disclosure under this article. *Hall v. Brandon*, 1978, 96 Misc.2d 318, 408 N.Y.S.2d 1006.

51. Examination questions or answers

Where Board of Law Examiners relinquished possession of multistate questions and examinee's answers in ordinary course prior to examinee's request for that information, examinee was not entitled to demand that material from Board. *Pasik v. State Bd. of Law Examiners*, 1982, 114 Misc.2d 397, 451 N.Y.S.2d 570, modified on other grounds 102 A.D.2d 395, 478 N.Y.S.2d 270.

Determination that civil service examination questions and answers which were intended to be reused had not been "finally administered" following initial use and thus were not available for inspection and copying by the public under this section was not arbitrary or capricious or in violation of the Law. *Social Service Emp. Union, Local 371 v. Cunningham*, 1981, 109 Misc.2d 331, 437 N.Y.S.2d 1005.

52. Privileges—Attorney client

Petitioner was not entitled, under this article to disclosure of a memorandum from an attorney for the Department of Health to its general counsel which was based upon communications between the attorney and Department's staff since such document was shielded by attorney-client privilege. *Steele v. New York State Dept. of Health*, 1983, 119 Misc.2d 963, 464 N.Y.S.2d 925.

53. — Executive

"Executive privilege" is confined to confidential communications between public officers, and to public officers, in the performance of their duties where the public interest requires that such confidential communications and the sources should not be divulged. *Kwitny v. McGuire*, 1979, 102 Misc.2d 124, 422 N.Y.S.2d 867, affirmed 77 A.D.2d 839, 432 N.Y.S.2d 149, affirmed 53 N.Y.2d 968, 441 N.Y.S.2d 659, 424 N.E.2d 546.

54. — Public Interest

Common-law interest privilege cannot protect from disclosure materials which this article requires to be disclosed. *Doolan v. Board of Co-op Educational Services, Second Supervisory Dist. of Suffolk County*, 1979, 48 N.Y.2d 341, 422 N.Y.S.2d 927, 398 N.E.2d 533.

"Public interest" privilege attached only to certain confidential communications between public officers in performance of their duties, and was not applicable in employee's action against private employer for alleged wrongful discharge in which no public official or governmental agency was involved. *Zampatori v. United Parcel Service*, 1983, 94 A.D.2d

PUBLIC OFFICERS LAW

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974, 463 N.Y.S.2d 977, on remand 125 Misc.2d 405, 479 N.Y.S.2d 470.

State Office of Alcoholism and Substance Abuse failed to sustain its burden of proving that portions of substance abuse surveys taken in schools in certain counties, together with the names of the schools in which the surveys were conducted, fell within statutory exception to disclosure under this article or that public interest would be jeopardized by disclosure, despite contention that such records were protected under common-law rule of privilege on ground that, when survey was taken, anonymity and confidentiality were guaranteed to those school districts which cooperated with the study. *Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, Division of Substance Abuse Services*, 1979, 99 Misc.2d 235, 415 N.Y.S.2d 780.

Since the mayor's committee on the judiciary in New York City performs a purely advisory function and its determinations have no legal effect, disappointed judicial candidate was not entitled to access to the records of the committee requested under either the 1974 or the 1978 Freedom of Information Law; even assuming the applicability of either statute, the public interest functions of the Committee and the necessity for confidentiality would bar access, under public interest privilege, to any information requested other than the names and addresses of the committee members. *Baumgarten v. Koch*, 1978, 97 Misc.2d 449, 411 N.Y.S.2d 487.

In order to preclude disclosure under this article there must be specific support for the claim of privilege; this requires the governmental agency to come forward and show that public interest would indeed be jeopardized by disclosure. *Dunlea v. Goldmark*, 1975, 85 Misc.2d 198, 380 N.Y.S.2d 496, modified on other grounds 54 A.D.2d 446, 389 N.Y.S.2d 423, affirmed 43 N.Y.2d 754, 401 N.Y.S.2d 1010, 372 N.E.2d 798.

55. Review

See *Notes of Decisions under section 89*.

FREEDOM OF INFORMATION LAW

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houses in conformity with the provisions of this article, pertaining to the availability, location and nature of records, including, but not limited to:

- (a) the times and places such records are available;
- (b) the persons from whom such records may be obtained;
- (c) the fees for copies of such records, which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law.

2. The state legislature shall, in accordance with its published rules, make available for public inspection and copying:

- (a) bills and amendments thereto, fiscal notes, introducers' bill memoranda, resolutions and amendments thereto, and index records;
- (b) messages received from the governor or the other house of the legislature, and home rule messages;
- (c) legislative notification of the proposed adoption of rules by an agency;
- (d) [Eff. until Jan. 1, 1989. See, also, par. (d) below.] members' code of ethics statements;
- (d) [Eff. Jan. 1, 1989. See, also, par. (d) above.] transcripts or minutes, if prepared, and journal records of public sessions including meetings of committees and subcommittees and public hearings, with the records of attendance of members thereat and records of any votes taken;
- (e) [Eff. until Jan. 1, 1989. See, also, par. (e) below.] transcripts or minutes, if prepared, and journal records of public sessions including meetings of committees and subcommittees and public hearings, with the records of attendance of members thereat and records of any votes taken;
- (e) [Eff. Jan. 1, 1989. See, also, par. (e) above.] internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;

- (f) [Eff. until Jan. 1, 1989. See, also, par. (f) below.] internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;

§ 88. Access to state legislative records

1. The temporary president of the senate and the speaker of the assembly shall promulgate rules and regulations for their respective

(f) [Eff. Jan. 1, 1989. See, also, par. (f) above.] administrative staff manuals and instructions to staff that affect members of the public;

(g) [Eff. until Jan. 1, 1989. See, also, par. (g) below.] administrative staff manuals and instructions to staff that affect members of the public;

(g) [Eff. Jan. 1, 1989. See, also, par. (g) above.] final reports and formal opinions submitted to the legislature;

(h) [Eff. until Jan. 1, 1989. See, also, par. (h) below.] final reports and formal opinions submitted to the legislature;

(h) [Eff. Jan. 1, 1989. See, also, par. (h) above.] final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the legislature;

(i) [Eff. until Jan. 1, 1989. See, also, par. (i) below.] final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the legislature;

(i) [Eff. Jan. 1, 1989. See, also, par. (i) above.] any other files, records, papers or documents required by law to be made available for public inspection and copying.

(j) [Repealed eff. Jan. 1, 1994] external audits conducted pursuant to section ninety-two of the legislative law and schedules issued pursuant to subdivision two of section ninety of the legislative law;

(k) [Eff. until Jan. 1, 1994] any other files, records, papers or documents required by law to be made available for public inspection and copying.

3. Each house shall maintain and make available for public inspection and copying: (a) a record of votes of each member in every session and every committee and subcommittee meeting in which the member votes;

(b) a record setting forth the name, public office address, title, and salary of every officer or employee; and

(c) a current list, reasonably detailed, by subject matter of any records required to be made available for public inspection and copying pursuant to this section.

(Added L.1977, c. 933, § 1; amended L.1987, c. 813, § 6; L.1987, c. 814, § 13.)

Historical Note

Codification. Former par. (j) of subd. 2 was redesignated par. (i) by L.1987, c. 813, § 6, eff. Jan. 1, 1989. Said former par. (j) was also redesignated par. (k) by L.1987, c. 814, § 13, eff. Aug. 7, 1987, without reference to the redesignation by L.1987, c. 813, § 6. In order to effectuate the redesignation by L.1987, c. 813, § 6, on Jan. 1, 1989, par. (k), as redesignated by L.1987, c. 814, § 13, will be redesignated par. (i).

1987 Amendments. Subd. 2, par. (d). L.1987, c. 813, § 6, eff. Jan. 1, 1989, redesignated former par. (e) as par. (d) and repealed former par. (d), which related to public inspection and copying of code of ethics statements of members of the state legislature.

Subd. 2, pars. (e) to (i). L.1987, c. 813, § 6, eff. Jan. 1, 1989, redesignated former pars. (e) to (j) as pars. (d) to (i).

Subd. 2, par. (j). L.1987, c. 814, § 13, eff. Aug. 7, 1989, without reference to the changes made by L.1987, c. 813, § 6, added par. (j) and redesignated former par. (j) as par. (k). For expiration of this amendment, see note below. See, also, Codification note above.

L.1987, c. 813, § 6, eff. Jan. 1, 1989, redesignated former par. (j) as par. (i). See Codification note above.

Subd. 2, par. (k). L.1987, c. 814, § 13, eff. Aug. 7, 1987, without reference to the changes made by L.1987, c. 813, § 6, redesignated former par. (j) as par. (k). For expiration of this amendment, see note below. See, also, Codification note above.

Effective Date of Amendment by L.1987, c. 814; Expiration. Section 14 of L.1987, c. 814, provided: "This act [which, in addition to the changes noted below, added State Finance Law § 2-a, amended this section and section 87, amended State Finance Law §§ 8 and 112, and enacted provisions set out as notes under State Finance Law § 2-a]

shall take effect immediately [Aug. 7, 1987] and shall remain in full force and effect until January first, nineteen hundred ninety-four at which time this act shall be deemed repealed, provided that sections seven [adding Executive Law §§ 950 to 954], nine [amending Judiciary Law § 211], ten [adding Judiciary Law §§ 249 to 249-c], and eleven [adding Public Authorities Law §§ 2930 to 2932] of this act shall take effect April first, nineteen hundred eighty-nine, and section eight [adding Legislative Law §§ 89 to 92 and renumbering State Finance Law former article 6 as 7] of this act shall take effect January first, nineteen hundred ninety, except that commencing on and after the date on which this act shall have become a law [Aug. 7, 1987], the state comptroller, state agencies, covered authorities, the state legislature and the judiciary are authorized to take all actions necessary to implement their respective internal control and audit responsibilities under such sections of this act, and provided that paragraph a of subdivision two-b of section eight of the state finance law, as added by section five of this act, and subdivision one of section nine hundred fifty-three and subdivision one of section nine hundred fifty-four of the executive law, as added by section seven of this act, and subdivision one of section two hundred forty-nine-c of the judiciary law, as added by section ten of this act, shall take effect April first, nineteen hundred eighty-nine, and subdivision one of section ninety-two of the legislative law, as added by section eight of this act, shall take effect January first, nineteen hundred ninety."

Effective Date. Section effective Jan. 1, 1978, pursuant to L.1977, c. 933, § 8.

Derivation. Former section 88, in part. For history, see Derivation note set out under section 87.

Cross References

Custody of legislative papers and documents, see Legislative Law § 22.
Destruction and reproduction of books and records of the senate and of the assembly, see Legislative Law §§ 22-a, 22-b.

Law Review Commentaries

Codification of government privileges in New York: official information and identity of informers. 44 Albany L.Rev. 279 (1980).

New York's Freedom of Information Law, disclosure under the CPLR, and the common-law privilege for official information: conflict and confusion over "the people's right to know". 33 Syracuse L.Rev. 615 (1982).

Library References

American Digest System

Matters subject to disclosure, see Records ¶54 et seq.

Encyclopedia

Records subject to inspection, see C.J.S. Records § 36.

§ 89. General provisions relating to access to records; certain cases

The provisions of this section apply to access to all records, except as hereinafter specified:

1. (a) The committee on open government is continued and shall consist of the lieutenant governor or the delegate of such officer, the secretary of state or the delegate of such officer, whose office shall act as secretariat for the committee, the commissioner of the office of general services or the delegate of such officer, the director of the budget or the delegate of such officer, and seven other persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly. The persons appointed by the temporary president of the senate and the speaker of the assembly shall be appointed to serve, respectively, until the expiration of the terms of office of the temporary president and the speaker to which the temporary president and speaker were elected. The four persons presently serving by appointment of the governor for fixed terms shall continue to serve until the expiration of their respective terms. Thereafter, their respective successors shall be appointed for terms of four years. The member representing local government shall be appointed for a term of four years, so long as such member shall remain a duly elected officer of a local government. The committee shall hold no less than two meetings annually, but may meet at any time. The members of the committee shall be entitled to reimbursement for actual expenses incurred in the discharge of their duties.

(b) The committee shall:

- i. furnish to any agency advisory guidelines, opinions or other appropriate information regarding this article;
- ii. furnish to any person advisory opinions or other appropriate information regarding this article;
- iii. promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article;
- iv. request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties; and

v. report on its activities and findings regarding articles six and seven of this chapter, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth.

2. (a) The committee on public access to records ~~may~~ **SEE ATTACHED AMENDMENTS** 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 commercial 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; 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.

(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.

2-a. 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.

3. Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. 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.

4. (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two.

(c) The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:

- i. the record involved was, in fact, of clearly significant interest to the general public; and
- ii. the agency lacked a reasonable basis in law for withholding the record.

5. (a)(1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(2) The request for an exception shall be in writing and state the reasons why the information should be excepted from disclosure.

(3) Information submitted as provided in subparagraph one of this paragraph shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction.

(b) On the initiative of the agency at any time, or upon the request of any person for a record excepted from disclosure pursuant to this subdivision, the agency shall:

(1) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued;

(2) permit the person who requested the exception, within ten business days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception;

(3) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; copies of such determination shall be served upon the person, if any, requesting the record, the person

who requested the exception, and the committee on public access to records.

(c) A denial of an exception from disclosure under paragraph (b) of this subdivision may be appealed by the person submitting the information and a denial of access to the record may be appealed by the person requesting the record in accordance with this subdivision:

(1) Within seven business days of receipt of written notice denying the request, the person may file a written appeal from the determination of the agency with the head of the agency, the chief executive officer or governing body or their designated representatives.

(2) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination shall be served upon the person, if any, requesting the record, the person who requested the exception and the committee on public access to records. The notice shall contain a statement of the reasons for the determination.

(d) A proceeding to review an adverse determination pursuant to paragraph (c) of this subdivision may be commenced pursuant to article seventy-eight of the civil practice law and rules. Such proceeding must be commenced within fifteen days of the service of the written notice containing the adverse determination provided for in subparagraph two of paragraph (c) of this subdivision.

(e) The person requesting an exception from disclosure pursuant to this subdivision shall in all proceedings have the burden of proving entitlement to the exception.

(f) Where the agency denies access to a record pursuant to paragraph (d) of subdivision two of section eighty-seven of this article, the agency shall have the burden of proving that the record falls within the provisions of such exception.

(g) Nothing in this subdivision shall be construed to deny any person access, pursuant to the remaining provisions of this article, to any record or part excepted from disclosure upon the express written consent of the person who had requested the exception.

(h) As used in this subdivision the term "agency" or "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.

6. 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.

7. 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 of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of any officer, employee or retiree of such employer, if such name or home address is otherwise available under this article.

(Added L.1977, c. 933, § 1; amended L.1981, c. 890, §§ 2, 3; L.1981, c. 975, § 1; L.1982, c. 73, § 2; L.1983, c. 80, § 2; L.1983, c. 652, § 3; L.1983, c. 783, § 1; L. 1984, c. 33, § 1; L. 1984, c. 227, § 1.)

8. See Suff. - violation

Historical Notes

1984 Amendments. Subd. 1, par. (a). L.1984, c. 33, § 1, eff. Mar. 27, 1984, in sentence beginning "The committee shall" substituted "two" for "four" and inserted ", but may meet at any time".

Subd. 4, par. (a). L.1984, c. 227, § 1, eff. June 19, 1984, in sentence beginning "Except as provided" substituted "ten business days" for "seven business days"; and in sentence beginning "In addition, each" substituted "open government" for "public access to records" and "when received by the agency and the ensuing" for "and the".

1983 Amendments. Subd. 1, par. (a). L.1983, c. 80, § 2, eff. May 10, 1983, in sentence beginning "The committee on" substituted "open government" for "public access to records".

Subd. 1, par. (b), subpar. v. L.1983, c. 80, § 2, eff. May 10, 1983, inserted "regarding articles six and seven of this chapter".

Subd. 2-a. L.1983, c. 652, § 3, eff. Sept. 1, 1984, added subd. 2-a.

Subd. 7. L.1983, c. 783, § 1, added subd. 7.

1982 Amendment. Subd. 4, par. (c). L.1982, c. 73, § 2, added par. (c).

1981 Amendments. Subd. 1, par. (a). L.1981, c. 975, § 1, eff. Jan. 1, 1982, in sentence beginning "The committee on" substituted "seven" for "six", inserted "except the representative of local governments as set forth herein," substi-

tuted "five" for "four" and inserted "one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government," and added sentence beginning "The member representing".

Subd. 3. L.1981, c. 890, § 2, in sentence beginning "Each entity subject" inserted ", including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section".

Subd. 4, pars. (a), (b). L.1981, c. 890, § 2, inserted references to subdivision five of this section.

Subds. 5, 6. L.1981, c. 890, § 3, added subd. 5 and redesignated former subd. 5 as 6.

Effective date and Applicability of Amendment by—L.1983, c. 783. Section 2 of L.1983, c. 783, provided: "This act [amending this section] shall take effect immediately [July 30, 1983] and shall apply to any request pursuant to the public officers law for which there is no final determination, including judicial review."

—L.1982, c. 73. Section 3 of L.1982, c. 73, provided: "This act [amending this section and section 87] shall take effect on the fifteenth day of October next succeeding the date on which it shall have become a law [May 3, 1982] and shall

apply only to actions commenced on or after such date."

—**L.1981, c. 890.** Section 4 of L.1981, c. 890, provided: "This act [amending this section and section 87] shall take effect January first, nineteen hundred eighty-two, and shall apply only to records submitted on or after such date, except that the provisions of section one of this act [amending section 87] shall take effect immediately [July 31, 1981]."

Effective Date. Section effective Jan. 1, 1978, pursuant to L.1977, c. 933, § 8.

Derivation. Former section 88, in part; former section 66. For history of said former section 88, see Derivation note set out under section 87. Said former section 66, L.1909, c. 51, was repealed by L.1974, c. 578, § 1.

Former Section 89. Section, which related to severability, was added L.1974, c. 578, § 2; repealed by L.1977, c. 933, § 1, and is now covered by section 90.

Personal Information in Agency Records; Report; Access Procedure. L.1980, c. 677, §§ 1 to 4, eff. June 26, 1980, provided:

"§ 1. Legislative declaration. The legislature declares as follows:

"(a) The right to personal privacy is a fundamental right guaranteed by the Constitution of the United States.

"(b) The past decade has seen a massive increase in the number, size and complexity of data banks and information systems maintained by the agencies, departments, bureaus, and commissions of the state of New York.

"(c) Many of these data banks and information systems contain information about individuals, including information of the most personal and sensitive nature.

"(d) The existence of these data banks and information systems and the increasingly sophisticated technology that makes them possible pose a potential threat to the right of privacy.

"(e) The legislature seeks to assess the extent, if any, to which such a threat now exists so as to determine what legislative action, if any, is necessary to regulate the creation, maintenance and use of these systems.

"(f) In order to make such an assessment, the legislature needs to gather information on each system now in existence under the aegis of the state of New York.

"§ 2. Definitions. (a) Agency. The term "agency" means any state board, bureau, commission, council, department, public authority, division, office or other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary, the state legislature or any unit of local government.

"(b) Person. The term "person" means any individual about whom personal information has been collected by an agency.

"(c) Personal information. The term "personal information" means any information concerning a person which, because of name, identifying number, symbol, mark or other identifying particular or combination of particulars, can be particularly associated with that person.

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

"(e) System of records. The term "system of records" means any group of records pertaining to one or more persons from which personal information may be retrieved by use of the name or other identifying particular or combination of particulars of a person.

"(f) Disclosure. The term "disclosure" means revealing, releasing, transferring, disseminating or otherwise communicating all or any part of any record orally, in writing or by electronic or any other means.

"(g) Committee. The term "committee" means the committee on public access to records as constituted pursuant to subdivision one of section eighty-nine of the public officers law.

"§ 3. Notices to the committee. Each agency that maintains a system of records shall, on or before December

first, nineteen hundred eighty, prepare and submit to the committee a notice describing each of its systems of records. The notice shall specify clearly and fully, for each system described, each of the following:

"(i) The name of the agency and the subdivision within the agency that maintains a system of records, and the name or title of the system of records in which such information is maintained;

"(ii) The name and business address of the official within the agency who is responsible for the system of records;

"(iii) The procedures that a person may follow to learn if the system of records contains personal information pertaining to that person;

"(iv) The procedures by which a person may gain access to a system of records containing personal information pertaining to such person and the procedure by which a person may seek to amend or correct its content;

"(v) The categories and the approximate number of persons on whom records are maintained in the system of records;

"(vi) The purposes for which each category of information within the system of records is collected and maintained;

"(vii) The uses made of each category of information within the system of records by the agency itself;

"(viii) The disclosures of personal information within the system of records that the agency regularly makes or authorizes outside the agency for each category of information, including the identity of any federal, state or local agencies to which such disclosures are made and

the categories of private persons or entities to which such disclosures are made;

"(ix) A statement indicating whether the agency makes or authorizes disclosures other than those enumerated pursuant to subdivision (viii) hereof, and if so, the means by which the agency determines whether such disclosures should be made or authorized and how often such disclosures are made or authorized;

"(x) The general or specific statutory authority for the collection and maintenance of each category of information within the system of records;

"(xi) Any policies governing retention and disposal of information within the system of records;

"(xii) Each and every source, if the source is not the person, for each category of information within the system of records;

"(xiii) The agency responsible, if other than the state of New York, for the funding of the system of records and a listing of any contracts or agreements entered into for the provision of such funding.

"§ 4. Functions of the committee. (a) The committee shall provide guidance to agencies, at their request, in the preparation by the agencies of the notices required by section three hereof. The committee shall prescribe the form of the notices to be prepared by the agencies.

"(b) The committee shall submit to the governor and the legislature, on or before March 15, 1981, a compilation of the agency notices prepared pursuant to section three hereof and shall cause that compilation to be published and made available to the public within thirty days thereafter."

Cross References

Access to—

Information contained in the statewide central register of child abuse and maltreatment, see Social Services Law § 424-a.

Patient information, see Public Health Law § 18.

Records containing personal information, see section 95.

Confidentiality of—

Adoption information, see Public Health Law §§ 4138-b, 4138-c.

Case files, etc., of community dispute resolution centers, see Judiciary Law § 849-b.

Clinical records of mental health patients, see Mental Hygiene Law § 33.13.

Information from state tax commission furnished to the department of social services regarding overpayments of tax, see Social Services Law § 136-a.

Confidentiality of—Continued

- Personnel records of police officers, firefighters and correction officers, see Civil Rights Law § 50-a.
- Probation reports submitted to courts regarding discretionary relief from forfeitures and disabilities, see Correction Law § 702.
- Records and reports regarding abandoned, delinquent, neglected or dependent children, see Social Services Law § 372.
- Reports of professional misconduct to the state board of professional medical misconduct, see Public Health Law § 230.
- Student financial aid statements, see Education Law § 663.
- Protection of public welfare records, see Social Services Law § 136.

New York Codes, Rules and Regulations

- Unemployment insurance and employment service records not subject to provisions of this article, see 12 NYCRR 700.4.

Law Review Commentaries

- Codification of government privileges in New York: official information and identity of informers. 44 Albany L.Rev. 279 (1980).

Library References

American Digest System

- Matters subject to disclosure, see Records ⇨54 et seq.

Encyclopedia

- Records subject to inspection, see C.J.S. Records § 36.

United States Code Annotated

- Records maintained on individuals, see section 552a of Title 5, Government Organization and Employees.

WESTLAW Electronic Research

- See WESTLAW guide following the Explanation pages of this volume.

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Notes of Decisions

1. Personal privacy, invasion of—Generally

Records of the State Industrial Commission showing the amount of a recipient's unemployment insurance benefits and the period of time during which those benefits were received were exempted from public access under this article as an unwarranted invasion of personal privacy, in absence of written consent of person to whom information pertained. *Messina v. Lufthansa German Airlines*, 1981, 83 A.D.2d 831, 441 N.Y.S.2d 557.

2. — Employment records

"Lost Time Report," kept as police record of sick time taken by particular officer, was not exempt from Freedom of Information Law disclosure to investigative reporter, attempting to establish that certain members of city police force were abusing sick leave privileges, on ground that disclosure would be unwarranted invasion of officer's privacy under Public Officers Law, as report was neither employment nor medical history, and assertion that officer would suffer "economic or personal hardship" was conclusory and not supported by facts. *Capital Newspapers Div. of Hearst Corp. v. Burns*, 1986, 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665.

Documents forwarded to Monroe County Civil Service Commission by respective law enforcement agencies were personnel records used to evaluate performance for purposes of determining continued employment or promotion and were thus exempt from disclosure. *Gannett Co., Inc. v. James*, 1982, 86 A.D.2d 744, 447 N.Y.S.2d 781, appeal denied 56 N.Y.2d 502, 450 N.Y.S.2d 1023, 435 N.E.2d 1099.

Disclosure of names, job titles and salary levels of county employees who were terminated due to substantial budget reductions was not exempt under this article on ground that information sought was of a personal nature, or that type of records sought were not relevant and essential to ordinary work of agency and

in absence of documentation of economic or personal hardship. *Gannett Co., Inc. v. Monroe County*, 1977, 59 A.D.2d 309, 399 N.Y.S.2d 534, affirmed 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151.

Information provided by employer to Department of Labor concerning application for unemployment compensation was exempt from disclosure under this article, and, thus, employee, who brought defamation action against employer, was not entitled to obtain from the Department the employer's allegedly defamatory letter accusing her of refusing work offered to her. *Clegg v. Bon Temps, Ltd.*, 1982, 114 Misc.2d 805, 452 N.Y.S.2d 825.

Disclosure of written reprimands of police officers, contained in report concerning investigation into alleged wrongdoing involving on-duty employment of city police officers, would not result in an unwarranted invasion of personal privacy and would not harm overall public interest, and thus such reprimands should be made available for public inspection and copying under this article. *Farrell v. Village Bd. of Trustees, of Village of Johnson City*, 1975, 83 Misc.2d 125, 372 N.Y.S.2d 905.

3. — Medical records

Patient records and interviews with patients and with other doctors obtained by State Board for Professional Medical Conduct during investigation of charges of professional misconduct against petitioner doctor were exempt from public access under this article, though the patient records related to doctor's treatment of his patients; standing of one seeking access to records was as a member of public and such status would be neither enhanced nor restricted because he was litigant or potential litigant, and, unless doctor proved patients expressly waived confidentiality, petitioner would not meet burden of establishing exemption from disclosure merely by showing that patient records were involved.

John P. v. Whalen, 1981, 54 N.Y.2d 89, 444 N.Y.S.2d 598, 429 N.E.2d 117.

The disclosure of medical histories of paid firemen of a fire district without permission, generally, would constitute an unwarranted invasion of personal privacy and be improper. *Op.State Compt.* 82-204.

4. — Names and addresses

Where personal injury law firm stated as its intention, in seeking access to motor vehicle accident reports maintained by police department, the direct mail solicitation of accident victims, privacy interests of accident victims required that their names and addresses be deleted from the reports made available for inspection, pursuant to section of freedom of information law [McKinney's Public Officers Law § 87, subd. 2(b)]. *Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse*, 1985, 65 N.Y.2d 294, 491 N.Y.S.2d 289, 480 N.E.2d 1071.

In light of recent amendment to this section, association of retired police officers was not entitled under this article to obtain access to names and addresses of all retirees of city police department who were currently receiving pensions and annuities. *New York Veteran Police Ass'n v. New York City Police Dept. Article I Pension Fund*, 1983, 61 N.Y.2d 659, 472 N.Y.S.2d 85, 460 N.E.2d 226.

Disclosure of certain standardized reading and mathematics test scores, in a "scrambled" order and with names deleted, would protect privacy of students, provide parent with records which she sought, and impose no onerous burden upon school district; therefore, trial court erred in failing to order disclosure of test scores on ground that in their existing order the scores would be identifiable to some students through correlation to alphabetical list. *Kryston v. Board of Ed., East Ramapo Central School Dist.*, 1980, 77 A.D.2d 896, 430 N.Y.S.2d 688.

Petitioner's application to compel power authority to disclose names and addresses of property owners on or over whose land proposed power transmission line would pass would be granted, as petitioner's purpose for obtaining list, which was to provide all involved owners with relevant information con-

cerning manner in which use of high voltage transmission lines might affect use and enjoyment of their property, was endowed with public interest, particularly in view of policy considerations inherent in this article. *Smigel v. Power Authority*, 1976, 54 A.D.2d 668, 387 N.Y.S.2d 962.

Listing of inmates, who were housed in area primarily used for housing inmates segregated from general population for punitive reasons and who may have witnessed assault on inmate by corrections officers, was not exempt from disclosure under Freedom of Information Law on the basis that disclosure would constitute unwarranted invasion of inmates' personal privacy in light of fact that state had yet to recognize absolute right to privacy and names sought to be elicited were those of convicted felons who had been incarcerated in state prison. *Bensing v. LeFevre*, 1986, 133 Misc.2d 198, 506 N.Y.S.2d 822.

Where petitioner did not offer any explanation or reason for request that college provide him with names and addresses of students, petitioner failed to show that names and addresses were not sought for commercial or fund-raising purposes, and thus access could properly be withheld pursuant to this section. *Krauss v. Nassau Community College*, 1983, 122 Misc.2d 218, 469 N.Y.S.2d 553.

Release of first names and addresses of those persons filing complaints with Division of Human Rights to private attorney would have been a clearly unwarranted invasion of personal privacy and therefore such information was exempt from disclosure under New York Freedom of Information Law. *Goodstein v. Shaw*, 1983, 119 Misc.2d 400, 463 N.Y.S.2d 162.

Sheriff acted properly in denying petitioner access to income executions on file in sheriff's department, where petitioner wanted names and addresses of judgment debtors in order to send them correspondence, so that it was not possible to delete identifying details, because information sought by petitioner thus amounted to an unwarranted invasion of personal privacy under section 89, excepting from disclosure records or portions thereof that if disclosed would constitute an unwarranted invasion of personal privacy. *Application of Nicholas*, 117 Misc.2d 630, 458 N.Y.S.2d 858.

Although names and public office addresses of those persons who created or formulated questions on Bar examination were within ambit of this article, disclosure of their home addresses, educational and employment backgrounds and ages would be unwarranted invasion of personal privacy and therefore that information was exempt from disclosure. *Pasik v. State Bd. of Law Examiners*, 1982, 114 Misc.2d 397, 451 N.Y.S.2d 570, modified on other grounds 102 A.D.2d 395, 478 N.Y.S.2d 270.

City's teachers' retirement system would be required to make available for copying a list of its present beneficiaries to not-for-profit corporation whose principal purpose was to investigate legislation and other governmental action and decisions affecting pension funds administered by retirement systems, since retirement system failed to meet its burden of establishing that demanded information would be used for commercial or fund-raising purposes or that information was of a personal nature and that disclosure of the information would result in economic or personal hardship to retirees. *New York Teachers Pension Ass'n, Inc. v. Teachers' Retirement System of City of New York*, 1979, 98 Misc.2d 1118, 415 N.Y.S.2d 561, affirmed 71 A.D.2d 250, 422 N.Y.S.2d 389.

Petitioner, which ran review course preparatory to the state certified public accountants examination, could not compel education commissioner to continue his long-established practice of supplying petitioner with lists of exam applicants for use in its business, as this section provides that an agency may delete identifying details to prevent an unwarranted invasion of personal privacy, and the legislature has defined "an unwarranted invasion of personal privacy" to include the sale or release of lists of names and addresses if such a list would be used for private, commercial or fund-raising purposes. *Person-Wolinsky Associates, Inc. v. Nyquist*, 1975, 84 Misc.2d 930, 377 N.Y.S.2d 897.

5. — Economic or personal hardship

Names, job titles and salary levels of former county employees who were terminated as a result of budget reductions were subject to disclosure under this section, and exception was not applicable

even if disclosure of such items would result in personal or economic hardship to the terminated employees since the records sought were relevant or essential to the ordinary work of the agency or municipality. *Gannett Co., Inc. v. Monroe County*, 1978, 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151.

Interest and status of petitioner seeking to compel the county department of health services to furnish him a full copy of written complaint made against adult home facility, including name of complainant, and manner in which disclosed information would be used by him was improper standard by which to determine economic or personal hardships as phrases were used in this section. *MacHacek v. Harris*, 1980, 106 Misc.2d 388, 431 N.Y.S.2d 927.

6. — Relevance to work of agency

Records regarding the termination of employees and their removal from the payroll are, by their very nature, relevant and essential to the ordinary work of county, and thus exception in this article applicable where records are not relevant or essential to the ordinary work of the agency or instrumentality is not in such case applicable. *Gannett Co., Inc. v. Monroe County*, 1977, 59 A.D.2d 309, 399 N.Y.S.2d 534, affirmed 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151.

Mere fact that agency which seeks disclosure of information pursuant to this article, would conclude, after receiving such information, that the information should not be acted on does not make the information "irrelevant to the work of the agency" so as to render the information exempt from disclosure to the agency. *Pooler v. Nyquist*, 1976, 89 Misc.2d 705, 392 N.Y.S.2d 948.

7. — Deletion of identifying details

Statutory authority to delete identifying details as means to remove records from what would otherwise be exception to disclosure mandated by this article extends only to records whose disclosure without deletion would constitute unwarranted invasion of personal privacy, and does not extend to records excepted in consequence of specific exemptions from disclosure by state or federal statute. *Short v. Board of Managers of Nassau County Medical Center*, 1982, 57

N.Y.2d 399, 456 N.Y.S.2d 724, 442 N.E.2d 1235.

Such identifying information as names, addresses and social security numbers would be deleted from documents disclosed under Freedom of Information Law [McKinney's Public Officers Law §§ 87, subd. 2(6), 89, subd. 2] containing curricula vitae of professional employees of college promoted to full professor in last five years, where deletion would not impede petitioner's ability to compare his credentials to those of other professional employees, but would protect individuals involved from unwarranted invasion of their personal privacy. *Harris v. City University of New York, Baruch College*, 1985, 114 A.D.2d 805, 495 N.Y.S.2d 175.

In proceedings by corporation to require Commissioner of Mental Hygiene and Attorney General to grant access to all files concerning petitioner and its affiliates and leadership, trial court's judgment granting such access adequately protected against inappropriate identification of confidential sources when it required deletions of names of third parties and names and addresses of third parties who had written letters to state officers complaining of petitioner. *Church of Scientology of New York v. State*, 1978, 61 A.D.2d 942, 403 N.Y.S.2d 224, affirmed 46 N.Y.2d 906, 414 N.Y.S.2d 900, 387 N.E.2d 1216.

Grievances and grievance decisions or dispositions with respect to grievances filed by registered nurses employed by hospital agency were discoverable under this article, despite contention that disclosure would constitute unwarranted invasion of personal privacy, but in order to balance legitimate rights and expectations of privacy of the grievants involved against the legitimate interest of competing union in obtaining disclosure, all personal identifying details would be redacted and deleted from the records produced. *United Federation of Teachers v. New York City Health and Hospitals Corp.*, 1980, 104 Misc.2d 623, 428 N.Y.S.2d 823.

8. Time for compliance

Petitioner's causes of action directed toward State Commissioner of Social Services' refusal to grant access to all copies of fair hearing decisions made by commissioner since Jan. 1, 1980 were

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properly dismissed, where commissioner rationally and reasonably complied with this section governing disclosure of records by offering to make voluminous records available to petitioner for his inspection and examination at commissioner's office on business days between 8:30 a.m. and 5:00 p.m. *Schanbarger v. New York State Com'r of Social Services*, 1984, 99 A.D.2d 621, 472 N.Y.S.2d 175, appeal dismissed 62 N.Y.2d 604, 478 N.Y.S.2d 1023, 467 N.E.2d 532.

Commission of Corrections chairman would have period of 120 days from date of service of copy of court order directing compliance with Freedom of Information Law, this article, in which to comply with the order. *Zanger v. Chinlund*, 1980, 106 Misc.2d 86, 430 N.Y.S.2d 1002.

9. Description of record

Inmate's request "to inspect and review any and all files or records kept on me and my number of identification of the New York State Department of Correctional Services" reasonably described the documents sought and disclosure provisions of the Freedom of Information Law could not be avoided on the basis of allegations that request would require review of thousands of records. *Konigsberg v. Coughlin*, 1986, 68 N.Y.2d 245, 508 N.Y.S.2d 393, 501 N.E.2d 1.

Since petitioner's request for access to copies of certain police records adequately identified the material sought, chief inspector lacked authority to require greater specificity and instead should have referred the issue of the records' discoverability to the entire committee, with his failure to do so legitimizing petitioner's Article 78 proceeding. *Johnson Newspaper Corp. v. Stainkamp*, 1983, 94 A.D.2d 825, 463 N.Y.S.2d 122, modified on other grounds 61 N.Y.2d 958, 475 N.Y.S.2d 272, 463 N.E.2d 613.

In proceeding seeking disclosure of certain documents, including publicly discussed memorandum relating to petitioner's performance as impartial arbitrator, special term should not have included broad direction in its judgment which required transportation authority to certify whether it was in possession of other records or documents so that petitioner might then determine whether additional disclosure would be sought, in

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that effect of disposition was to afford petitioner broad and unfettered disclosure, thereby circumventing required procedures under this article. *Kheel v. Ravitch*, 1983, 93 A.D.2d 422, 462 N.Y.S.2d 182, affirmed 62 N.Y.2d 1, 475 N.Y.S.2d 814, 464 N.E.2d 118.

Petitioner, after having been injured in subway and having filed a notice of claim with New York City Transit Authority, was not entitled, under provisions of this article, to all police and other records in matter in possession of transit authority, but petitioner was entitled to police reports upon payment of the appropriate fee. *Arzuaga v. New York City Transit Authority*, 1979, 73 A.D.2d 518, 422 N.Y.S.2d 689.

Description of material sought to be discovered under this section as "budget examiner's file" was not too vague since readily identifiable material was sought; although there were allegations that the files contained some material which should be exempt, there was no such showing as to establish that the public was to be denied access to the whole file. *Dunlea v. Goldmark*, 1976, 54 A.D.2d 446, 389 N.Y.S.2d 423, affirmed 43 N.Y.2d 754, 401 N.Y.S.2d 1010, 372 N.E.2d 798.

If agency has previously identified class or category of documents in the normal course of business, it must produce them in response to request phrased in terms or categories. *Zanger v. Chinlund*, 1980, 106 Misc.2d 86, 430 N.Y.S.2d 1002.

10. Custody or control of records

Village's admission that it expected return from district attorney of records of public lottery sponsored by volunteer fire department fully justified prospective aspect of special term's order granting to newspaper right of inspection upon records' retransfer to village's custody. *Westchester Rockland Newspapers, Inc. v. Kimball*, 1980, 50 N.Y.2d 575, 430 N.Y.S.2d 574, 408 N.E.2d 904.

Temporary possession in another does not necessarily oust permanent possessor of control which would make it subject to responsibilities imposed by this article. *Id.*

11. Preparation of record

Where civil service commission did not maintain separate files for police

disciplinary proceedings but, rather, data was transferred to employee's personnel card, and, to accede to petitioners' request for disclosure the commission would have to go through every employee's file and compile the information, it was not required to do so. *Gannett Co., Inc. v. James*, 1982, 86 A.D.2d 744, 447 N.Y.S.2d 781, appeal denied 56 N.Y.2d 502, 450 N.Y.S.2d 1023, 435 N.E.2d 1099.

Rearranging or "scrambling" standardized reading and mathematics test scores so as to change the order in which they were listed would not constitute preparation of record not possessed or maintained by school district within meaning of this article. *Kryston v. Board of Ed., East Ramapo Central School Dist.*, 1980, 77 A.D.2d 896, 430 N.Y.S.2d 688.

Shortage of manpower in agency from which disclosure was sought, allegedly making it difficult for agency to sift through records, locate information sought, and redact, where necessary, identifying personal details did not provide defense to disclosure under this article. *United Federation of Teachers v. New York City Health and Hospitals Corp.*, 1980, 104 Misc.2d 623, 428 N.Y.S.2d 823.

Standing alone, cost to governmental agency in preparation of a report is not sufficient basis to preclude disclosure under this article. *Trauernicht v. Board of Co-op Educational Services of Nassau County*, 1978, 95 Misc.2d 394, 407 N.Y.S.2d 398.

12. Reasons for denial

Broad allegations that inmate's file sought by inmate under the freedom of information law contained exempt material was insufficient to overcome presumption that records were open for inspection and to justify categorical denial to inmate of all access to the material. *Konigsberg v. Coughlin*, 1986, 68 N.Y.2d 245, 508 N.Y.S.2d 393, 501 N.E.2d 1.

City's conclusory allegations that list of names of individuals employed on several public works projects by non-union contractors "would be used for commercial or fund raising purposes" or that disclosure "would result in economic or personal hardship" were insufficient to justify withholding of such information from union which had re-

quested it under Freedom of Information Law. *Hopkins v. City of Buffalo*, 1985, 107 A.D.2d 1028, 486 N.Y.S.2d 514.

Reasons of district principal and chief negotiator of board of education as to why disclosure of preliminary contract proposals and demands between board of education and its teachers association would impede ongoing collective bargaining negotiations were not arbitrary nor capricious and, thus, special term properly concluded that, based upon expertise of board's affiants, burden of proving material exempt had been met. *Cohalan v. Board of Ed. of Bayport-Blue Point School Dist.*, 1980, 74 A.D.2d 812, 425 N.Y.S.2d 367.

13. Burden of proof

Where exemption from this article is claimed, burden lies with agency to articulate particularized and specific specification and to establish that material requested fall squarely within ambit of the exemption. *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 1984, 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437. See, also, *Hopkins v. City of Buffalo*, 1985, 107 A.D.2d 1028, 486 N.Y.S.2d 514; *Pasik v. State Bd. of Law Examiners*, 1984, 102 A.D.2d 395, 478 N.Y.S.2d 270; *City of New York v. Bus-Top Shelters, Inc.*, 1980, 104 Misc.2d 702, 428 N.Y.S.2d 784.

Burden of demonstrating that material requested under this article is exempt falls on shoulders of one who asserts it; in absence of specific statutory protection for the requested material, this article compels disclosure, not concealment. *Westchester Rockland Newspapers, Inc. v. Kimball*, 1980, 50 N.Y.2d 575, 430 N.Y.S.2d 574, 408 N.E.2d 904. See, also, *Hawkins v. Kurlander*, 1983, 98 A.D.2d 14, 469 N.Y.S.2d 820; *Austin v. Purcell*, 1984, 103 A.D.2d 827, 478 N.Y.S.2d 64; *Goodstein v. Shaw*, 1983, 119 Misc.2d 400, 463 N.Y.S.2d 162.

While respondent has burden, under this section, of proving that release of requested information would amount to an unwarranted invasion of personal privacy, such burden is substantially diminished when petitioner refuses to divulge purpose for which he seeks such information. *Application of Nicholas*, 1983, 117 Misc.2d 630, 458 N.Y.S.2d 858.

14. Attorney fees

In view of pending federal litigation in which city was named as a party defendant, Appellate Division did not err, as a matter of law, in holding that city had a reasonable basis in law for withholding materials requested under the Freedom of Information Law, which the city asserted had been prepared for the litigation, and thus, Appellate Division's denial of request for attorney fees against city would not be disturbed. *Niagara Environmental Action by Raymond v. City of Niagara Falls*, 1984, 63 N.Y.2d 651, 479 N.Y.S.2d 512, 468 N.E.2d 694.

Where city had reasonable, though ultimately insufficient, basis in law for withholding materials requested under Freedom of Information Law, requesting party was not entitled to award of attorney fees. *Hopkins v. City of Buffalo*, 1985, 107 A.D.2d 1028, 486 N.Y.S.2d 514.

Newspapers did not "substantially prevail," within meaning of this section allowing attorney fees to party who substantially prevails in litigation against agency, in suit against local industrial development agency seeking disclosure of records pertaining to economic development expenditure, where the records were released prior to the assertion of any defense to the newspapers' Article 78 proceeding against the agency. *William J. Kline and Son, Inc. v. Fallows*, 1984, 124 Misc.2d 701, 478 N.Y.S.2d 524.

Petitioner was entitled to attorney fees where Department of Health lacked a reasonable basis in law for withholding requested records which were of clearly significant interest to the general public. *Steele v. New York State Dept. of Health*, 1983, 119 Misc.2d 963, 464 N.Y.S.2d 925.

15. Costs

Assessment of costs pursuant to section of the Public Officers Law authorizing award of reasonable attorney fees and costs if agency lacked reasonable basis in law for withholding requested information lies within sound discretion of trial court. *McAndrew v. Board of Educ. for City School Dist. of City of Port Jervis*, 1986, 120 A.D.2d 591, 502 N.Y.S.2d 70.

16. Review—Generally

On issue whether particular document is exempt from disclosure under Freedom of Information Law, Article 78 proceeding standard of review, that agency's determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable, but, rather, person resisting disclosure must prove entitlement to an exception. *Capital Newspapers Div. of Hearst Corp. v. Burns*, 1985, 109 A.D.2d 92, 490 N.Y.S.2d 651, appeal granted 66 N.Y.2d 603, 489 N.E.2d 256.

Since the committee on public access of records is the administrative agency charged with oversight of this article, its interpretation of the statute, if not irrational or unreasonable, should be upheld. *Sheehan v. City of Binghamton*, 1977, 59 A.D.2d 808, 398 N.Y.S.2d 905; *Gannett Co., Inc. v. James*, 1981, 108 Misc.2d 862, 438 N.Y.S.2d 901, affirmed 86 A.D.2d 744, 447 N.Y.S.2d 781.

Great weight must be afforded recommendation of Committee on Public Access to Records as body designated by this section to render adversary opinions to state agencies and others regarding this article. *Washington Post Co. v. New York State Ins. Dept.*, 1982, 114 Misc.2d 601, 452 N.Y.S.2d 163, reversed 94 A.D.2d 648, 462 N.Y.S.2d 208, reversed 61 N.Y.2d 557, 475 N.Y.S.2d 263, 463 N.E.2d 604.

Administrative determination by committee on public access to records was entitled to weight and consideration in determining applicability of statutory exemptions under this article. *Kwitny v. McGuire*, 1979, 102 Misc.2d 124, 422 N.Y.S.2d 867, affirmed 77 A.D.2d 839, 432 N.Y.S.2d 149, affirmed 53 N.Y.2d 968, 441 N.Y.S.2d 659, 424 N.E.2d 546.

17. — Persons entitled to maintain proceeding

Entitlement under freedom of information law [McKinney's Public Officers Law § 84 et seq.] of personal injury law firm to motor vehicle accident reports maintained by police department was not contingent upon showing of some cognizable interest other than that inherent in being a member of the public. *Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse*, 1985,

65 N.Y.2d 294, 491 N.Y.S.2d 289, 430 N.E.2d 1071.

Since this article directs that certain records be made available to "any persons" on request, petitioning attorney had standing to maintain Article 78 proceeding seeking disclosure of certain documents, regardless of whether he might represent interests other than the corporation directly requesting the records. *Cavalier v. McCue*, 1977, 58 A.D.2d 729, 396 N.Y.S.2d 299.

18. — Exhaustion of administrative remedies

See, also, *Notes of Decisions under CPLR 7801*.

Demand for relief pursuant to freedom of information law request was not properly before court where petitioner, who claimed requests were not fully complied with by authority responsible for denying him civil service position, had not directed request for further information to head of agency possessing documents he wished to inspect. *Kurland v. McLaughlin*, 1986, 122 A.D.2d 947, 505 N.Y.S.2d 967.

Petitioner could not seek to compel disclosure of agency's records by an Article 78 proceeding, where petitioner failed to exhaust his administrative appeal remedy. *Town of Hempstead v. Commissioner, State Office of Mental Retardation and Developmental Disabilities*, 1986, 119 A.D.2d 582, 500 N.Y.S.2d 751.

Petitioner's letter to chief inspector effectively amounted to an appeal of ruling that records sought were "intra-agency" documents to the State Police Committee on Appeals, and thus there was no impediment to institution of proceeding to review denial of petitioner's request for access to copies of certain police records on ground of failure to exhaust administrative remedies. *Johnson Newspaper Corp. v. Stainkamp*, 1983, 94 A.D.2d 825, 463 N.Y.S.2d 122, affirmed as modified on other grounds 61 N.Y.2d 958, 475 N.Y.S.2d 272, 463 N.E.2d 613.

Party seeking to obtain information under this article must first apply to the records access officer and, if their application is denied, then appeal to the appeals officer; no redress from the courts may be sought until those administrative remedies have been exhausted. *Moussa*

v. State, 1982, 91 A.D.2d 863, 458 N.Y.S.2d 377.

Under this section requiring agency either to furnish explanation in writing for nonproduction of records or to provide access to materials sought, seven-day limitation for agency's response to demand was to be interpreted as directory rather than mandatory, and where it was not complied with, exemption was not to be disregarded but, rather, applicant was to be deemed to have exhausted his administrative remedies and entitled to seek judicial remedy. *Floyd v. McGuire*, 1982, 87 A.D.2d 388, 452 N.Y.S.2d 416.

Town supervisor's letter to applicant for information pursuant to this section requesting more specifics with respect to applications did not constitute waiver of administrative procedures necessary in order for disclosure of information and did not preclude application of doctrine of exhaustion of administrative remedies. *Cosgrove v. Klinger*, 1977, 58 A.D.2d 910, 396 N.Y.S.2d 498.

Parolee was not entitled to order pursuant to Article 78 compelling Board of Parole to release parole records under Freedom of Information Law where parolee had not exhausted his administrative remedies under the Law. *Robertson v. Chairman of New York State Bd. of Parole*, 1984, 122 Misc.2d 829, 471 N.Y.S.2d 1015.

If petitioners were dissatisfied with Attorney General's response to request made under this article, their proper course was to seek relief not by way of motion, but, rather, to pursue their administrative remedies. *Wiener v. People by Abrams*, 1983, 119 Misc.2d 970, 464 N.Y.S.2d 919.

Where Board of Law Examiners claimed it was totally exempt from this article, exhaustion of administrative remedies doctrine was no bar to materials sought by attorney in his freedom of information law action, even though he had not previously requested such material from Board. *Pasik v. State Bd. of Law Examiners*, 1982, 114 Misc.2d 397, 451 N.Y.S.2d 570, modified on other grounds 102 A.D.2d 395, 478 N.Y.S.2d 270.

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19. Request for confidentiality

Insurance Department's promise to keep confidential minutes of insurance company meetings given by the companies to the Department for examination was irrelevant to determining whether the minutes were subject to disclosure under this article. *Washington Post Co. v. New York State Ins. Dept.*, 1984, 61 N.Y.2d 557, 475 N.Y.S.2d 263, 463 N.E.2d 604.

20. Access by public officials

Contrary to contention of respondents, executive director of State Consumer Protection Board, who petitioned to have Supreme Court overrule State Education Department's refusal to provide certain information to Board on ground that such refusal contravened this article, had power to conduct investigations, research, studies and analysis of matters affecting the interest of consumers. *Pooler v. Nyquist*, 1976, 89 Misc.2d 705, 392 N.Y.S.2d 948.

A member of a board of education need not observe the procedures required of the general public for obtaining access to tapes of school board meeting for official purposes unless expressly so provided in a board regulation. *Op. State Compt.* 80-163.

21. Good faith requests

In plot owner's Article 78 proceeding to inspect and copy certain documents of not-for-profit cemetery corporation, evidence sustained finding that plot owner's request to inspect was made in good faith, and therefore, plot owner's petition was properly granted. *De Paula v. Memory Gardens, Inc.*, 1983, 96 A.D.2d 641, 465 N.Y.S.2d 73.

22. In camera inspection

Proper procedure for reaching determination whether agency records are exempt from production as interagency or intraagency materials is by in camera inspection ordered by Special Term. *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 1984, 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437.

Appellate Division did not abuse its discretion in removing duty of deletion from records of public lottery sponsored by volunteer fire department of details

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which would identify those who had received any of the funds on basis of economic need and placing such duty in hands of special term, where it was to be carried out in camera. *Westchester Rockland Newspapers, Inc. v. Kimball*, 1980, 50 N.Y.2d 575, 430 N.Y.S.2d 574, 408 N.E.2d 904.

Agency is required to articulate particularized and specific justification for withholding information and, if necessary, can be required to submit the requested materials to the court for in camera inspection to show that the records are exempt from disclosure. *Fink v. Lefkowitz*, 1979, 47 N.Y.2d 567, 419 N.Y.S.2d 467, 393 N.E.2d 463.

Where record indicated that entire work reports might not be non-exempt under this article, respondents would be required to submit any proposed deletions to special term for an in camera inspection and to submit all other material directly to petitioners. *Polansky v. Regan*, 1981, 81 A.D.2d 102, 440 N.Y.S.2d 356.

Parties should be given opportunity to expand their papers to claim or resist applicability of new criteria that files compiled for law enforcement purposes must now meet to be exempt from disclosure in an Article 78 proceeding seeking access to records relating to refusal of proposed site for new amusement park; situation might be an appropriate

one for in camera inspection. *Glantz v. Scopetta*, 1978, 66 A.D.2d 716, 411 N.Y.S.2d 295.

In suit against city arising from shooting by police officer, "records of complaints and investigations thereon of civilian and other complaints" against police officer, were subject to disclosure; however, records were to be examined by court in camera and court should order disclosure only of those portions of records which would not identify a confidential source or disclose confidential information relating to a criminal investigation. *Walker v. City of New York*, 1978, 64 A.D.2d 980, 408 N.Y.S.2d 811.

On application of representative of two infant pedestrians struck by moving trains to compel Commissioner of Transportation to permit access to reports concerning accident in question, circumstances warranted only that court be permitted to inspect in camera reports submitted on both accidents by carriers and any reports that may have been prepared by Commissioner concerning accidents in question. *Bloomberg v. Hennessy*, 1979, 99 Misc.2d 958, 417 N.Y.S.2d 593.

Accident report of Commissioner of Transportation, if any, was not barred by any statute from disclosure to representative of two infant pedestrians struck by moving trains. *Id.*

§ 90. Severability

If any provision of this article or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the article or the application thereof to other persons and circumstances.

(Added L.1977, c. 933, § 1.)

Historical Note

Effective Date. Section effective Jan. 1, 1978, pursuant to L.1977, c. 933, § 8.

Derivation. Former section 89, added L.1974, c. 578, § 2, and repealed by L.1977, c. 933, § 1.

Former Section 90. A former section 90 was renumbered 100.

Another former section 90 was renumbered 115.

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Public Officers' Law if the donor is not under investigation by or in litigation with the agency. NYS Ethics Commn. AO 96-22.

regarding the physically handicapped

sions

the handicapped, based on evidence that access barriers had existed for more than 12 years after effective date of Public Officers Law provision mandating that access be provided. *Smith v. Town of Warwick* (3 Dept. 1991) 169 A.D.2d 976, N.Y.S.2d 874.

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on corruption. Robert C. Newman, 16

icted of a crime of corrup-

imes: bribery in the first degree, the third degree, rewarding official misconduct in the second degree, any such crime is committed for the benefit of any agency or public official of the state, or public benefit corporation of the state, or such public office, agency or subdivision or public authority may be enumerated crimes from appearing as a public official of the state, or any other public official or representative in any professional or representative capacity for a period of five years from the date of

legislature

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A critical evaluation. Tristram J.

corruption. Robert C. Newman, 16

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A critical evaluation. Tristram J.

New York's New Ethics Law: Turning the tide on corruption. Robert C. Newman, 16 Hofstra L.Rev. 319 (1988).

ARTICLE 6—FREEDOM OF INFORMATION LAW

Cross References

Obtaining and furnishing taxpayer identification information, see Tax Law § 5

New York Codes, Rules and Regulations

Public access to records, see 19 NYCRR 80.1 et seq.

Rules of the City of New York

Campaign finance board, public access to information, see 52 RCNY Chapter 6.
Confidentiality of information, drugs and devices, see 24 RCNY §§ 75.37 and 75.39.
Confidentiality of reportable disease reports and records, see 24 RCNY § 11.07.
Department of juvenile justice, compliance, see 41 RCNY Chapter 1.
Income and expense statements, confidentiality, see 19 RCNY § 33-06.
Inspection of health code records and proceedings, see 24 RCNY § 3.27.
Pre-sentence reports, see 42 RCNY Chapter 1.
Real property transfer tax returns, secrecy, see 19 RCNY § 23-12.
Uniform rules and regulations for all city agencies, see 43 RCNY Chapter 1.

Law Review and Journal Commentaries

A first amendment right of access to affidavits in support of search warrants. Note. 90 Colum.L.Rev. 2216 (1990).
"Every citizen may freely . . . publish": Protecting the press under the New York State Constitution. Tofel. 40 Syracuse L.Rev. 1041 (1989).
Public access to court records in civil proceedings: The New York approach. Carpinello. 54 Alb.L.Rev. 93. Fall 1989.

United States Supreme Court

Freedom of information, law-enforcement exemption, confidential sources, presumptions, see U.S. Dept. of Justice v. Landano, U.S.N.J.1993, 113 S.Ct. 2014, 508 U.S. 165, 124 L.Ed.2d 84, on remand 873 F.Supp. 884.
Law enforcement exemption, FOIA, FBI rap sheet, personal privacy interest, see U.S. Dept. of Justice v. Reporters Committee For Freedom of Press, U.S.Dist.Col.1989, 109 S.Ct. 1468, 489 U.S. 749, 103 L.Ed.2d 774.

§ 84. Legislative declaration

Historical and Statutory Notes

Short Title. This article and Public Officers Law § 100 are popularly known as the "sunshine laws".

Law Review and Journal Commentaries

Freedom From Information Law. Michael J. Siris, 60 Alb.L.Rev. 1273 (1997).
Keeping the faith: A model local ethics law—Content and commentary. Mark Davies, 21 Fordham Urb.L.J. 61 (1993).

United States Supreme Court

Freedom of information, public interest test, Bureau of Land Management mailing list, see *Bibles v. Oregon Natural Desert Ass'n*, 1997, 117 S.Ct. 795, 136 L.Ed.2d 825.

PUBLIC OFFICERS LAW

isions

ive functions within the state" and sets motion a process within an administrative body, and thus, falls squarely within exception to Civil Rights Law and does preclude inmate serving sentence from gaining records pursuant to FOIL, subject to any valid exceptions to FOIL access for review by court. *Hillard v. Clark*, 7, 174 Misc.2d 282, 664 N.Y.S.2d 424. In the absence of legislative intent to the contrary, any part of Civil Rights Law tends to limit inmate's civil rights not affect inmate's broad rights under Freedom of Information Law (FOIL) as member of public to request and receive government documents. *Hillard v. Clark*, 7, 174 Misc.2d 282, 664 N.Y.S.2d 424. Alleged violations of the Freedom of Information Law must be pursued in Supreme Court, not by an appeal to the Commissioner. Therefore, the petition-allegations that the board failed to promptly respond to his requests for information were not properly before the Commissioner. 1992, 31 Educ.Dept.Rep.

Purpose

miracle Mile Associates v. Yudelson (4 t. 1979) 68 A.D.2d 176, 417 N.Y.S.2d [main volume] appeal denied 48 2d 606, 421 N.Y.S.2d 1031, 397 N.E.2d appeal denied 48 N.Y.2d 706, 422 S.2d 68, 397 N.E.2d 758.

New York Teachers Pension Ass'n, Inc. Teachers' Retirement System of City of York, 1979, 98 Misc.2d 1118, 415 S.2d 561, affirmed 71 A.D.2d 250, 422 S.2d 389, [main volume] appeal denied N.Y.2d 701, 426 N.Y.S.2d 1025, 403 2d 187.

New York Freedom of Information like its federal counterpart, creates privilege from discovery in civil action, rather, its purpose is to maximize availability of government documents to the public, and exemptions are to be narrowly construed. *Grossman v. Schwarz*, 1989, F.R.D. 376.

Purpose of Freedom of Information (FOIL) is to shed light on governmental decision making, which in turn both its electorate to make informed choices regarding governmental activities facilitates exposure of waste, negligence and abuse. *Encore College Books, Inc. v. Auxiliary Service Corp. of University of New York at Farmingdale*, 1995, 87 N.Y.2d 410, 639 N.Y.S.2d 63 N.E.2d 302.

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Purpose of Freedom of Information Law (FOIL) is to shed light on governmental decision making so that electorate may make informed choices regarding governmental activities, and to expose governmental waste, negligence, and abuse. *Tartan Oil Corp. v. State Dept. of Taxation and Finance* (3 Dept. 1998) 239 A.D.2d 36, 668 N.Y.S.2d 76.

Purpose of Freedom of Information Law (FOIL) government agency disclosure exemption for records compiled for law enforcement purposes which, if disclosed, would reveal nonroutine criminal investigative techniques or procedures is to prevent violators of law from being apprised of nonroutine procedures by which law enforcement officials gather information. *Spencer v. New York State Police* (3 Dept. 1992) 187 A.D.2d 919, 591 N.Y.S.2d 207.

Freedom of Information Law (FOIL) promotes policy of open government by presumptively opening records of government agencies to public access, and agencies covered by FOIL must disclose all records except those covered by specific

statutory exceptions; however, FOIL expressly excludes judiciary from its definition of agency subject to disclosure rules. *Harvey v. Hynes*, 1997, 174 Misc.2d 174, 665 N.Y.S.2d 1000.

Principles and objectives underlying Freedom of Information Law (FOIL) are to afford broad disclosure and achieve maximum public access to government documents. *Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of State University of New York*, 1996, 169 Misc.2d 210, 643 N.Y.S.2d 323, appeal dismissed 240 A.D.2d 490, 658 N.Y.S.2d 653, leave to appeal granted 91 N.Y.2d 810, 671 N.Y.S.2d 714, 694 N.E.2d 883.

4. Public interest privilege

Freedom of Information Law (FOIL) is based on overriding policy consideration that public is vested with inherent right to know, and that official secrecy is anathema to democratic form of government. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

§ 86. Definitions

Notes of Decisions

Property of state or local government, record 6

Record

Computer tapes 4a

Property of state or local government 6

Judiciary

Defendant was not entitled to grant of his motion, under Freedom of Information Law (FOIL), for production of grand jury minutes; grand jury minutes are court records, not agency records, and thus are exempt from ambit of FOIL. *Mulligrav v. Santucci* (3 Dept. 1993) 195 A.D.2d 786, 600 N.Y.S.2d 382.

Grand Jury minutes are court records and are exempt from the ambit of Freedom of Information Law (FOIL). *Harvey v. Hynes*, 1997, 174 Misc.2d 174, 665 N.Y.S.2d 1000.

2. Agency

Dunlea v. Goldmark, 1976, 85 Misc.2d 198, 380 N.Y.S.2d 496, modified on other grounds 54 A.D. 446, 389 N.Y.S.2d 423, [main volume] affirmed 43 N.Y.2d 754, 401 N.Y.S.2d 1010, 372 N.E.2d 798.

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Note 2

Notes of Decisions

1. Construction

Miracle Mile Associates v. Yudelson (4 Dept. 1979) 68 A.D.2d 176, 417 N.Y.S.2d 142, [main volume] appeal denied 48 N.Y.2d 606, 421 N.Y.S.2d 1031, 397 N.E.2d 761, appeal denied 48 N.Y.2d 706, 422 N.Y.S.2d 68, 397 N.E.2d 758.

Freedom of Information Law (FOIL) itself is to be read liberally and its exemptions read narrowly. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale*, 1995, 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302.

Freedom of Information Law (FOIL), under which all records of public agency are presumptively open to public inspection, without regard to need for purpose of applicant, is to be construed liberally and its exemption narrowly interpreted so that public is granted maximum access to records of government. *Buffalo News, Inc. v. Buffalo Enterprise Development Corp.*, 1994, 84 N.Y.2d 488, 619 N.Y.S.2d 695, 644 N.E.2d 277.

Under Freedom of Information Law (FOIL), all records of a public agency are presumptively open to public inspection. *Tartan Oil Corp. v. State Dept. of Taxation and Finance* (3 Dept. 1998) 239 A.D.2d 36, 668 N.Y.S.2d 76.

Freedom of Information Law (FOIL) is to be liberally construed, with its exceptions narrowly interpreted. *Tartan Oil Corp. v. State Dept. of Taxation and Finance* (3 Dept. 1998) 239 A.D.2d 36, 668 N.Y.S.2d 76.

Freedom of Information Law (FOIL) is not restricted to purpose for which document was produced or function to which it relates. *Stoll v. New York State College of Veterinary Medicine at Cornell University* (3 Dept. 1997) 238 A.D.2d 38, 664 N.Y.S.2d 851, leave to appeal dismissed 91 N.Y.2d 956, 671 N.Y.S.2d 717, 694 N.E.2d 886.

Provisions of Freedom of Information Law (FOIL) are to be liberally construed so as to grant public maximum access to governmental records. *Stoll v. New York State College of Veterinary Medicine at Cornell University* (3 Dept. 1997) 238 A.D.2d 38, 664 N.Y.S.2d 851, leave to appeal dismissed 91 N.Y.2d 956, 671 N.Y.S.2d 717, 694 N.E.2d 886.

2. Construction with other laws

Freedom of Information Law (FOIL) request is "commencement of a proceeding before an officer exercising adminis-

trative functions within the state" and sets into motion a process within an administrative body, and thus, falls squarely within exception to Civil Rights Law and does not preclude inmate serving sentence from obtaining records pursuant to FOIL, subject to any valid exceptions to FOIL access for review by court. *Hillard v. Clark*, 1997, 174 Misc.2d 282, 664 N.Y.S.2d 424.

In the absence of legislative intent to the contrary, any part of Civil Rights Law that tends to limit inmate's civil rights cannot affect inmate's broad rights under Freedom of Information Law (FOIL) as member of public to request and receive government documents. *Hillard v. Clark*, 1997, 174 Misc.2d 282, 664 N.Y.S.2d 424.

Alleged violations of the Freedom of Information Law must be pursued in Supreme Court, not by an appeal to the Commissioner. Therefore, the petitioner's allegations that the board failed to adequately respond to his requests for information were not properly before the Commissioner. 1992, 31 Educ.Dept.Rep. 351.

3. Purpose

Miracle Mile Associates v. Yudelson (4 Dept. 1979) 68 A.D.2d 176, 417 N.Y.S.2d 142, [main volume] appeal denied 48 N.Y.2d 606, 421 N.Y.S.2d 1031, 397 N.E.2d 761, appeal denied 48 N.Y.2d 706, 422 N.Y.S.2d 68, 397 N.E.2d 758.

New York Teachers Pension Ass'n, Inc. v. Teachers' Retirement System of City of New York, 1979, 98 Misc.2d 1118, 415 N.Y.S.2d 561, affirmed 71 A.D.2d 250, 422 N.Y.S.2d 389, [main volume] appeal denied 49 N.Y.2d 701, 426 N.Y.S.2d 1025, 403 N.E.2d 187.

New York Freedom of Information Law, like its federal counterpart, creates no privilege from discovery in civil action, but rather, its purpose is to maximize accessibility of government documents to public, and exemptions are to be narrowly construed. *Grossman v. Schwarz*, 1989, 125 F.R.D. 376.

Purpose of Freedom of Information Law (FOIL) is to shed light on government decision making, which in turn both permits electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale*, 1995, 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302.

Purpose of Freedom of Information Law (FOIL) is to shed light on government decision making so that may make informed choices regarding governmental activities, and governmental waste, negligence. *Tartan Oil Corp. v. State Dept. of Taxation and Finance* (3 Dept. 1998) 239 A.D.2d 36, 668 N.Y.S.2d 76.

Purpose of Freedom of Information Law (FOIL) government agency exemption for records covered by enforcement purposes which would reveal nonroutine investigative techniques or procedures to prevent violators of law from apprised of nonroutine procedures which law enforcement officials use in formation. *Spencer v. New York Police* (3 Dept. 1992) 187 A.D.2d 207, 668 N.Y.S.2d 207.

Freedom of Information Law promotes policy of open government by presumptively opening records of government agencies to public access, and records covered by FOIL must be made available except those covered

§ 86. Definitions

Property of state or local government
record 6
Record

Computer tapes 4a
Property of state or local government 6

In Judiciary

Defendant was not entitled to his motion, under Freedom of Information Law (FOIL), for production of minutes; grand jury minutes records, not agency records, are exempt from ambit of FOIL. *Santucci* (3 Dept. 1993) 195 A.D.2d 600, 660 N.Y.S.2d 382.

Grand Jury minutes are covered and are exempt from the ambit of Freedom of Information Law (FOIL) *v. Hynes*, 1997, 174 Misc.2d 1000, 668 N.Y.S.2d 1000.

2. Agency

Dunlea v. Goldmark, 1976, 198, 380 N.Y.S.2d 496, modified grounds 54 A.D. 446, 389 N.Y.S.2d 446, [main volume] affirmed 43 N.Y.2d 1010, 372 N.E.2d 798.

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Note 2

function with respect to colleges, and is included in definition of state agency under State Finance Law. *Stoll v. New York State College of Veterinary Medicine at Cornell University* (3 Dept. 1997) 238 A.D.2d 38, 664 N.Y.S.2d 851, leave to appeal dismissed 91 N.Y.2d 956, 671 N.Y.S.2d 717, 694 N.E.2d 886.

University was not performing governmental or proprietary function of state when it retained records pursuant to federal mandate and for federal review, and was thus not "agency" subject to Freedom of Information Law (FOIL). *Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of the State University of New York* (2 Dept. 1997) 240 A.D.2d 490, 658 N.Y.S.2d 653, leave to appeal granted 91 N.Y.2d 810, 671 N.Y.S.2d 714, 694 N.E.2d 883.

Not-for-profit corporation formed by private businessmen to further their own interests in economic growth of area was not so entwined with municipal government as to be treated as "agency" subject to Freedom of Information Law (FOIL), even though it received over 50% of its revenues from county, where it simply contracted with county on fee-for service basis. *Farms First v. Saratoga Economic Development Corp.* (3 Dept. 1995) 222 A.D.2d 861, 635 N.Y.S.2d 720.

Volunteer ambulance company, which performed functions solely for municipal entity and "municipal subdivision" of town, submitted budget to and received fundings from town, and had allocations of its funds scrutinized by town, clearly fell within definition of "agency" subject to requirements of freedom of information law. *Ryan v. Mastic Volunteer Ambulance Co.* (2 Dept. 1995) 212 A.D.2d 716, 622 N.Y.S.2d 795, leave to appeal denied 88 N.Y.2d 804, 645 N.Y.S.2d 446, 668 N.E.2d 417.

Auxiliary service corporation of state university was not an "agency" of state, for purposes of Freedom of Information Law. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale* (1 Dept. 1995) 212 A.D.2d 418, 622 N.Y.S.2d 684, leave to appeal granted 85 N.Y.2d 811, 631 N.Y.S.2d 287, 655 N.E.2d 400, affirmed as modified 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302.

Bank serving as trustee under indenture of trust for industrial revenue bonds was not "agency" of city industrial development authority that had issued bonds and assigned them to bank, and, thus, bond records were not records of agency

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within meaning of Freedom of Information Law. *United Food and Commercial Workers, Dist. Union, Local One v. City of Schenectady Indus. Development Agency* (3 Dept. 1994) 204 A.D.2d 887, 612 N.Y.S.2d 477.

State university's laboratory animal users' committee was not an "agency" subject to Freedom of Information Law (FOIL); the committee did not perform a governmental function for the state. *American Soc. for Prevention of Cruelty to Animals v. Board of Trustees of State University of New York* (2 Dept. 1992) 184 A.D.2d 508, 584 N.Y.S.2d 198, leave to appeal denied 80 N.Y.2d 757, 589 N.Y.S.2d 308, 602 N.E.2d 1124.

City economic development corporation, organized under Not-For-Profit Corporation Law, was governmental agency and subject to disclosure requirements of Freedom of Information Law (FOIL). *Buffalo News, Inc. v. Buffalo Enterprise Development Corp.* (4 Dept. 1991) 173 A.D.2d 43, 578 N.Y.S.2d 945, appeal dismissed 79 N.Y.2d 977, 583 N.Y.S.2d 195, 592 N.E.2d 803, affirmed 84 N.Y.2d 488, 619 N.Y.S.2d 695, 644 N.E.2d 277.

3. Record—Generally

Sorley v. Clerk, Mayor and Bd. of Trustees of Incorporated Village of Rockville Centre (2 Dept. 1968) 30 A.D.2d 822, 292 N.Y.S.2d 575, [main volume] appeal denied 25 N.Y.2d 739, 304 N.Y.S.2d 1027, 251 N.E.2d 558.

Very broad definition of records in Freedom of Information Law (FOIL) is not limited by purpose for which document was originated or the function to which it relates. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale*, 1995, 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302.

Since auxiliary service corporation of state university receives copy of booklist compiled by its subcontractor to ensure that campus bookstore is adequately maintained, and it does so for benefit of state university, booklist information was kept or held by college for agency and fell within unambiguous definition of records under Freedom of Information Law (FOIL). *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale*, 1995, 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302.

Film and filmstrips used in public community college course on human sexuality were "records" within meaning of Free-

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Information Law. *Schenectady County Comptroller v. State of New York* (1 Dept. 1981) 81 N.Y.2d 690, 603 N.E.2d 15.

Physical evidence presented, including articles of loaded weapons, was not "records" subject to Freedom of Information Law. *Sideri v. Attorney General, New York County* (2 Dept. 1993) 243 A.D.2d 423, 663 N.Y.S.2d 811, 692 N.E.2d 130.

Bank serving as trustee of trust for industrial revenue bonds was not "agency" of city industrial development authority that had assigned them to bank and records were not records within meaning of Freedom of Information Law. *United Food and Commercial Workers, Dist. Union, Local One v. City of Schenectady Indus. Development Agency* (3 Dept. 1994) 204 A.D.2d 887, 612 N.Y.S.2d 477.

Fact that records sought were organization, pertaining to health science center, and compiled pursuant to state law and regulations, did not render records protected from Freedom of Information Law. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale*, 1995, 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302.

§ 87. Access to agency records

2. Each agency shall make its records available for public inspection and shall deny access to records

(d) are trade secrets, confidential information, or derived from

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ing of Freedom of Information Law (FOIL). *United Food and Commercial Workers, Local One v. City of Indus. Development Agency* (4 Dept. 1994) 204 A.D.2d 887, 612

University's laboratory animal was not an "agency" sub-division of Information Law. Committee did not perform a function for the state.

for Prevention of Cruelty Board of Trustees of State New York (2 Dept. 1992) 184 N.Y.S.2d 198, leave to 80 N.Y.2d 757, 589 N.Y.S.2d 1124.

development corporation, Not-For-Profit Corporation governmental agency and disclosure requirements of Information Law (FOIL). *Inc. v. Buffalo Enterprise Corp.* (4 Dept. 1991) 173 N.Y.S.2d 945, appeal dismissed 84 N.Y.S.2d 977, 583 N.Y.S.2d 195, affirmed 84 N.Y.2d 488, 695, 644 N.E.2d 277.

Generally

Clerk, Mayor and Bd. of Incorporated Village of Rock (3 Dept. 1968) 30 A.D.2d 822, 575, [main volume] appeal dismissed 739, 304 N.Y.S.2d 1027, 8.

definition of records in Information Law (FOIL) is purpose for which documented or the function to. *Encore College Book-Auxiliary Service Corp. of New York at Farmingdale* (N.Y.2d 410, 639 N.Y.S.2d 302).

service corporation of receives copy of booklist its subcontractor to ensure bookstore is adequately maintained so for benefit of state booklist information was kept college for agency and fell ambiguous definition of records of Information Law *Encore College Bookstores, Inc. Service Corp. of State University at Farmingdale*, 1995, 87 N.Y.S.2d 990, 663 N.E.2d

matrises used in public course on human sexuality within meaning of Free-

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Information Law (FOIL). *Russo v. Nassau County Community College*, 1993, 81 N.Y.2d 690, 603 N.Y.S.2d 294, 623 N.E.2d 15.

Physical evidence presented in criminal trial, including articles of clothing and alleged weapons, was not "record" that could be disclosed under Freedom of Information Law. *Sideri v. Office of Dist. Atty., New York County* (1 Dept. 1997) 243 A.D.2d 423, 663 N.Y.S.2d 206, leave to appeal denied 91 N.Y.2d 808, 669 N.Y.S.2d 261, 692 N.E.2d 130.

Bank serving as trustee under indenture of trust for industrial revenue bonds was not "agency" of city industrial development authority that had issued bonds and assigned them to bank, and, thus, bond records were not records of agency within meaning of Freedom of Information Law. *United Food and Commercial Workers, Dist. Union, Local One v. City of Schenectady Indus. Development Agency* (3 Dept. 1994) 204 A.D.2d 887, 612 N.Y.S.2d 477.

Fact that records sought by animal welfare organization, pertaining to source of dogs and cats acquired by state university health science center, were maintained and compiled pursuant to federal rather than state law and regulation did not render records protected from disclosure under Freedom of Information Law (FOIL); even assuming that science center had to register with federal government to demonstrate compliance with federal Animal Welfare Act, center was not thereby rendered a federal body, and center's powers and functions derived from state rather than federal law and its documents were within purview of FOIL. *Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of State University of New York*, 1996, 169 Misc.2d 210, 643 N.Y.S.2d 223, appeal dismissed 240 A.D.2d 490, 658 N.Y.S.2d 653, leave to appeal granted 91 N.Y.2d 810, 671 N.Y.S.2d 714, 694 N.E.2d 883.

§ 87. Access to agency records

[See main volume for 1]

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

[See main volume for (a) to (c)]

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise

§ 87

4. — Assessment records

Property assessors' field books did not constitute public records that could be copied pursuant to Freedom of Information Law. *David v. Lewisohn* (3 Dept. 1988) 142 A.D.2d 305, 535 N.Y.S.2d 793, appeal denied 74 N.Y.2d 610, 546 N.Y.S.2d 554, 545 N.E.2d 868.

4a. — Computer tapes

City department was required to comply with publishing company's reasonable request to have information which it had requested under freedom of information law and which was presently maintained in computer language, transferred onto computer tapes; department had agreed to provide information only in hard copy. *Brownstone Publishers, Inc. v. New York City Dept. of Bldgs.*, 1990, 146 Misc.2d 376, 550 N.Y.S.2d 564, affirmed 166 A.D.2d 294, 560 N.Y.S.2d 642.

Information on computer disc of city department was to be provided to publishing company on computer tapes, rather than hard copy totalling over one million pages; Freedom of Information Law appeared to give right to ask for records in computer disc or tape form; publishing company was to pay for employing one worker for a few hours on overtime basis to copy disc onto computer tapes; and if information were provided on hard copy, publishing company would have to sift through over one million pages to find information contained in records. *Brownstone Publishers, Inc. v. New York City Dept. of Bldgs.*, 1990, 146 Misc.2d 376, 550 N.Y.S.2d 564, affirmed 166 A.D.2d 294, 560 N.Y.S.2d 642.

6. — Property of state or local government, record

Mere issuance of breath testing manual to Division of State Police trainees did not render manuals the property of state police and each trainee an available source from which such records could be requested under Freedom of Information Law (FOIL). *Sills v. New York State Div. of State Police* (3 Dept. 1998) — A.D.2d —, 669 N.Y.S.2d 990.

and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

[See main volume for (e) and (f)]

(g) are inter-agency or intra-agency materials which are not:

[See main volume for i to iii]

iv. [Eff. until Jan. 1, 1999.] external audits, including but not limited to audits performed by the comptroller and the federal government; or

[See main volume for (h) and (i)]

(j) [Eff. until Dec. 1, 1999.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

[See main volume for 3 and 4]

(As amended L.1988, c. 746, § 15; L.1990, c. 289, § 1.)

Historical and Statutory Notes

1990 Amendment. Subd. 2, par. (d). L.1990, c. 289, § 1, eff. June 23, 1990, substituted provisions denying access to records submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise for provisions denying access to records maintained for the regulation of commercial enterprise.

1988 Amendment. Subd. 2, par. (j). L.1988, c. 746, § 15, added par. (j). For expiration, see note below.

Effective Date of Amendment by L.1988, c. 746; Expiration. L.1988, c. 746, § 17; amended L.1991, c. 212, § 2; L.1998, c. 582, § 1; L.1995, c. 651, § 2, eff. Aug. 8, 1995, provided: "This act [L.1988, c. 746] shall take effect on the thirtieth

day after it shall have become a law [eff. Jan. 25, 1989] and shall remain in full force and effect until December 1, 1999 when upon such date the amendments and provisions made by this act shall be deemed repealed; provided, however, any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until the expiration on December 1, 1999."

Effective Date of Amendment by L.1987, c. 814; Expiration. Amendment by L.1987, c. 814, § 12, effective Aug. 7, 1987, and shall remain in full force and effect until Jan. 1, 1999, at which time L.1987, c. 814 shall be deemed repealed, pursuant to section 14, of L.1987, c. 814, set out as a note under section 88.

Legislative Histories

L.1990, c. 289: For memorandum of the State Department of Economic Development, see McKinney's 1990 Session Laws of New York, p. 2411.

L.1988, c. 746: For memorandum of the Legislative Representative of the City of New York, see McKinney's 1988 Session Laws of New York, p. 2141.

L.1981, c. 890: For memorandum of the State Executive Department, see McKinney's 1981 Session Laws of New York, p. 2376.

Cross References

Confidentiality of identity of certain taxpayers remitting withholding taxes by means of electronic transfer, see Tax Law § 9.

Rules of the City of New York

Industrial and commercial incentive program, reports to other agencies, see 19 RCNY § 14-43.

West's McKinney's Forms

The following forms appear in Selected Consolidated Laws under Public Officers Law § 87:

Notice of petition in Article 78 proceeding and addresses of property owners lines will pass, see SCL, PUB OFF petition in Article 78 proceeding to disclose names and addresses of property owners over will pass, see SCL, PUB OFF § 87. Judgment in Article 78 proceeding to disclose names and addresses of property transmission lines will pass, see SC Petition in Article 78 proceeding to ann work sheets prepared for state co able, see SCL, PUB OFF § 87. For Judgment in Article 78 proceeding ann and work sheets prepared for s discoverable, see SCL, PUB OFF § Notice of petition in Article 78 proceeding information as to absence from employment OFF § 87, Form 6.

Petition in Article 78 proceeding to con to absence from employment of pa Form 7.

Order and judgment in Article 78 proceeding information as to absence from employment PUB OFF § 87, Form 8.

Order to show cause in Article 78 proceeding authority's employee payroll and Form 9.

Petition in Article 78 proceeding to employee payroll and disciplinary Affidavit in support of petition in Article housing authority's employee payroll § 87, Form 11.

Notice of petition in Article 78 proceeding computer-tape format, see SCL, PUB

Petition in Article 78 proceeding to obtain format, see SCL, PUB OFF § 87.

Affirmation in support of petition in Article records in computer-tape format, s

Affidavit in support of petition in Article records in computer-tape format, s

Order in Article 78 proceeding to obtain format, see SCL, PUB OFF § 87.

Law Review and

1987 Survey of New York law—Administrative (1988).

1990 Survey of New York law: Local Government (1991).

substantial injury to the competitive
for (e) and (f)

materials which are not:

volume for i to iii)

internal audits, including but not limited to
and the federal government; or

for (h) and (i)

photographs, microphotographs, videotape
under authority of section eleven hundred

for 3 and 4)

c 289, § 1.)

Statutory Notes

day after it shall have become a law [eff.
Jan. 25, 1989] and shall remain in full
force and effect until December 1, 1999
when upon such date the amendments and
provisions made by this act shall be
deemed repealed; provided, however, any
such local laws as may be enacted pursu-
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L.1987, c. 814; **Expiration.** Amendment
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pursuant to section 14 of L.1987, c. 814,
set out as a note under section 88.

Histories

State Department of Economic Development,
New York, p. 2411.

Legislative Representative of the City of New
York, p. 2141.

State Executive Department, see McKinney's
76.

References

ymers remitting withholding taxes by means of

City of New York

am, reports to other agencies, see 19 RCNY

McKinney's Forms

Consolidated Laws under Public Officers Law

notice of petition in Article 78 proceeding to compel power authority to disclose names
and addresses of property owners over whose land proposed power transmission
lines will pass, see SCL, PUB OFF § 87, Form 1.

notice of petition in Article 78 proceeding to compel power authority to disclose names and
addresses of property owners over whose land proposed power transmission lines
will pass, see SCL, PUB OFF § 87, Form 2.

judgment in Article 78 proceeding granting petition to compel power authority to
disclose names and addresses of property owners over whose land proposed power
transmission lines will pass, see SCL, PUB OFF § 87, Form 3.

notice of petition in Article 78 proceeding to annul determination of budget director that files and
work sheets prepared for state commission on cable television were not discover-
able, see SCL, PUB OFF § 87, Form 4.

judgment in Article 78 proceeding annulling determination of budget director that files
and work sheets prepared for state commission on cable television were not
discoverable, see SCL, PUB OFF § 87, Form 5.

notice of petition in Article 78 proceeding to compel police department to release
information as to absence from employment of particular officer, see SCL, PUB
OFF § 87, Form 6.

judgment in Article 78 proceeding to compel police department to release information as
to absence from employment of particular police officer, see SCL, PUB OFF § 87,
Form 7.

order and judgment in Article 78 proceeding compelling police department to release
information as to absence from employment of particular police officer, see SCL,
PUB OFF § 87, Form 8.

order to show cause in Article 78 proceeding to obtain access to municipal housing
authority's employee payroll and disciplinary records, see SCL, PUB OFF § 87,
Form 9.

petition in Article 78 proceeding to obtain access to municipal housing authority's
employee payroll and disciplinary records, see SCL, PUB OFF § 87, Form 10.
Affidavit in support of petition in Article 78 proceeding to obtain access to municipal
housing authority's employee payroll and disciplinary records, see SCL, PUB OFF
§ 87, Form 11.

notice of petition in Article 78 proceeding to obtain disclosure of public records in
computer-tape format, see SCL, PUB OFF § 87, Form 12.

petition in Article 78 proceeding to obtain disclosure of public records in computer-tape
format, see SCL, PUB OFF § 87, Form 13.

Affirmation in support of petition in Article 78 proceeding to obtain disclosure of public
records in computer-tape format, see SCL, PUB OFF § 87, Form 14.

Affidavit in support of petition in Article 78 proceeding to obtain disclosure of public
records in computer-tape format, see SCL, PUB OFF § 87, Form 15.

Order in Article 78 proceeding to obtain disclosure of public records in computer-tape
format, see SCL, PUB OFF § 87, Form 16.

Law Review and Journal Commentaries

1987 Survey of New York law—Administrative Law. McGonagle. 39 Syracuse L.Rev. 1
(1988).

1990 Survey of New York law: Local government. Nesbitt. 42 Syracuse L.Rev. 679
(1991).

Notes of Decisions

I. GENERALLY

Attorneys' fees 13
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 Substantial injury to competitive position 5a

1. Construction

Government records are presumptively open to public unless they fall within enumerated exemption in Public Officers Law. *Mingo v. New York State Div. of Parole* (3 Dept. 1997) 244 A.D.2d 781, 666 N.Y.S.2d 244.

Taxpayer's request under Freedom of Information Law (FOIL) to compel town to produce records relating to tentative property tax assessment was moot as result of town's prior production of records in its possession and correction of subsequent clerical error in assessment. *Corvetti v. Town of Lake Pleasant* (3 Dept. 1997) 239 A.D.2d 841, 657 N.Y.S.2d 536.

Commitment to policy of open government and public accountability under Freedom of Information Law (FOIL) mandates all agencies to make records available to public unless they fall into one of designated statutorily defined exemptions which allow, but do not require, them to withhold certain information. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

Freedom of Information Law (FOIL) exemptions are to be narrowly construed, and agency seeking to prevent disclosure bears burden of demonstrating applicability of particular exemption claimed. *Legal Aid Soc. of Northeastern New York, Inc. v. New York State Dept. of Social Services* (3 Dept. 1993) 195 A.D.2d 150, 605 N.Y.S.2d 785.

Freedom of Information Law (FOIL) exemptions from disclosure of government agency records are to be narrowly construed and burden to establish applicability of exemption is on agency seeking to prevent disclosure. *Spencer v. New York State Police* (3 Dept. 1992) 187 A.D.2d 919, 591 N.Y.S.2d 207.

All agency records are presumptively available for public inspection and copying under Freedom of Information Law (FOIL), unless documents in question fall within a statutory exemption. *New York*

Times Co. v. New York State Dept. of Health, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

Freedom of Information Law (FOIL) exemptions are to be narrowly construed. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

2. Construction with other laws

Disclosure of public documents provisions of city charter did not create right to disclosure that would be broader than provisions of statewide Freedom of Information Law (FOIL); city charter provisions and similar laws deny access to records if it would not be in the public interest to disclose them, and FOIL exemptions can fairly be seen as legislative "codification" of case law construction of when it is in the public interest to deny access to records. *Turner v. Department of Finance of City of New York* (1 Dept. 1998) 242 A.D.2d 146, 673 N.Y.S.2d 428.

Freedom of Information Law (FOIL) exemptions from disclosure engrafted limitations of disclosure of otherwise accessible public information pursuant to city charter provisions. *Turner v. Department of Finance of City of New York* (1 Dept. 1998) 242 A.D.2d 146, 673 N.Y.S.2d 428.

Record is not considered an employment history merely because it records facts concerning employment, for purposes of Freedom of Information Law section exempting from mandatory disclosure records that if disclosed would constitute unwarranted invasion of privacy, including but not limited to disclosure of employment history. *Mothers on the Move, Inc. v. Messer* (2 Dept. 1997) 236 A.D.2d 408, 652 N.Y.S.2d 773.

Medical evaluations provided by Visiting Psychiatric Service, a unit of Office of Health and Mental Health Services, fell within exception to Freedom of Information Law (FOIL) barring disclosure by social service officials of information and communications relating to persons receiving public assistance or care, pursuant to Public Health Law 18, and, thus, government properly declined to disclose records, even in redacted form. *Rabinowitz v. Hammons* (1 Dept. 1996) 228 A.D.2d 369, 644 N.Y.S.2d 726, leave to appeal denied 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232.

Law governing

Teacher's discovery request against board of education for violation of civil rights in connection with dismissal of elementary school teacher governed by Federal Rules of Civil Procedure and not by state Freedom of Information Law. *Greenberg v. Board of Educ. of City of New York*, 1 F.R.D. 361.

2b. Purpose

While purpose of Freedom of Information Law (FOIL) may be to shed light on government decision-making, it is not confined to records actually used in decision-making process. *New News v. Office of President of Board of Staten Island*, 1995, 166 Misc.2d 479, affirmed 231 A.D.2d 647 N.Y.S.2d 270.

Records within section

Police activity logs contained information kept (or) held for an undetermined period and thus were records available under Freedom of Information Law. *New York City Police Dept. v. City of New York*, 1997, 243 A.D.2d 267, 653 N.Y.S.2d 54, 673 N.Y.S.2d 54.

Memorialized discussions at executive sessions, which result in formal vote, whether or not privileged attorney-client communications or otherwise, are not type of records to which public has access under Freedom of Information Law (FOIL). *Wm. J. Klein v. County of Hamilton* (3 Dept. 1995) 235 A.D.2d 44, 653 N.Y.S.2d 339.

Disclosure of any trial evidence in a case that would constitute unwarranted invasion of privacy under Freedom of Information Law would interfere with district attorney's appeal of criminal conviction. *Sider v. Dist. Atty., New York County* (1997) 243 A.D.2d 423, 663 N.Y.S.2d 261, 692 N.E.2d 130.

Freedom of Information Law exemptions from disclosure intra-agency communications which are not statistical or factual data, instructions to affect public, final agency policy recommendations, or external audits are not deliberative materials, i.e., communications exchanged for discussion but constituting final policy decisions. *Mothers on the Move, Inc. v. Messer*, 1997, 236 A.D.2d 408, 652 N.Y.S.2d 773.

Decisions

Times Co. v. New York State Dept. of Health, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

Freedom of Information Law (FOIL) exemptions are to be narrowly construed. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

2. Construction with other laws

Disclosure of public documents provisions of city charter did not create right to disclosure that would be broader than provisions of statewide Freedom of Information Law (FOIL); city charter provisions and similar laws deny access to records if it would not be in the public interest to disclose them, and FOIL exemptions can fairly be seen as legislative "codification" of case law construction of when it is in the public interest to deny access to records. *Turner v. Department of Finance of City of New York* (1 Dept. 1998) 242 A.D.2d 146, 673 N.Y.S.2d 428.

Freedom of Information Law (FOIL) exemptions from disclosure engrafted limitations of disclosure of otherwise accessible public information pursuant to city charter provisions. *Turner v. Department of Finance of City of New York* (1 Dept. 1998) 242 A.D.2d 146, 673 N.Y.S.2d 428.

Record is not considered an employment history merely because it records facts concerning employment, for purposes of Freedom of Information Law section exempting from mandatory disclosure records that if disclosed would constitute unwarranted invasion of privacy, including but not limited to disclosure of employment history. *Mothers on the Move, Inc. v. Messer* (2 Dept. 1997) 236 A.D.2d 408, 652 N.Y.S.2d 773.

Medical evaluations provided by Visiting Psychiatric Service, a unit of Office of Health and Mental Health Services, fell within exception to Freedom of Information Law (FOIL) barring disclosure by social service officials of information and communications relating to persons receiving public assistance or care, pursuant to Public Health Law 18, and, thus, government properly declined to disclose records, even in redacted form. *Rabinowitz v. Hammons* (1 Dept. 1996) 228 A.D.2d 369, 644 N.Y.S.2d 726, leave to appeal denied 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232.

2a. Law governing

Teacher's discovery request in action against board of education for violation of his civil rights in connection with his dismissal as elementary school teacher was governed by Federal Rules of Civil Procedure and not by state Freedom of Information Law. *Greenberg v. Board of Educ. of City of New York*, 1989, 125 F.R.D. 361.

2b. Purpose

While purpose of Freedom of Information Law (FOIL) may be to shed light on government decision-making, its ambit is not confined to records actually used in decision-making process. *New York 1 News v. Office of President of Borough of Staten Island*, 1995, 166 Misc.2d 270, 631 N.Y.S.2d 479, affirmed 231 A.D.2d 524, 647 N.Y.S.2d 270.

2c. Records within section

Police activity logs contained "information kept [or] held * * * for an agency," and thus were records available under Freedom of Information Law. *Gould v. New York City Police Dept.*, 1996, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808.

Memorialized discussions at duly convened executive sessions, which do not result in formal vote, whether consisting of privileged attorney-client communications or otherwise, are not type of governmental records to which public must be given access under Freedom of Information Law (FOIL). *Wm. J. Kline & Sons Inc. v. County of Hamilton* (3 Dept. 1997) 235 A.D.2d 44, 663 N.Y.S.2d 339.

Disclosure of any trial evidence in criminal case that would constitute "record" under Freedom of Information Law would interfere with district attorney's handling of appeal of criminal conviction, for purposes of FOIL exception. *Sideri v. Office of Dist. Atty., New York County* (1 Dept. 1997) 243 A.D.2d 423, 663 N.Y.S.2d 206, leave to appeal denied 91 N.Y.2d 808, 669 N.Y.S.2d 261, 692 N.E.2d 130.

Freedom of Information Law exempting from disclosure intra-agency materials which are not statistical or factual tabulations or data, instructions to staff that affect public, final agency policy or determinations, or external audits applies only to deliberative materials, i.e., communications exchanged for discussion purposes not constituting final policy decisions; factual observations are not exempt from disclosure, even in documents issued before final decision. *Mothers on the Move,*

Inc. v. Messer (2 Dept. 1997) 236 A.D.2d 408, 652 N.Y.S.2d 773.

Files maintained by police department's office of equal employment opportunity relating to sexual harassment complaints by department employees were relevant to question of whether department created hostile work environment for purposes of employment discrimination action, since files would reveal frequency with which claims similar to employees were alleged and specific nature of those claims. *Morrison v. New York City Police Dept.* (1 Dept. 1996) 225 A.D.2d 463, 639 N.Y.S.2d 372.

Factual statements regarding circumstances surrounding shooting of drug suspect would be discoverable in civil rights action brought under § 1983, even though material might be privileged under state law. *Svaigsen v. City of New York* (1 Dept. 1994) 203 A.D.2d 32, 609 N.Y.S.2d 894.

State Environmental Protection and Spill Compensation Fund satisfied its disclosure obligations under the Freedom of Information Law (FOIL) when, in response to plaintiff's FOIL request for information regarding number of reimbursement claims granted by Fund, it provided access at reasonable time to its voluminous file containing requested documents. *White v. Regan* (3 Dept. 1991) 171 A.D.2d 197, 575 N.Y.S.2d 375, appeal denied 79 N.Y.2d 754, 581 N.Y.S.2d 281, 589 N.E.2d 1263, appeal denied 79 N.Y.2d 754, 581 N.Y.S.2d 282, 589 N.E.2d 1264.

Records in possession of county department of social services pertaining to petitioner, who was released from foster care, and his natural mother were not exempt from disclosure under Freedom of Information Law. *Malowsky v. D'Elia* (2 Dept. 1990) 160 A.D.2d 798, 553 N.Y.S.2d 836.

Disclosure of details regarding the electrical, security and transmission systems of correctional facility was not mandated under Freedom of Information Law where such disclosure might impair the effectiveness of these systems and compromise the safe and successful operation of prison. *Flowers v. Sullivan* (2 Dept. 1989) 149 A.D.2d 287, 545 N.Y.S.2d 289, appeal dismissed in part 75 N.Y.2d 850, 552 N.Y.S.2d 924, 552 N.E.2d 172, appeal dismissed 75 N.Y.2d 1004, 557 N.Y.S.2d 311, 556 N.E.2d 1118.

Statistical and factual tabulations held by office of county department of civil services were not within intra agency materials exception to Freedom of Information Act. *Akras v. Suffolk County Dept.*

of Civil Service (2 Dept. 1988) 137 A.D.2d 523, 524 N.Y.S.2d 266.

Applications by researchers which were not approved by state university's Institutional Animal Care and Use Committee were not created by agency nor would their disclosure be more injurious to consultative functions of government than those applications which committee approved, and nonapproved applications were not intra-agency documents exempt from disclosure under Freedom of Information Law. *American Soc. for Prevention of Cruelty to Animals v. Board of Trustees of State University of New York, State University of New York at Stony Brook*, 1990, 147 Misc.2d 847, 556 N.Y.S.2d 447.

4a. Records exempt from disclosure

Given that confidentiality of executive sessions of county board of supervisors had been specifically sanctioned by Open Meetings Law, records of those sessions fell within Freedom of Information Law's (FOIL) exemption of records "specifically exempted from disclosure by state or federal statute," and were thus shielded from public disclosure, even though records may have been provided without objection to grand jury pursuant to subpoena. *Wm. J. Kline & Sons Inc. v. County of Hamilton* (3 Dept. 1997) 235 A.D.2d 44, 663 N.Y.S.2d 339.

For purposes of Freedom of Information Law (FOIL) section providing that public agency may deny access to records that are "specifically exempted from disclosure by state or federal statute," State statute need not expressly state that it is intended to establish FOIL exemption, so long as there is clear legislative intent to establish and preserve confidentiality of records. *Wm. J. Kline & Sons Inc. v. County of Hamilton* (3 Dept. 1997) 235 A.D.2d 44, 663 N.Y.S.2d 339.

Information concerning names and identification numbers of inmates who filed grievances was exempt from disclosure under Freedom of Information Law (FOIL), as information was not generally available and could be used to identify particular grievances filed by each inmate. *Di Rose v. New York State Dept. of Correctional Services* (3 Dept. 1996) 226 A.D.2d 846, 640 N.Y.S.2d 353.

Records compiled by city transit authority in connection with charges and dispositions involving two separate and unrelated hearings by transit adjudication bureau were specifically exempted by state statute from disclosure under Freedom of Information law. *Reape v. State of N.Y.*

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Metropolitan Transp. Authority (2 Dept. 1992) 185 A.D.2d 275, 586 N.Y.S.2d 23, leave to appeal denied 81 N.Y.2d 710, 599 N.Y.S.2d 804, 616 N.E.2d 159.

Grand Jury minutes are court records and are exempt from the ambit of Freedom of Information Law (FOIL). *Harvey v. Hynes*, 1997, 174 Misc.2d 174, 665 N.Y.S.2d 1000.

5. Rules and regulations

Village regulation limiting hours within which public documents could be inspected in village clerk's office to less than regular business hours was invalid under Freedom of Information Law. *Murtha v. Leonard* (2 Dept. 1994) 210 A.D.2d 411, 620 N.Y.S.2d 101.

5a. Substantial injury to competitive position

Booklist compiled by subcontractor for auxiliary service corporation of state university to ensure that campus bookstore was adequately maintained was exempt from disclosure under Freedom of Information Law (FOIL) as release of information would cause substantial injury to competitive position of subcontracting bookstore which had compiled list; bookstore's competitor conceded that it wanted textbook information in order to sell very same books to students that patronize its competitor and economic windfall would be conferred on competitor by disclosure of list which was compiled through efforts and expense of subcontracting bookstore. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale*, 1995, 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302.

Commercial information is "confidential" for purposes of Freedom of Information Law (FOIL) if it would impair government's ability to obtain necessary information in future or cause substantial harm to competitive position of person from whom information was obtained. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale*, 1995, 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302.

6. Fees

Portions of county code section imposing \$20 fee for copies of police reports were invalid as being inconsistent with statute limiting fees which can be charged for copies of agency records to 25 cents per photocopy or actual cost of reproducing record except when different fee is

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otherwise prescribed by statute. *Gand Schotsky & Rappaport, P.C. v. Suffolk County* (2 Dept. 1996) 226 A.D.2d 339, 6 N.Y.S.2d 214.

Statutory limitation on fees chargeable for copies of records, limiting such fees 25¢ per photocopy, preempted local ordinance authorizing charge of \$7 per certified copy of accident reports and municipality could not authorize to charge higher fee. *Sheehan v. City of Syracuse*, 1987, 137 Misc.2d 438, 521 N.Y.S.2d 21.

8. — Votes of members

Smithson v. Ilion Housing Authority (Dept. 1987) 130 A.D.2d 965, 516 N.Y.S.2d 564, [main volume] affirmed 72 N.Y.2d 1034, 534 N.Y.S.2d 930, 531 N.E.2d 61.

Only in event that action is taken formal vote at executive session does Freedom of Information Law (FOIL) as Open Meetings Law require public record of manner in which each member of county board of supervisors voted. *Wm. Kline & Sons Inc. v. County of Hamilton* (3 Dept. 1997) 235 A.D.2d 44, 663 N.Y.S.2d 339.

Disciplinary committee's failure to record final vote, as requested by law student, in hearing on student's alleged violation of certain law school bylaws, did not warrant annulment of committee's determination that student violated bylaw. *Willett v. City University of New York (CUNY) Law School* (2 Dept. 1996) 2 A.D.2d 642, 647 N.Y.S.2d 798, leave appeal denied 90 N.Y.2d 801, 660 N.Y.S.2d 555, 683 N.E.2d 20.

10. — List of records

Petitioner was entitled to record sought pursuant to his Freedom of Information Law request due to solid was authority's failure to provide factual basis for exemption from law. *Rushford Oneida-Herkimer Solid Waste Authority* (4 Dept. 1995) 217 A.D.2d 966, 6 N.Y.S.2d 904.

State university's institutional animal care and use committee was not required under Freedom of Information Law to maintain list of records in possession of committee if such list was maintained by state university, and committee was not required to produce lists where *Society for Prevention of Cruelty to Animals* was informed that university maintained list and failed to request list from university. *American Soc. for Prevention of Cruelty to Animals v. Board of Trustees of State University of New York, State University of New York at Stony Brook*

Metropolitan Transp. Authority (2 Dept. 1992) 185 A.D.2d 275, 586 N.Y.S.2d 23, leave to appeal denied 81 N.Y.2d 710, 599 N.Y.S.2d 804, 616 N.E.2d 159.

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Portions of county code section imposing \$20 fee for copies of police reports were invalid as being inconsistent with statute limiting fees which can be charged for copies of agency records to 25 cents per photocopy or actual cost of reproducing record except when different fee is

otherwise prescribed by statute. *Gandin, Schotsky & Rappaport, P.C. v. Suffolk County* (2 Dept. 1996) 226 A.D.2d 339, 640 N.Y.S.2d 214.

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8. — Votes of members

Smithson v. Ilion Housing Authority (4 Dept. 1987) 130 A.D.2d 965, 516 N.Y.S.2d 564, [main volume] affirmed 72 N.Y.2d 1034, 534 N.Y.S.2d 930, 531 N.E.2d 651.

Only in event that action is taken by formal vote at executive session do both Freedom of Information Law (FOIL) and Open Meetings Law require public record of manner in which each member of county board of supervisors voted. *Wm. J. Kline & Sons Inc. v. County of Hamilton* (3 Dept. 1997) 235 A.D.2d 44, 663 N.Y.S.2d 339.

Disciplinary committee's failure to record final vote, as requested by law student, in hearing on student's alleged violation of certain law school bylaws, did not warrant annulment of committee's determination that student violated bylaws. *Willett v. City University of New York (CUNY) Law School* (2 Dept. 1996) 231 A.D.2d 642, 647 N.Y.S.2d 798, leave to appeal denied 90 N.Y.2d 801, 660 N.Y.S.2d 555, 683 N.E.2d 20.

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of New York at Stony Brook, 1990, 147 Misc.2d 847, 556 N.Y.S.2d 447.

11. Litigation—Generally

Under Freedom of Information Law (FOIL), city school construction authority had to disclose to property owner from whom parcel was taken by eminent domain the amounts paid to owners of other parcels which had been condemned, even though property owner had ongoing litigation with authority. *Greco v. Supp*, 1997, 171 Misc.2d 425, 654 N.Y.S.2d 560.

13. Attorneys' fees

Department of Correctional Services did not have reasonable basis in law to withhold access to inmates and their representative to records pertaining to inmate disturbance and, accordingly, inmates, who prevailed in their action under freedom of information law, were entitled to recover attorney fees; on date Department refused access, decisional law required Department to allow access to requested records. *Banchs v. Coughlin* (3 Dept. 1990) 168 A.D.2d 711, 563 N.Y.S.2d 864.

14. Discovery

Procedural rules relating to discovery in civil actions do not apply to Freedom of Information Law (FOIL) requests. *De Corse v. City of Buffalo* (4 Dept. 1997) 239 A.D.2d 949, 659 N.Y.S.2d 604.

II. DENIAL OF ACCESS

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31. Statutory exemptions

Disclosing to third-party tracer social security numbers and birthdates of homeowners on Mutual Mortgage Insurance/Mortgage Insurance Premium List would be "unwarranted invasion of personal privacy" under Freedom of Information Act provision exempting from disclosure personnel and medical files and similar files if disclosure would constitute clearly unwarranted invasion of personal

privacy. *Oliva v. U.S.*, 1991, 756 F.Supp. 105.

Videotape of alleged perpetrator making telephone calls and written records generated by investigation conducted by United Nations which were turned over to New York law enforcement authorities in connection with the latter's investigation were not exempt under federal law from disclosure to harassing telephone call recipient who had United Nations office, in circumstances involving neither any search of United Nations' premises nor any interference with United Nations' property or assets. *Burtis v. New York Police Dept.* (1 Dept. 1997) 240 A.D.2d 259, 659 N.Y.S.2d 875.

Serology reports in office of city medical examiner came within provision of city charter calling for medical examiner to promptly deliver to district attorney all records relating to all deaths as to which there was indication of criminality and excludes such records from public inspection, and thus, sister of murder victim, for whose murder sister's brother had been convicted, could not obtain reports under Freedom of Information Law (FOIL). *Katz v. Scott* (1 Dept. 1997) 236 A.D.2d 259, 653 N.Y.S.2d 346, leave to appeal denied 90 N.Y.2d 801, 660 N.Y.S.2d 554, 683 N.E.2d 19.

Documents, worksheets, and audiotape allegedly created in connection with autopsy of murder victim were not available to public under Freedom of Information Law (FOIL) as exemption existed for those records under New York City Charter. *Mitchell v. Borakove* (1 Dept. 1996) 225 A.D.2d 435, 639 N.Y.S.2d 791, appeal dismissed 88 N.Y.2d 919, 646 N.Y.S.2d 987, 670 N.E.2d 228.

Prison inmate convicted of two homicides was not entitled under freedom of information law to autopsy reports, the discovery of which was specifically exempted by separate statute. *Lyon v. Dunne* (3 Dept. 1992) 180 A.D.2d 922, 580 N.Y.S.2d 803, leave to appeal denied 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940.

Information concerning investigation into leaks of testimony which had been presented to grand jury was exempt from disclosure under Freedom of Information Law as information compiled for law enforcement purposes or as information exempt from disclosure by state statute prohibiting disclosure of grand jury materials. *New York News, Inc. v. Office of Special State Prosecutor of State of N.Y.* (1 Dept. 1989) 153 A.D.2d 512, 544 N.Y.S.2d 151.

Autopsy reports maintained by medical examiner were not subject to disclosure under freedom of information law. *Herald Co. v. Murray* (4 Dept. 1988) 136 A.D.2d 954, 524 N.Y.S.2d 949.

Where Freedom of Information Law (FOIL) exemption is claimed, burden lies with agency to articulate particularized and specific justification and to establish that material requested falls within ambit of statutory exemptions; mere conclusory allegations, without factual support, are insufficient to sustain agency's burden of proof. *Clinch v. Town of Hyde Park*, 1997, 173 Misc.2d 497, 661 N.Y.S.2d 786.

Town board was entitled to audiotapes of incoming and outgoing public telephone calls made from town police department, notwithstanding objections by chief of police; chief failed to show that exemptions of Freedom of Information Law (FOIL) applied to tapes at issue. *Clinch v. Town of Hyde Park*, 1997, 173 Misc.2d 497, 661 N.Y.S.2d 786.

Statute limiting disclosure of content of tax returns and reports to copy of decision and to statistics proscribed distribution of all other documents, exhibits, transcripts made or filed in connection with tax proceeding and, thus, exhibits and transcripts of tax hearings conducted by state Department of Taxation and Finance against taxpayer fell within exception to Freedom of Information Law (FOIL). *Tartan Oil Corp. v. State, Dept. of Taxation and Finance*, 1997, 172 Misc.2d 322, 659 N.Y.S.2d 410, affirmed 239 A.D.2d 36, 668 N.Y.S.2d 76.

31a. Final judgments

Even though motions for leave to appeal to Court of Appeals were pending, order and judgment entered by Supreme Court requiring city Department of Finance to disclose records sought by publishing company under the FOIL was "final determination by court of competent jurisdiction" within meaning of statute exempting certain information from disclosure and applying to "records which are the subject of a request for access . . . and as to which no final determination by a court of competent jurisdiction has been made on or before" statute's effective date. *Brownstone Publishers, Inc. v. New York City Dept. of Finance* (1 Dept. 1990) 167 A.D.2d 166, 561 N.Y.S.2d 245.

32. Personal privacy, invasion of

Information pertaining to release of persons arrested in civil disturbance was exempt from Freedom of Information Law (FOIL) disclosure and from public disclo-

sure as an unwarranted invasion of personal privacy. *Leibowitz v. Safir* (1998) — A.D.2d —, 674 N.Y.S.2d —. Inmate was not entitled under Freedom of Information Law (FOIL) to obtain information and records pertaining to individual's parole records, even though information was redacted, but such information was exempt from disclosure on ground that it was confidential, if released, would be an invasion of privacy. *Collins v. New York State Parole* (3 Dept. 1998) — A.D.2d —, 672 N.Y.S.2d 145.

Reports of police investigator and statement of witness who did not testify came within Freedom of Information Law (FOIL) exemptions for information compiled for law enforcement purposes for information constituting an invasion of privacy. *Mulhall v. Fitzgerald* (1998) — A.D.2d —, 672 N.Y.S.2d —.

Under Freedom of Information Law (FOIL), recipient of harassing telephone calls at home and at office in United Nations was not entitled to disclosure of plaintiff follow-up reports pertaining to interviews of persons recorded on telephone traps. *Burtis v. New York Police Dept.* (1997) 240 A.D.2d 259, 659 N.Y.S.2d 875.

Under Freedom of Information Law (FOIL), recipient of harassing telephone calls at home and at office in United Nations was not entitled to disclosure of plaintiff follow-up report regarding telephone traps, telephone numbers, names of persons recorded on telephone interviews of those persons; place telephone traps could not be characterized as criminal investigation techniques, procedures, and interviews of persons who had no connection with harassment complaint implicated privacy concerns. *Burtis v. New York Police Dept.* (1 Dept. 1997) 240 A.D.2d 259, 659 N.Y.S.2d 875.

Documents outlining investigation and determination of guilt of public employee on charges of "racial insensitivity" not exempt from disclosure under Freedom of Information Law (FOIL); disclosure did not constitute unwarranted invasion of privacy; employee's discipline was clearly relevant to work performance. *New York 1 News v. Office of President of Borough of State* (2 Dept. 1996) 231 A.D.2d 512, 674 N.Y.S.2d 270.

Application under freedom of information law for production of application for homestead program should not be

autopsy reports maintained by medical examiner were not subject to disclosure under freedom of information law. *Her-Co. v. Murray* (4 Dept. 1988) 136 A.D.2d 954, 524 N.Y.S.2d 949.

Where Freedom of Information Law (FOIL) exemption is claimed, burden lies on agency to articulate particularized specific justification and to establish that material requested falls within ambit of statutory exemptions; mere conclusory allegations, without factual support, are insufficient to sustain agency's burden of proof. *Clinch v. Town of Hyde Park*, 173 Misc.2d 497, 661 N.Y.S.2d 786. Town board was entitled to audiotapes of incoming and outgoing public telephone calls made from town police department, notwithstanding objections by chief of police; chief failed to show that exemptions under Freedom of Information Law (FOIL) applied to tapes at issue. *Clinch v. Town of Hyde Park*, 1997, 173 Misc.2d 497, 661 N.Y.S.2d 786.

Statute limiting disclosure of content of returns and reports to copy of decision and to statistics proscribed distribution of other documents, exhibits, transcripts made or filed in connection with tax proceedings and, thus, exhibits and transcripts of tax hearings conducted by state Department of Taxation and Finance against taxpayer fell within exception to Freedom of Information Law (FOIL). *Tartan Oil Corp. v. State, Dept. of Taxation and Finance*, 1997, 172 Misc.2d 322, 659 N.Y.S.2d 928, affirmed 239 A.D.2d 36, 668 N.Y.S.2d 928.

Final judgments

Even though motions for leave to appeal to Court of Appeals were pending, order of judgment entered by Supreme Court requiring city Department of Finance to disclose records sought by publishing company under the FOIL was "final determination" by court of competent jurisdiction within meaning of statute exempting certain information from disclosure and applying to "records which are the subject of request for access * * * and as to which final determination by a court of competent jurisdiction has been made on or before" statute's effective date. *Brown-Peone Publishers, Inc. v. New York City Dept. of Finance* (1 Dept. 1990) 167 A.D.2d 166, 561 N.Y.S.2d 245.

Personal privacy, invasion of

Information pertaining to release of persons arrested in civil disturbance was exempt from Freedom of Information Law (FOIL) disclosure and from public disclosure

as an unwarranted invasion of personal privacy. *Leibowitz v. Safir* (2 Dept. 1998) — A.D.2d —, 674 N.Y.S.2d 736.

Inmate was not entitled under Freedom of Information Law (FOIL) to obtain information and records pertaining to another individual's parole records, even if certain information was redacted, but, rather, such information was exempt from disclosure on ground that it was confidential and, if released, would be invasion of privacy. *Collins v. New York State Div. of Parole* (3 Dept. 1998) — A.D.2d —, 674 N.Y.S.2d 145.

Reports of police investigator and statement of witness who did not testify at trial came within Freedom of Information Law (FOIL) exemptions for information compiled for law enforcement purposes and for information constituting an invasion of privacy. *Mulhall v. Fitzgerald* (3 Dept. 1998) — A.D.2d —, 672 N.Y.S.2d 480.

Under Freedom of Information Law (FOIL), recipient of harassing telephone calls at home and at office in United Nations was not entitled to disclosure of complaint follow-up reports pertaining to interviews of persons recorded on telephone traps. *Burtis v. New York Police Dept.* (1 Dept. 1997) 240 A.D.2d 259, 659 N.Y.S.2d 875.

Under Freedom of Information Law (FOIL), recipient of harassing telephone calls at home and at office in United Nations was not entitled to disclosure of complaint follow-up report regarding telephone traps, telephone numbers and names of persons recorded on traps, and interviews of those persons; placement of traps could not be characterized as routine criminal investigation techniques or procedures, and interviews of persons recorded who had no connection with recipient's harassment complaint implicated personal privacy concerns. *Burtis v. New York Police Dept.* (1 Dept. 1997) 240 A.D.2d 259, 659 N.Y.S.2d 875.

Documents outlining investigation and determination of guilt of public employee on charges of "racial insensitivity" were not exempt from disclosure under Freedom of Information Law (FOIL); request for disclosure did not constitute unwarranted invasion of privacy; employee discipline was clearly relevant to work of borough office. *New York 1 News v. Office of President of Borough of Staten Island* (2 Dept. 1996) 231 A.D.2d 524, 647 N.Y.S.2d 270.

Application under freedom of information law for production of applications for homestead program should not have been

denied in its entirety; while invasion of some of the material would constitute unwarranted invasion of personal privacy, disclosure should have been made of non-exempt information contained in applications. *Wilson v. Town of Islip* (2 Dept. 1992) 179 A.D.2d 763, 578 N.Y.S.2d 642.

Under Freedom of Information Law, to extent that prison officials' narrative descriptions of contents of videotapes indicated strip frisks or other possible display of nudity of inmates, redactions from videotapes were properly ordered to prevent invasions of personal privacy. *Buffalo Broadcasting Co. Inc. v. New York State Dept. of Correctional Services* (3 Dept. 1992) 174 A.D.2d 212, 578 N.Y.S.2d 928, leave to appeal denied 79 N.Y.2d 759, 584 N.Y.S.2d 447, 594 N.E.2d 941.

License application form response to inquiry whether applicant had or was currently receiving treatment for any disabilities was not subject to disclosure under the Freedom of Information Law, which permits agency to deny access to records or portions thereof if disclosure would constitute unwarranted invasion of personal privacy and defines unwarranted invasion of personal privacy to include disclosure of medical history. *Hanig v. State Dept. of Motor Vehicles* (3 Dept. 1990) 168 A.D.2d 884, 564 N.Y.S.2d 805, appeal granted 77 N.Y.2d 805, 568 N.Y.S.2d 913, 571 N.E.2d 83, affirmed 79 N.Y.2d 106, 580 N.Y.S.2d 715, 588 N.E.2d 750.

While petitioner was not entitled to grand jury testimony requested, criminal convictions and any pending criminal action against grand jury witness did not fall within invasion of privacy exception to disclosure provisions of freedom of information law since they were matters of public record. *Thompson v. Weinstein* (2 Dept. 1989) 150 A.D.2d 782, 542 N.Y.S.2d 33.

Internal investigation and report of disturbance at county jail, undertaken to assess whether disciplinary or other action should be taken against any sheriff's deputies, were exempt from disclosure under Freedom of Information Law as personnel records used to evaluate performance toward continued employment or promotion. *Gannett Co., Inc. v. Riley*, 1994, 161 Misc.2d 321, 613 N.Y.S.2d 559.

Under freedom of information law (FOIL), town board was required to release photographs of abortion protestors whose prosecutions for disorderly conduct were pending; although photographs were compiled for law enforcement purposes, there was no indication as to how disclosure of photographs would interfere with

investigations or judicial proceedings or result in deprivation of right to fair trial, and photographs were not exempt from FOIL as unwarranted invasion of privacy, as names and addresses of those individuals had been released. *Planned Parenthood of Westchester Inc. v. Town Bd. of Town of Greenburgh*, 1992, 154 Misc.2d 971, 587 N.Y.S.2d 461.

32a. Commercial enterprise, substantial injury to

Energy Planning Board properly determined that operating data which cogenerator filed with Board was confidential for term of power purchase agreement between cogenerator and electric utility, despite claim that data was necessary to monitor cogenerator's continuing status as qualifying facility, given industry-wide transition from regulatory, monopolistic environment to fully competitive one; disclosure of data could result in competitors, like utility, inferring essential aspects of cogenerator's production costs fundamental to projecting future costs, disclosure would give competitors of cogenerator's steam host undue advantage in knowing part of host's production costs, and disclosure would violate any confidentiality agreements between cogenerator and host, thus making it more difficult for cogenerator to compete for steam customers in future. *New York State Elec. & Gas Corp. v. New York State Energy Planning Bd.* (3 Dept. 1996) 221 A.D.2d 121, 645 N.Y.S.2d 145, leave to appeal granted 89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, appeal withdrawn 89 N.Y.2d 1031, 638 N.Y.S.2d 246, 680 N.E.2d 620.

33. Contract awards, impairment of

Successful bidder's response to Department of Transportation's (DOT) request for proposal for high-speed ferry service was not exempt from disclosure under Freedom of Information Law (FOIL) as document that would impair present or imminent contract awards if disclosed; response did not include any intraagency confidential information which would assist in DOT's contract negotiations, and requesting party did not seek evaluative material or other internal analysis that would undermine DOT's efforts to negotiate contracts. *Cross-Sound Ferry Services Inc. v. Department of Transp.* (3 Dept. 1995) 219 A.D.2d 346, 634 N.Y.S.2d 575.

34a. Computer data

Computer data management system, which contained information derived from

real property transfer reports, which were exempt from public disclosure under the Real Property Tax Law was similarly protected under freedom of information law. *Property Valuation Analysts, Inc. v. Williams* (3 Dept. 1990) 164 A.D.2d 131, 563 N.Y.S.2d 545.

34b. Disciplinary proceedings

Although confidentiality requirement imposed on files concerning possible instances of professional misconduct is not imposed on actual hearings, statutes and case law reflect policy of keeping disciplinary proceedings involving licensed professionals confidential until final determination; policy safeguards information that potential complainant might regard as private or confidential and removes possible disincentive to filing of professional misconduct complaints. *Johnson Newspaper Corp. v. Melino*, 1990, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.2d 1046.

35. Trade secrets

Department of Transportation's (DOT) claim that requested information contained trade secrets within meaning of Freedom of Information Law (FOIL) exemption did not support its decision to supply redacted version of response to request for proposal when complying with FOIL request, where DOT did not raise trade secret exemption when responding to request, and offered no explanation for why it did not raise exemption when it supplied requesting party with redacted version. *Cross-Sound Ferry Services Inc. v. Department of Transp.* (3 Dept. 1995) 219 A.D.2d 346, 634 N.Y.S.2d 575.

Assuming that auxiliary service corporation of state university was subject to Freedom of Information Law, as an agency of state, it would nevertheless not be required to produce upon request of private bookstore list of information regarding upcoming semester's course materials; data could be withheld as information received from subcontractor which would cause substantial injury to subcontractor's position. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale* (1 Dept. 1995) 212 A.D.2d 418, 622 N.Y.S.2d 684, leave to appeal granted 85 N.Y.2d 811, 631 N.Y.S.2d 287, 655 N.E.2d 400, affirmed as modified 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302.

Documents relating to Department of Health's decision to award contract for Acquired Immune Deficiency Syndrome (AIDS) Intervention Management System to successful bidder were not exempt from

disclosure through rejected bidder's Freedom of Information Law request as trade secrets or documents which, if disclosed would cause substantial injury to successful bidder's competitive position; there was no adequate showing that documents were "trade secrets" or that their disclosure would cause substantial injury to successful bidder's competitive position and there was no showing that successful bidder had any reasonable expectation of not having its bid open to public. *Professional Standards Review Council of America Inc. v. New York State Dept. of Health* (3 Dept. 1993) 193 A.D.2d 937, 597 N.Y.S.2d 829.

Dispute over whether electric utility's report to state agency was immune from disclosure to competitor under freedom of information law was rendered moot by release of report following unstayed trial court decision for competitor; utility's failure to seek stay pending appeal was cause of mootness, and issue of whether report was "trade secret" within meaning of exception to law was neither particularly significant nor one which would be expected to typically evade review. *Niagara Mohawk Power Corp. v. New York State Dept. of Environmental Conservation* (3 Dept. 1991) 169 A.D.2d 943, 564 N.Y.S.2d 839.

Records of county agency engaged in waste transportation services, including commercial customer lists and commercial credit accounts, were not exempt from disclosure under freedom of information law (FOIL) pursuant to exemption for information constituting "trade secrets," as agency failed to show that its customer lists were either not known or discoverable or were compiled through years of effort, and nature of agency's business was open and notorious. *Waste-Stream, Inc. v. St. Lawrence County Solid Waste Disposal Authority*, 1995, 166 Misc.2d 630 N.Y.S.2d 1020.

Information concerning electronic manufacturer's retail distributors and pricing policy were not "trade secrets or other economically sensitive information" exempt from disclosure pursuant to Freedom of Information Law request for documents generated in Attorney General's federal antitrust action against manufacturer. *Ragusa v. New York State Dept. of Law*, 1991, 152 Misc.2d 602, 57 N.Y.S.2d 959.

State university's Institutional Animal Care and Use Committee, in responding to request under Freedom of Information Law made by American Society for Pre

real property transfer reports, which were exempt from public disclosure under the Real Property Tax Law was similarly protected under freedom of information law. *Property Valuation Analysts, Inc. v. Williams* (3 Dept. 1990) 164 A.D.2d 131, 68 N.Y.S.2d 545.

b. Disciplinary proceedings

Although confidentiality requirement imposed on files concerning possible instances of professional misconduct is not imposed on actual hearings, statutes and case law reflect policy of keeping disciplinary proceedings involving licensed professionals confidential until final determination; policy safeguards information that potential complainant might regard as private or confidential and removes possible disincentive to filing of professional misconduct complaints. *Johnson Newspaper Corp. v. Melino*, 1990, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.2d 1046.

c. Trade secrets

Department of Transportation's (DOT) claim that requested information contained trade secrets within meaning of Freedom of Information Law (FOIL) exemption did not support its decision to apply redacted version of response to request for proposal when complying with FOIL request, where DOT did not raise trade secret exemption when responding request, and offered no explanation for why it did not raise exemption when it applied requesting party with redacted version. *Cross-Sound Ferry Services Inc. v. Department of Transp.* (3 Dept. 1995) 9 A.D.2d 346, 634 N.Y.S.2d 575.

Assuming that auxiliary service corporation of state university was subject to Freedom of Information Law, as an agency of state, it would nevertheless not be required to produce upon request of private bookstore list of information regarding upcoming semester's course materials; materials could be withheld as information received from subcontractor which would cause substantial injury to subcontractor's position. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale* (1 Dept. 1995) 212 A.D.2d 418, 622 N.Y.S.2d 684, leave to appeal granted 85 N.Y.2d 811, 631 N.Y.S.2d 287, 655 N.E.2d 400, affirmed as modified 87 N.Y.2d 410, 639 N.Y.S.2d 990, 63 N.E.2d 302.

Documents relating to Department of Health's decision to award contract for required Immune Deficiency Syndrome (IDS) Intervention Management System successful bidder were not exempt from

disclosure through rejected bidder's Freedom of Information Law request as trade secrets or documents which, if disclosed, would cause substantial injury to successful bidder's competitive position; there was no adequate showing that documents were "trade secrets" or that their disclosure would cause substantial injury to successful bidder's competitive position and there was no showing that successful bidder had any reasonable expectation of not having its bid open to public. *Professional Standards Review Council of America Inc. v. New York State Dept. of Health* (3 Dept. 1993) 193 A.D.2d 937, 597 N.Y.S.2d 829.

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Records of county agency engaged in waste transportation services, including commercial customer lists and commercial credit accounts, were not exempt from disclosure under freedom of information law (FOIL) pursuant to exemption for information constituting "trade secrets," as agency failed to show that its customer lists were either not known or discoverable or were compiled through years of effort, and nature of agency's business was open and notorious. *Waste-Stream, Inc. v. St. Lawrence County Solid Waste Disposal Authority*, 1995, 166 Misc.2d 6, 636 N.Y.S.2d 1020.

Information concerning electronic manufacturer's retail distributors and pricing policy were not "trade secrets" or other economically sensitive information" exempt from disclosure pursuant to Freedom of Information Law request for documents generated in Attorney General's federal antitrust action against manufacturer. *Ragusa v. New York State Dept. of Law*, 1991, 152 Misc.2d 602, 578 N.Y.S.2d 959.

State university's Institutional Animal Care and Use Committee, in responding to request under Freedom of Information Law made by American Society for Pre-

vention of Cruelty to Animals for research project review forms, was required to respond to questions relating to procedures to be performed on laboratory animals including whether survival surgery would be performed, whether controlled or hazardous substances will be used and whether animals would be euthanized at completion of research, where questions were framed to elicit information concerning care and treatment of animals in question and did not, except in most general terms, explore underlying hypothesis of researcher, researcher's method, analysis or results, and did not implicate any trade secrets. *American Soc. for Prevention of Cruelty to Animals v. Board of Trustees of State University of New York, State University of New York at Stony Brook*, 1990, 147 Misc.2d 847, 556 N.Y.S.2d 447.

36. Law enforcement records--Generally

Use or potential use in litigation of information which is sought is critical factor in assessing whether statute, under which personnel records of police officers, correction officers, and firefighters which are used to evaluate performance are confidential and not subject to review, will provide exemption from Freedom of Information Law (FOIL) and prohibit discovery of such records. *Daily Gazette Co. v. City of Schenectady* (3 Dept. 1998) 242 A.D.2d 164, 673 N.Y.S.2d 783.

Prison officials adequately stated basis for their denial of inmate's request for disclosure of documents relating to his arrest and indictment pursuant to Freedom of Information Law; officials stated that either documents sought were compiled for law-enforcement purposes and their disclosure would reveal investigative techniques and procedures and identify confidential information relating to criminal investigations, or their disclosure would constitute unwarranted invasion of privacy. *Mulhall v. Fitzgerald* (3 Dept. 1998) — A.D.2d —, 672 N.Y.S.2d 480.

"Rap sheets" of individuals who were not witnesses at requesting party's trial were exempt from disclosure under Freedom of Information Law. *Woods v. Kings County Dist. Attorney's Office* (2 Dept. 1996) 224 A.D.2d 554, 651 N.Y.S.2d 595.

Under Freedom of Information Law, inmate was not entitled to categorical list of all records possessed by State Police; it was clear from terms of petitioner's demand that what he actually sought was a specific listing of individual items in his file. *Pennington v. McMahon* (3 Dept.

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1996) 234 A.D.2d 624, 650 N.Y.S.2d 492, leave to appeal denied 89 N.Y.2d 816, 659 N.Y.S.2d 857, 681 N.E.2d 1304.

Scientific evidence, excluding ballistics and fingerprint tests, may properly be exempted from disclosure under Freedom of Information Law (FOIL) government agency nonroutine criminal investigative technique or procedure disclosure exemption. *Spencer v. New York State Police* (3 Dept. 1992) 187 A.D.2d 919, 591 N.Y.S.2d 207.

37. — Interference with investigation or proceeding

Serology report was not exempt from disclosure by city's chief medical examiner under Freedom of Information Law (FOIL) on basis that disclosure would interfere with law enforcement investigations where examiner's assertion of that ground was merely conclusory, and no attempt was made to specify, with particularity, basis for its refusal to comply with request. *Katz v. Scott* (1 Dept. 1997) 236 A.D.2d 259, 653 N.Y.S.2d 346, leave to appeal denied 90 N.Y.2d 801, 660 N.Y.S.2d 554, 683 N.E.2d 19.

Fact that records of county sheriff's department were in temporary possession of prosecutor for presentation to federal grand jury did not warrant dismissal of action to compel production of records pursuant to Freedom of Information Law. *Buffalo Broadcasting Co., Inc. v. County of Erie* (4 Dept. 1993) 190 A.D.2d 1086, 593 N.Y.S.2d 706.

Correctional facility could not make blanket assertion that all videotapes made during inmate uprising were exempt from disclosure under Freedom of Information Law on ground disclosure would interfere with criminal investigations, endanger inmate informants, or endanger safety of all inmates shown on tapes; facility could properly be required to edit out specific portions of tapes which were actually exempt, providing sufficient descriptions of what was redacted for judicial review of justification for claimed exemptions. *Buffalo Broadcasting Co., Inc. v. New York State Dept. of Correctional Services* (3 Dept. 1990) 155 A.D.2d 106, 552 N.Y.S.2d 712, on subsequent appeal 174 A.D.2d 212, 578 N.Y.S.2d 928, leave to appeal denied 79 N.Y.2d 759, 584 N.Y.S.2d 447, 594 N.E.2d 941.

Police report may be withheld or redacted, in part, under freedom of information law if information and report was compiled for law enforcement purposes and, if disclosed, would, inter alia, inter-

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fere with law enforcement investigations, identify confidential source or disclose confidential information relating to criminal investigation. *Moore v. Santucci* (2 Dept. 1989) 151 A.D.2d 677, 543 N.Y.S.2d 103.

Newspaper was not entitled to copies of all affidavits taken by city police in course of their investigation into death of individual, as requested information, if disclosed, would interfere with law enforcement investigations or disclosed confidential information. *Auburn Publisher, Inc. v. City of Auburn* (4 Dept. 1989) 147 A.D.2d 900, 537 N.Y.S.2d 354, appeal denied 74 N.Y.2d 614, 547 N.Y.S.2d 848, 547 N.E.2d 103.

39. — Confidential source or information

Allen v. Strojnowski (2 Dept. 1987) 129 A.D.2d 700, 514 N.Y.S.2d 463, [main volume] appeal dismissed 70 N.Y.2d 871, 523 N.Y.S.2d 493, 518 N.E.2d 5.

Trial court properly denied petitioner access to statements made by individuals alleged by petitioner to be "known informants;" disclosure of such documents, if they exist, would constitute unwarranted invasion of personal privacy, might endanger safety of informants and would necessarily reveal documents compiled for law enforcement purposes that would identify confidential source. *Scarola v. Morgenthau* (1 Dept. 1998) — A.D.2d —, 668 N.Y.S.2d 174.

City did not deny access to its General Offense Reports on ground that reports, if disclosed, would identify confidential source and it failed to establish factually that production of reports would otherwise be unwarranted invasion of privacy, so that petitioner was entitled to unredacted copies of reports. *De Corse v. City of Buffalo* (4 Dept. 1997) 239 A.D.2d 949, 659 N.Y.S.2d 604.

Summaries of statements of witnesses who did not testify at trial and direct statements of those witnesses, which were contained in investigatory file compiled by State Police which led to file requester's arrest and murder conviction, were exempt from disclosure under Freedom of Information Law (FOIL). *Spencer v. New York State Police* (3 Dept. 1992) 187 A.D.2d 919, 591 N.Y.S.2d 207.

Public Officers Law, which exempts records compiled for law enforcement purposes from disclosure in response to request under Freedom of Information Law, did not apply to prisoner's request for memo book entries made by police officers who investigated two armed robberies giv-

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en that police never asserted that person who may have furnished statements to officers were promised confidentiality since witnesses later testified against person at trial. *Laureano v. Grin* (Dept. 1992) 179 A.D.2d 602, 579 N.Y.S.2d 857.

Fact that certain confidential information from state's child abuse investigation was already in public domain due to other sources did not render records confidential, and thus subject to disclosure under freedom of information law. *York News Inc. v. Grinker*, 1989 Misc.2d 325, 537 N.Y.S.2d 770.

39a. Correction records

Records requested by petitioner regarding altercation involving petitioner at correctional facility which resulted in inmate and petitioner's later prosecution for murder were exempt from disclosure under Freedom of Information Law on grounds that they were interagency intraagency records and that disclosure would be invasion of privacy. *Tate v. Francesco* (3 Dept. 1995) 217 A.D.2d 629, 629 N.Y.S.2d 529, leave to appeal denied 86 N.Y.2d 712, 635 N.Y.S.2d 949, 635 N.E.2d 772.

Inmate's petition to compel release of certain documents requested under Freedom of Information Law (FOIL) should have been dismissed without the benefit of camera inspection of pertinent documents, targeted information was referred to as "predecisional" or "confidential" in broad and conclusory fashion without details as to what was contained in completely or partially redacted documents. *Grune v. New York State Dept. of Correctional Services* (3 Dept. 1990) 142 A.D.2d 834, 562 N.Y.S.2d 826.

40. — Investigative techniques

Allen v. Strojnowski (2 Dept. 1987) 129 A.D.2d 700, 514 N.Y.S.2d 463, [main volume] appeal dismissed 70 N.Y.2d 871, 523 N.Y.S.2d 493, 518 N.E.2d 5.

Redaction of canine training categories from transit police dog documents provided applicant under Freedom of Information Law (FOIL) was warranted; categories would reveal nonroutine criminal investigative techniques and procedures and details that would identify names and addresses of individuals and organizations noted in records. *O'Donne v. Donadio* (1 Dept. 1998) — A.D.2d —, 674 N.Y.S.2d 301.

Under Freedom of Information Law (FOIL), recipient of harassing telephone

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Trial court properly denied petitioner access to statements made by individuals alleged by petitioner to be "known informants;" disclosure of such documents, if they exist, would constitute unwarranted invasion of personal privacy, might endanger safety of informants and would necessarily reveal documents compiled for law enforcement purposes that would identify confidential source. *Scarola v. Morgenthau* (1 Dept. 1998) — A.D.2d —, 668 N.Y.S.2d 174.

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ing that police never asserted that persons who may have furnished statements to officers were promised confidentiality and since witnesses later testified against prisoner at trial. *Laureano v. Grimes* (1 Dept. 1992) 179 A.D.2d 602, 579 N.Y.S.2d 357.

Fact that certain confidential information from state's child abuse investigation was already in public domain due to various sources did not render records non-confidential, and thus subject to disclosure under freedom of information law. *New York News Inc. v. Grinker*, 1989, 142 Misc.2d 325, 587 N.Y.S.2d 770.

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Records requested by petitioner regarding alteration involving petitioner at correctional facility which resulted in death of inmate and petitioner's later prosecution for murder were exempt from disclosure under Freedom of Information Law on grounds that they were interagency or intraagency records and that disclosure would be invasion of privacy. *Tate v. De Francesco* (3 Dept. 1995) 217 A.D.2d 831, 629 N.Y.S.2d 529, leave to appeal denied 86 N.Y.2d 712, 635 N.Y.S.2d 949, 659 N.E.2d 772.

Inmate's petition to compel release of certain documents requested under freedom of information law (FOIL) should not have been dismissed without the benefit of in camera inspection of pertinent documents, targeted information was merely referred to as "predecisional" or "evaluative" in broad and conclusory fashion without details as to what was contained in completely or partially redacted documents. *Grune v. New York State Dept. of Correctional Services* (3 Dept. 1990) 166 A.D.2d 834, 562 N.Y.S.2d 826.

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Under Freedom of Information Law (FOIL), recipient of harassing telephone

calls at home and at office in United Nations was not entitled to disclosure of complaint follow-up report regarding telephone traps, telephone numbers and names of persons recorded on traps, and interviews of those persons; placement of traps could not be characterized as routine criminal investigation techniques or procedures, and interviews of persons recorded who had no connection with recipient's harassment complaint implicated personal privacy concerns. *Burtis v. New York Police Dept.* (1 Dept. 1997) 240 A.D.2d 259, 659 N.Y.S.2d 875.

Under Freedom of Information Law (FOIL), recipient of harassing telephone calls at home and at office in United Nations was entitled to disclosure of follow-up complaint reports in redacted form, with deletion of any information regarding placement of telephone traps and surveillance cameras, as that information could not be characterized as routine criminal investigation techniques or procedures, and any information that could be characterized as internal government exchange would be protected by inter/intra agency exception. *Burtis v. New York Police Dept.* (1 Dept. 1997) 240 A.D.2d 259, 659 N.Y.S.2d 875.

Portions of investigatory file compiled by State Police, which led to file requester's arrest and murder conviction, relating to laboratory examinations of evidence seized from crime scene and elsewhere were within Freedom of Information Law (FOIL) government agency nonroutine criminal investigative technique or procedure disclosure exemption. *Spencer v. New York State Police* (3 Dept. 1992) 187 A.D.2d 919, 591 N.Y.S.2d 207.

Portions of investigatory file compiled by State Police, which led to file requester's arrest and murder conviction, describing State Police's surveillance of places which requester was known to frequent and its establishment of roadblocks did not describe "nonroutine procedures" within meaning of Freedom of Information Law (FOIL) government agency nonroutine criminal investigative technique or procedure disclosure exemption. *Spencer v. New York State Police* (3 Dept. 1992) 187 A.D.2d 919, 591 N.Y.S.2d 207.

Prison inmate convicted of two homicides was entitled under freedom of information law to receive inventory listing of evidence retrieved from homicide scene, absent more than conclusory assertions by State Police that disclosure of such a list would reveal nonroutine criminal investigative procedures and techniques. *Lyon*

v. Dunne (3 Dept. 1992) 180 A.D.2d 922, 580 N.Y.S.2d 803, leave to appeal denied 79 N.Y.2d 758, 584 N.Y.S.2d 441, 594 N.E.2d 940.

Records of narcotics district's "buy operation" were exempt from disclosure under Freedom of Information Law, since such records were compiled for law enforcement purposes and, if disclosed, would reveal confidential sources and information as well as expert criminal investigative techniques. *Ennis v. Slade* (1 Dept. 1992) 179 A.D.2d 558, 579 N.Y.S.2d 59, leave to appeal denied 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940.

Records and documents related to fabrication of fingerprint evidence by State Police were not exempt from disclosure under the Freedom of Information Law (FOIL) on ground that records would reveal nonroutine criminal investigative techniques, as fingerprint tests are example of routine investigative techniques and methods of discovering fabricated fingerprints were not shown to be unique and had been subject of testimony in open court. *Muniz v. Roth*, 1994, 163 Misc.2d 293, 620 N.Y.S.2d 700.

40a. — Redaction of records

City police department satisfied its burden of establishing that redaction of personal information regarding police officers and witnesses involved in investigation of case of individual who requested material under Freedom of Information Law was proper and, thus, in camera inspection of documents was unnecessary. *Davidson v. Police Dept. of City of New York* (1 Dept. 1993) 197 A.D.2d 466, 602 N.Y.S.2d 855.

Under Freedom of Information Law, prison inmate was entitled to disclosure of personal reference cards of other inmates who were in lineup with him, though information that was not typically available in publicly accessible arrest and conviction records including, but not limited to, inmates' prison identification numbers, dietary requirements, and name and address of their next of kin—would be redacted. *Dobranski v. Hooper* (3 Dept. 1989) 154 A.D.2d 736, 546 N.Y.S.2d 180.

41. — Civil investigations

Documents obtained by Department of Law during course of civil investigation were not exempt from disclosure under Freedom of Information Law (FOIL) as documents compiled during law enforcement investigation, absent showing that disclosure of documents would interfere with law enforcement investigations or judicial proceedings, even if documents were

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furnished in confidentiality. *Bello v. State Police* followup: reports (DD5s) are of N.Y. Dept. of Law (2 Dept. 1994) 208 A.D.2d 832, 617 N.Y.S.2d 856, leave to appeal denied 85 N.Y.2d 807, 628 N.Y.S.2d 50, 651 N.E.2d 918.

42. — Particular records

Inmate grievances against state correction officers and administrative decision relating thereto constituted "personnel records" used to evaluate performance to ward continued employment or promotion which were exempt from disclosure under freedom of information law. *Prisoners' Legal Services of New York v. New York State Dept. of Correctional Services*, 1988, 73 N.Y.2d 26, 538 N.Y.S.2d 190, 535 N.E.2d 243.

City and police officers failed to show names of police officers who had been disciplined for their involvement in off-duty incident, and respective discipline imposed against each officer, which were sought by newspapers under Freedom of Information Law (FOIL), would be used in existing or potential litigation, and thus, records were not exempt from disclosure under FOIL pursuant to statute which makes confidential personnel records used to evaluate performance of police officers, correction officers, and firefighters. *Daily Gazette Co. v. City of Schenectady* (3 Dept. 1998) 242 A.D.2d 164, 673 N.Y.S.2d 783.

Records relating to Department of Taxation and Finance audits of sale and use tax returns were protected by Tax Law nondisclosure provision, and thus were exempt from disclosure under Freedom of Information Law (FOIL), where gasoline distributor, in connection with gasoline station owner's suit against distributor for commissions, requested from Department the gasoline station's financial documents used in audits and the Department's own audit records. *Tartan Oil Corp. v. State Dept. of Taxation and Finance* (3 Dept. 1998) 239 A.D.2d 36, 668 N.Y.S.2d 76.

Under Freedom of Information Law (FOIL), recipient of harassing telephone calls at home and at office in United Nations was entitled to disclosure of letters written by and to recipient, telephone list which recipient compiled, follow-up complaint reports describing complaint and police investigation, follow-up complaint report pertaining to interview of presumed perpetrator, letter to chief of security at United Nations, and letter to principal legal officer at United Nations. *Burtis v. New York Police Dept.* (1 Dept. 1997) 240 A.D.2d 259, 659 N.Y.S.2d 875.

DD5 reports and police officer notebooks are exempt from Freedom of Information Law (FOIL) disclosure. *Def. ex rel. on Behalf of Barbera v. New York City Police Dept.* (1 Dept. 1996) A.D.2d 176, 640 N.Y.S.2d 536, leave to appeal granted 88 N.Y.2d 806, 670 N.Y.S.2d 986, 670 N.E.2d 227, reverse 73 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808.

Police department failed to meet burden of demonstrating that all material requested by plaintiff with respect to department's investigation into murder of plaintiff's decedent was exempt from disclosure under freedom of information law; therefore, matter was remitted for in camera examination of material requested and termination of whether material fell within specific statutory exemption. *Brown v. Town of Amherst* (4 Dept. 1993) A.D.2d 979, 600 N.Y.S.2d 601.

In action against estate of motorist whose vehicle ran over plaintiff's decedent after motorist had been fatally shot, failed to show why vouchers, crime scene report and detective's report prepared in course of criminal investigation were privileged, despite contention that investigation was "presumably" not closed since murder is not governed by statute of limitations, as there was no claim that investigation remained active. *Estate of Glover v. City of New York* (1 Dept. 1993) A.D.2d 268, 599 N.Y.S.2d 584.

Grand jury minutes are court records, not agency records, and are exempt from ambit of Freedom of Information Law. *Gibson v. Grady* (2 Dept. 1993) 192 A.D.2d 657, 597 N.Y.S.2d 84.

Portions of investigatory file compiled by State Police, which led to file requester's arrest and murder conviction, relating to method by which State Police gathered information about requester and accomplices from private businesses within Freedom of Information Law (FOIL) government agency nonroutine criminal investigative technique or procedure disclosure exemption. *Spencer v. New York State Police* (3 Dept. 1992) A.D.2d 919, 591 N.Y.S.2d 207.

Freedom of Information Law did not require city police department to provide petitioner with ballistics report and print of line up photograph, where ball

furnished in confidentiality. *Bello v. State Police* followup reports (DD5s) are exempt from disclosure under intra-agency material exemption pursuant to Public Officers Law. *Qayyam v. New York City Police Dept.* (1 Dept. 1996) 227 A.D.2d 185, 642 N.Y.S.2d 28.

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Inmate grievances against state correction officers and administrative decision relating thereto constituted "personnel records" used to evaluate performance toward continued employment or promotion which were exempt from disclosure under freedom of information law. *Prisoners' Legal Services of New York v. New York State Dept. of Correctional Services*, 1988, 73 N.Y.2d 26, 538 N.Y.S.2d 190, 535 N.E.2d 243.

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Under Freedom of Information Law (FOIL), recipient of harassing telephone calls at home and at office in United Nations was entitled to disclosure of letters written by and to recipient, telephone list which recipient compiled, follow-up complaint reports describing complaint and police investigation, follow-up complaint report pertaining to interview of presumed perpetrator, letter to chief of security at United Nations, and letter to principal legal officer at United Nations. *Murtis v. New York Police Dept.* (1 Dept. 1997) 240 A.D.2d 259, 659 N.Y.S.2d 875.

DD5 reports and police officer memo books are exempt from Freedom of Information Law (FOIL) disclosure. *DeFelice ex rel. on Behalf of Barbera v. New York City Police Dept.* (1 Dept. 1996) 226 A.D.2d 176, 640 N.Y.S.2d 536, leave to appeal granted 88 N.Y.2d 806, 646 N.Y.S.2d 986, 670 N.E.2d 227, reversed 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808.

Police department failed to meet burden of demonstrating that all material requested by plaintiff with respect to department's investigation into murder of plaintiff's decedent was exempt from disclosure under freedom of information law; therefore, matter was remitted for in camera examination of material requested and determination of whether material fell within specific statutory exemption. *Brown v. Town of Amherst* (4 Dept. 1993) 195 A.D.2d 979, 600 N.Y.S.2d 601.

In action against estate of motorist whose vehicle ran over plaintiff's decedent after motorist had been fatally shot, city failed to show why vouchers, crime scene report and detective's report prepared in course of criminal investigation were privileged; despite contention that investigation was "presumably" not closed since murder is not governed by statute of limitations, as there was no claim that investigation remained active. *Estate of Glover v. City of New York* (1 Dept. 1993) 195 A.D.2d 268, 599 N.Y.S.2d 584.

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Portions of investigatory file compiled by State Police, which led to file requester's arrest and murder conviction, relating to method by which State Police gathered information about requester and his accomplices from private businesses were within Freedom of Information Law (FOIL) government agency nonroutine criminal investigative technique or procedure disclosure exemption. *Spencer v. New York State Police* (3 Dept. 1992) 187 A.D.2d 919, 591 N.Y.S.2d 207.

Freedom of Information Law did not require city police department to provide petitioner with ballistics report and reprint of line up photograph, where ballis-

tics report had been destroyed and line up photograph could not be located. *Adams v. Hirsch* (1 Dept. 1992) 182 A.D.2d 583, 582 N.Y.S.2d 724.

Police officer's memo book, despite its evidentiary value at trial, remained private property of police officer and was exempted by law from disclosure to petitioner under Freedom of Information law. *Scott v. Chief Medical Examiner, City of New York* (1 Dept. 1992) 179 A.D.2d 443, 577 N.Y.S.2d 861, leave to appeal denied 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940, certiorari denied 113 S.Ct. 259, 506 U.S. 891, 121 L.Ed.2d 190.

Proceeding pursuant to Freedom of Information Law seeking disclosure of county arson control plan for arson investigation would be remitted to afford parties an opportunity to particularize their respective assertions where respondents did not identify with specificity those provisions of the plan which they claimed to be immune from disclosure, and why. *Grune v. Alexander* (2 Dept. 1990) 168 A.D.2d 496, 562 N.Y.S.2d 739.

Documents produced by police department pursuant to demand under Freedom of Information Law, concerning investigation of sexual assault by university security guard against student, should not have been redacted to exclude names and addresses of witnesses or details of acts constituting assault, particularly in light of criminal action against guard and civil action against university; police department failed to allege that anyone was promised anonymity in exchange for cooperation in investigation so as to qualify as "confidential source" within meaning of FOIL, any of witnesses could have been called to testify at criminal trial, their names and addresses were discoverable absent protective order, and commencement of civil action opened issue of assault to inquiry such that revelation of details of crime would not constitute unwarranted invasion of privacy. *Cornell University v. City of New York Police Dept.* (1 Dept. 1989) 153 A.D.2d 515, 544 N.Y.S.2d 356, appeal denied 75 N.Y.2d 707, 554 N.Y.S.2d 476, 553 N.E.2d 1024.

Documents generated in Attorney General's federal antitrust action against electronics manufacturer were not exempt from disclosure under Freedom of Information Law as materials compiled for law enforcement purposes which would interfere with law enforcement investigations or judicial proceedings if disclosed; there was no judicial proceeding or law enforcement investigation in progress involving

manufacturer, and antitrust action had resulted in judgment. *Ragusa v. New York State Dept. of Law*, 1991, 152 Misc.2d 602, 578 N.Y.S.2d 959.

District attorney could not satisfy duty under Freedom of Information Law, following convicted defendant's request for copies of investigative reports, by asserting general privilege and turning documents over to court for in camera inspection. *Brownell v. Grady*, 1990, 147 Misc.2d 105, 554 N.Y.S.2d 382.

Inmate was not entitled under freedom of information law to names of other Muslim inmates who had filed grievances based on being pat-frisked by female correctional officers, in that prison rules setting forth grievance program and procedures provided that information would be kept confidential, thus creating privacy interest, within meaning of freedom of information law exception; moreover, information was not necessary in that it was not essential for requesting inmate to litigate pat-frisks for Muslims by female officers as class action. *Faulkner v. Lefevre*, 1988, 140 Misc.2d 699, 532 N.Y.S.2d 337.

43. Danger to life or safety

Nalo v. Sullivan (2 Dept. 1986) 125 A.D.2d 311, 509 N.Y.S.2d 53, appeal denied 69 N.Y.2d 612, [main volume] 517 N.Y.S.2d 1027, 511 N.E.2d 86.

Under Freedom of Information Law (FOIL), prison inmate was not entitled to disclosure of certain provisions of State Department of Correctional Services employee manual to extent such provisions pertained to supervision and security of inmates and, as such, fell within exemption governing materials which, if disclosed, would endanger life or safety of any person. *Boddie v. Goord* (3 Dept. 1998) — A.D.2d —, 674 N.Y.S.2d 466.

Denial of inmate's Freedom of Information Law request for letter written by former paramour was justified by concerns that disclosure would constitute an unwarranted invasion of privacy and could endanger the life or safety of the author. *Deane v. Annucci* (3 Dept. 1998) — A.D.2d —, 669 N.Y.S.2d 696, leave to appeal denied.

Names of persons who transmitted or forwarded reports concerning interviews with two prosecution witnesses to law enforcement officials, date reports were sent, and names of persons to whom reports were sent fell within exemption from Freedom of Information Law disclosure for those materials which, if disclosed, would endanger life or safety of any per-

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son, as the information pertained to investigation surrounding prisoner's murder conviction and disclosure could have subjected certain persons to retribution or could identify a confidential source or confidential information. *Howard v. Malone* (3 Dept. 1998) — A.D.2d —, 668 N.Y.S.2d 418.

State police met its burden of demonstrating that disclosure of troop, zone, and station assignments of each of its sworn members could endanger the life and safety of those officers, such that this information was exempt from disclosure under Public Officers Law exempting from disclosure documents which, if disclosed, would endanger life or safety of any person. *Ruberti, Girvin & Ferlazzo P.C. v. New York State Div. of State Police* (3 Dept. 1996) 218 A.D.2d 494, 641 N.Y.S.2d 411.

Portion of mobilization plans and documents prepared for annual training exercises for New York guard were exempt from disclosure on ground of possibility that disclosure would endanger safety of guard members or others. *Connolly v. New York Guard* (3 Dept. 1991) 175 A.D.2d 372, 572 N.Y.S.2d 443.

In ordering disclosure of correctional facility's videotapes of inmates under Freedom of Information Law, court properly concluded that, inasmuch as techniques for storming of cell and for administration of tear gas and reaction thereto might not be readily or totally observable by either inmates in general or targets of those practices in particular, possibility of endangerment to prison security and personal safety of correctional staff existed sufficiently to justify redaction. *Buffalo Broadcasting Co. Inc. v. New York State Dept. of Correctional Services* (3 Dept. 1992) 174 A.D.2d 212, 578 N.Y.S.2d 928, leave to appeal denied 79 N.Y.2d 759, 584 N.Y.S.2d 447, 594 N.E.2d 941.

Correctional facility's videotapes of inmates were not exempt from disclosure under Freedom of Information Law on ground disclosure would endanger safety and security of institution, absent showing that videotapes would reveal anything more to inmates than would be personally observed during their actual confinement. *Buffalo Broadcasting Co., Inc. v. New York State Dept. of Correctional Services* (3 Dept. 1990) 155 A.D.2d 106, 552 N.Y.S.2d 712, on subsequent appeal 174 A.D.2d 212, 578 N.Y.S.2d 928, leave to appeal denied 79 N.Y.2d 759, 584 N.Y.S.2d 447, 594 N.E.2d 941.

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Videotape depicting inmate's transfer to prison's special housing unit fell within Freedom of Information Law's exemption for materials that would endanger life or safety if disclosed, barring inmate from obtaining copy of tape; tape revealed geographical layout of unit and disclosed identities of inmates and officers who occupied unit, creating risk of violence to ward prison employees, and threat to safety of employees, inmates and general public in event of escape. *Lonski on Behalf of Collins v. Kelly* (4 Dept. 1989) 14 A.D.2d 977, 540 N.Y.S.2d 114.

Redacted portions of certain program and security assessment summaries in possession of correctional facility were exempt from disclosure to inmate under provision of Public Officers Law permitting nondisclosure of information that poses danger to life or safety of any person. *Stronza v. Hoke* (3 Dept. 1989) 148 A.D.2d 900, 539 N.Y.S.2d 528, appeal denied 74 N.Y.2d 611, 546 N.Y.S.2d 555, 545 N.E.2d 869.

44. Inter-agency materials—Generally

Miracle Mile Associates v. Yudelson (4 Dept. 1979) 68 A.D.2d 176, 417 N.Y.S.2d 142, appeal denied [main volume] 48 N.Y.2d 606, 421 N.Y.S.2d 1031, 397 N.E.2d 761, appeal denied 48 N.Y.2d 706, 422 N.Y.S.2d 68, 397 N.E.2d 758.

Witness statement, contained within police complaint follow-up report constitutes factual data, and thus is not within intra-agency exemption to Freedom of Information Law, insofar as it embodies factual account of witness' observations, even if there is no assurance of accuracy and reliability. *Gould v. New York City Police Dept.*, 1996, 89 N.Y.2d 267, 653 N.Y.S.2d 64, 675 N.E.2d 808.

"Inter-agency materials," which may be withheld from public under Public Officers Law, means deliberative materials or communications exchanged for discussion purposes not constituting final policy decisions. *Mingo v. New York State Div. of Parole* (3 Dept. 1997) 244 A.D.2d 781, 666 N.Y.S.2d 244.

45. — Statistical or factual data

MacRae v. Dolce (2 Dept. 1987) [main volume] 130 A.D.2d 577, 515 N.Y.S.2d 295.

Backup factual and statistical data to final determination of agency is not exempt from disclosure through Freedom of Information Law request on ground that they are intra-agency documents revealing nature of governmental deliberative process. *Professional Standards Review*

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Backup factual and statistical data to final determination of agency is not exempt from disclosure through Freedom of Information Law request on ground that they are intraagency documents revealing nature of governmental deliberative process. *Professional Standards Review*

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Council of America Inc. v. New York State Dept. of Health (3 Dept. 1993) 193 A.D.2d 937, 597 N.Y.S.2d 829.

Statistical and factual records concerning transfers of real property in city did not fall within one of narrowly interpreted exemptions to Freedom of Information Law particularly since data disclosed in transfer of noncooperative real property, including condominiums, was readily available to the public and, therefore, information services and publishing company in the field of real estate was entitled to access to those records, including apartment numbers of transferred cooperative units; however, names of buyers and sellers were irrelevant to appraisal and did not have to be disclosed. *Brownstone Publishers, Inc. v. New York City Dept. of Finance* (1 Dept. 1989) 150 A.D.2d 185, 540 N.Y.S.2d 796, appeal denied 75 N.Y.2d 791, 552 N.Y.S.2d 92, 551 N.E.2d 585.

"Significant/insignificant" notations contained in real estate transfer data provided to State Board of Equalization and Assessment by city did not constitute statistical or factual tabulations or data, pursuant to statute exempting intraagency and interagency materials from public disclosure under Freedom of Information Law. *David v. Lewisohn* (3 Dept. 1988) 142 A.D.2d 305, 535 N.Y.S.2d 793, appeal denied 74 N.Y.2d 610, 546 N.Y.S.2d 554, 545 N.E.2d 868.

Inmate's statements taken by Commissioner of Corrections while investigating prison disturbance were discoverable under freedom of information law where statements recited factual claims made by inmates concerning alleged assaults; signed statements did not constitute investigator's notes, and thus could not be classified as intra-agency material, and there was no showing that statements were gathered specifically for law enforcement purposes. *Faulkner v. Del Giacco*, 1988, 139 Misc.2d 790, 529 N.Y.S.2d 255.

46. — Instructions to staff

Individual, who had been acquitted of making harassing phone calls to his girl friend, was not entitled under Freedom of Information Law to written report of accusation and written notification of proposed imposition of penalty with respect to state police investigator who had been found guilty of misconduct for having allegedly obtained unlisted telephone number of girl friend and giving it to individual; report of accusation was report of internal investigation of complaint and was properly withheld under exemption

relating to data compiled for law enforcement purposes or as predecisional intra-agency material, and written notification of proposed imposition of penalty, which represented intermediate step leading to decision to proceed to formal disciplinary hearing, was clearly exempt as predecisional intra-agency material. *Scaccia v. New York State Div. of State Police* (3 Dept. 1988) 138 A.D.2d 50, 530 N.Y.S.2d 309.

47. — Final policy or determination

Kheel v. Ravitch (1 Dept. 1983) 93 A.D.2d 422, 462 N.Y.S.2d 182, [main volume] dismissal denied 60 N.Y.2d 681, 468 N.Y.S.2d 106, 455 N.E.2d 665, affirmed 62 N.Y.2d 1, 475 N.Y.S.2d 814, 464 N.E.2d 118.

Where public community college used certain film and filmstrips for years in college course on human sexuality, items were not "inter-agency or intra-agency materials" excluded from disclosure under Freedom of Information Law (FOIL), but rather constituted "final agency policy or determinations" subject to public disclosure; even if classroom environment was one of deliberation, that in itself did not alter status of items used in classroom. *Russo v. Nassau County Community College*, 1993, 81 N.Y.2d 690, 603 N.Y.S.2d 294, 623 N.E.2d 15.

Portion of administrative law judge's (ALJ's) interoffice memorandum recommending denial of party's request for oral argument in proceeding to upgrade electric lines, which was expressly adopted by Public Service Commission (PSC) in its final decision, did not fall within exception to Freedom of Information Law (FOIL) for interagency or intraagency materials which are not final deliberations and, thus, was subject to disclosure. *Century House Historical Soc. v. State Public Service Com'n* (3 Dept. 1997) 237 A.D.2d 844, 655 N.Y.S.2d 182.

Investigator's report on charges of racial insensitivity against public employee were not exempt from disclosure under Freedom of Information Law (FOIL) once borough president relied on and incorporated investigator's findings in his final decision; exemption for intra-agency materials could not apply to final agency policy or decisions, and investigator's findings were expressly adopted by borough president in explaining his decision. *New York 1 News v. Office of President of Borough of Staten Island* (2 Dept. 1996) 231 A.D.2d 524, 647 N.Y.S.2d 270.

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Attorney-client privilege did not exempt Attorney General from disclosing, under Freedom of Information Law, documents that provided agency staff attorneys with final agency policy with regard to legal representation under Public Officers Law in defending public employees; documents did not concern particular lawsuit that was either pending or imminent, but rather, contained agency's final policy, which was to be applied to all litigation in general, and policy was neither drafted nor communicated in context of existing attorney-client relationship. *Charles v. Abrams* (3 Dept. 1993) 199 A.D.2d 652, 604 N.Y.S.2d 1013.

Individual, who had been acquitted of making harassing phone calls to his girl friend, was entitled under Freedom of Information Law to documents constituting final determination of disciplinary action taken against state police investigator who had allegedly given girl friend's number to individual; information sought was not exempt from disclosure as intra-agency material, as that exemption did not apply to final agency policy or determination and was not exempt from disclosure as part of confidential personnel records of police officer used to evaluate performance. *Scaccia v. New York State Div. of State Police* (3 Dept. 1988) 138 A.D.2d 50, 530 N.Y.S.2d 309.

Newspaper was entitled to disclosure under Freedom of Information Law of final determination in a fireman's suspension hearing, despite claim that material was specifically exempt from disclosure under statute providing exemption for "personnel records" under control of paid fire department; however, newspaper was not entitled to disclosure of all supporting allegations, complaints or witness names since those matters were not final agency determinations. *Rome Sentinel Co. v. City of Rome*, 1989, 145 Misc.2d 183, 546 N.Y.S.2d 304.

49. — Opinions, recommendations, etc.

City of New York v. New York State Bd. of Equalization and Assessment, 1985, 65 N.Y.2d 656, 491 N.Y.S.2d 610, 481 N.E.2d 242, [main volume] on remand 136 Misc.2d 325, 518 N.Y.S.2d 330.

Redacted portions of transfer assessment forms sought by inmate pursuant to Freedom of Information Law (FOIL) request fell within exception to disclosure for interagency or intraagency materials which are not, inter alia, final agency policy or determinations; request was denied

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on basis that redacted material was evaluative in nature. *Di Rose v. New York State Dept. of Correction* (3 Dept. 1993) 228 A.D.2d 878, 636 N.Y.S.2d 223.

Police officer's internal affairs division (IAD) records and civil complaint review board (CCRB) file fell within exemption from disclosure of Freedom of Information Law as predecisional interagency materials. *Flores v. City of New York* (2 Dept. 1994) 207 A.D.2d 302, 615 N.Y.S.2d 400.

Investigative report authored by deputy commissioner of county department correction and addressed to director of office of affirmative action, detailing allegations of discrimination made by correction officer, summarizing investigation and setting forth deputy commissioner's conclusions, was exempt from disclosure under the Freedom of Information Law as predecisional, interagency material; moreover, report contained no purely factual data which could be considered non-exempt. *Goodstein & West v. O'Rourke* (2 Dept. 1994) 201 A.D.2d 731, 6 N.Y.S.2d 306.

Subjective comments, opinions, and recommendations written in by Department of Health committee members on rating sheets relating to Department's decision to award contract for Acquired Immune Deficiency Syndrome (AIDS) Intervention Management System to successful bidder were exempt from disclosure through rejected bidder's Freedom of Information Law (FOIL) request as intraagency documents revealing nature of government deliberative process and could be redacted from rating sheets supplied to rejected bidder pursuant to FOIL request. *Professional Standards Review Council v. America Inc. v. New York State Dept. of Health* (3 Dept. 1993) 193 A.D.2d 937, 59 N.Y.S.2d 829.

Documents sought by petitioner in connection with his failure to achieve rank of professor at college were exempt from disclosure under Freedom of Information Law as interagency or intraagency material which were not statistical or factual tabulations or data, or final agency policy or determinations, since recommendation of various committees concerning promotional candidates were entirely advisory in nature and rendered only to aid actual decisionmaker, the board of trustees, in reaching determination on particular candidate. *Rothenberg v. City University of New York* (1 Dept. 1993) 191 A.D.2d 195, 594 N.Y.S.2d 219, leave to

Attorney-client privilege did not exempt Attorney General from disclosing, under Freedom of Information Law, documents that provided agency staff attorneys with final agency policy with regard to legal representation under Public Officers Law in defending public employees; documents did not concern particular lawsuit that was either pending or imminent, but rather, contained agency's final policy, which was to be applied to all litigation in general, and policy was neither drafted nor communicated in context of existing attorney-client relationship. *Charles v. Abrams* (3 Dept. 1993) 199 A.D.2d 652, 604 N.Y.S.2d 1013.

Individual, who had been acquitted of making harassing phone calls to his girl friend, was entitled under Freedom of Information Law to documents constituting final determination of disciplinary action taken against state police investigator who had allegedly given girl friend's number to individual; information sought was not exempt from disclosure as intra-agency material, as that exemption did not apply to final agency policy or determination and was not exempt from disclosure as part of confidential personnel records of police officer used to evaluate performance. *Scaccia v. New York State Div. of State Police* (3 Dept. 1988) 138 A.D.2d 50, 530 N.Y.S.2d 309.

Newspaper was entitled to disclosure under Freedom of Information Law of final determination in a fireman's suspension hearing, despite claim that material was specifically exempt from disclosure under statute providing exemption for "personnel records" under control of paid fire department; however, newspaper was not entitled to disclosure of all supporting allegations, complaints or witness names since those matters were not final agency determinations. *Rome Sentinel Co. v. City of Rome*, 1989, 145 Misc.2d 183, 546 N.Y.S.2d 304.

49. — Opinions, recommendations, etc.

City of New York v. New York State Bd. of Equalization and Assessment, 1985, 65 N.Y.2d 656, 491 N.Y.S.2d 610, 481 N.E.2d 242, [main volume] on remand 136 Misc.2d 325, 518 N.Y.S.2d 330.

Redacted portions of transfer assessment forms sought by inmate pursuant to Freedom of Information Law (FOIL) request fell within exception to disclosure for interagency or intraagency materials which are not, inter alia, final agency policy or determinations; request was denied

on basis that redacted material was evaluative in nature. *Di Rose v. New York State Dept. of Correction* (3 Dept. 1996) 228 A.D.2d 878, 636 N.Y.S.2d 223.

Police officer's internal affairs division (IAD) records and civil complaint review board (CCRB) file fell within exemption from disclosure of Freedom of Information Law as predecisional interagency materials. *Flores v. City of New York* (1 Dept. 1994) 207 A.D.2d 302, 615 N.Y.S.2d 400.

Investigative report authored by deputy commissioner of county department of correction and addressed to director of office of affirmative action, detailing allegations of discrimination made by correction officer, summarizing investigation, and setting forth deputy commissioner's conclusions, was exempt from disclosure under the Freedom of Information Law, as predecisional, interagency material; moreover, report contained no purely factual data which could be considered non-exempt. *Goodstein & West v. O'Rourke* (2 Dept. 1994) 201 A.D.2d 731, 608 N.Y.S.2d 306.

Subjective comments, opinions, and recommendations written in by Department of Health committee members on rating sheets relating to Department's decision to award contract for Acquired Immune Deficiency Syndrome (AIDS) Intervention Management System to successful bidder were exempt from disclosure through rejected bidder's Freedom of Information Law (FOIL) request as intraagency documents revealing nature of governmental deliberative process and could be redacted from rating sheets supplied to rejected bidder pursuant to FOIL request. Professional Standards Review Council of America Inc. v. New York State Dept. of Health (3 Dept. 1993) 193 A.D.2d 937, 597 N.Y.S.2d 829.

Documents sought by petitioner in connection with his failure to achieve rank of professor at college were exempt from disclosure under Freedom of Information Law as interagency or intraagency material which were not statistical or factual tabulations or data, or final agency policy or determinations, since recommendations of various committees concerning promotional candidates were entirely advisory in nature and rendered only to aid actual decisionmaker, the board of trustees, in reaching determination on particular candidate. *Rothenberg v. City University of New York* (1 Dept. 1993) 191 A.D.2d 195, 594 N.Y.S.2d 219, leave to

appeal denied 81 N.Y.2d 710, 600 N.Y.S.2d 197, 616 N.E.2d 854.

Report of city water department consisting of internal review of that agency was exempt from disclosure under Freedom of Information Law, where report consisted solely of opinions, advice, evaluations, recommendations and other subjective material and did not contain statistical or factual tabulations or data or instructions to staff which affected public or final agency policies or determinations. *Rome Sentinel Co. v. City of Rome* (4 Dept. 1991) 174 A.D.2d 1005, 572 N.Y.S.2d 165.

Memoranda from associate director for Department of Health's Division of Health Risk Control, containing his legal opinions on state's right to obtain reports of physical examinations of residents, interpretations of Public Health Law, recommendations on information provided to Departmental employee assigned to review physicians' reports, and opinions on Department's use of examination information and its compliance with Public Health Law, was not entirely exempt from disclosure under intra-agency memorandum exemption. *Williams & Connolly v. Axelrod* (3 Dept. 1988) 139 A.D.2d 806, 527 N.Y.S.2d 113.

Town documents were exempt from public access under Freedom of Information Law, insofar as they consisted only of opinions, advice, evaluations, deliberations, proposals, policy formulations, conclusions, or recommendations; government agency deliberative functions would be hindered by their disclosure. *Town of Oyster Bay v. Williams* (2 Dept. 1987) 134 A.D.2d 267, 520 N.Y.S.2d 599.

50. — Particular records

Police complaint follow-up reports contained factual data such as names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators, checklists indicating whether victims and witnesses were interviewed and shown photos, whether crime scenes were photographed and dusted for fingerprints, and whether neighborhood residents were canvassed for information, and blank space denominated "details" in which officers recorded particulars of any action taken in connection with investigation, and thus were not entitled to blanket exemption to Freedom of Information Law as intraagency material. *Gould v. New York City Police Dept.*, 1996, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808.

Letters of recommendation in file of former prison inmate were exempt from

disclosure under Public Officers Law as interagency predecisional material. *Mingo v. New York State Div. of Parole* (3 Dept. 1997) 244 A.D.2d 781, 666 N.Y.S.2d 244.

Chancellor's committee reports, consisting of findings and recommendations regarding personal actions to be taken by board of education, and hearing panel reports consisting of findings and recommendations subject to challenge by appeal to State Commissioner of Education, were predecisional material exempt from disclosure to dismissed teacher under Freedom of Information Law. *Elentuck v. Green* (2 Dept. 1994) 202 A.D.2d 425, 608 N.Y.S.2d 701, leave to appeal denied 84 N.Y.2d 809, 621 N.Y.S.2d 519, 645 N.E.2d 1219, rearrangement denied 85 N.Y.2d 858, 624 N.Y.S.2d 376, 648 N.E.2d 796.

Rating sheets relating to Department of Health's decision to award contract for Acquired Immune Deficiency Syndrome (AIDS) Intervention Management System to successful bidder were not exempt from disclosure through rejected bidder's Freedom of Information Law request as intra-agency documents revealing nature of governmental deliberative process where individual members of Department committee were required to rate response to criteria of request for proposals and accord it numerical value and rating given each category reflected voting which determined contract award. *Professional Standards Review Council of America Inc. v. New York State Dept. of Health* (3 Dept. 1993) 193 A.D.2d 937, 597 N.Y.S.2d 829.

Interim report and attached analysis concerning allegations of deliberately inflated student test scores, which were prepared by State Education Department employees for Department's deputy commissioner, were predecisional, intra-agency memoranda which were exempt from disclosure under Freedom of Information Law; documents summarized departmental investigation and concluded by noting that meeting to discuss any further action or investigation would be desirable, and documents contained opinions of various Department employees as to significance, or lack thereof, of scoring discrepancies. *Mitner v. Sobol* (3 Dept. 1991) 173 A.D.2d 1064, 570 N.Y.S.2d 402.

Forms containing information to assist in determining placement of inmate at most appropriate facility were exempted from freedom of information law as intra-agency material; they contained predecisional evaluations, recommendations and

conclusions concerning inmate's conduct in prison. *Dory v. Scully* (2 Dept. 1989) 152 A.D.2d 570, 543 N.Y.S.2d 497, appeal granted 75 N.Y.2d 701, 551 N.Y.S.2d 905, 551 N.E.2d 106, affirmed 76 N.Y.2d 725, 557 N.Y.S.2d 876, 557 N.E.2d 112.

Certain program and security assessment summaries in possession of correctional facility were exempt from disclosure to inmate under section of Public Officers Law permitting agencies to deny access to portions of certain interagency or intra-agency records. *Stronza v. Hoke* (3 Dept. 1989) 148 A.D.2d 900, 539 N.Y.S.2d 528, appeal denied 74 N.Y.2d 611, 546 N.Y.S.2d 555, 545 N.E.2d 869.

Confidential investigatory files of State Education Department, Office of Professional Discipline, containing name of complainant against dental license applicant, were exempt from disclosure under Freedom of Information Law. *Murphy v. New York State Educ. Dept., Office of Professional Discipline* (1 Dept. 1989) 148 A.D.2d 160, 543 N.Y.S.2d 70.

Magazine was not entitled, under Freedom of Information Law, to obtain police records concerning officers' use of firearms in that such records were intra-agency materials which were not statistical factual tabulations or data, instructions to staff that affect public, or final agency policy or determinations. *Newsday, Inc. v. New York City Police Dept.* (1 Dept. 1987) 123 A.D.2d 4, 518 N.Y.S.2d 966.

51. Examination questions or answers

Attorney's request for his bar examination scores pursuant to Freedom of Information Law was rendered moot by destruction of examination by State Board of Law Examiners and did not fit within exception to mootness doctrine; it was unlikely that attorney would again sit for bar examination that he had passed; attorney did not request test results for approximately ten months after learning that he passed examination; and issue was neither significant nor important enough to merit review. *Duban v. State Bd. of Law Examiners* (3 Dept. 1990) 157 A.D.2d 946, 550 N.Y.S.2d 207, appeal dismissed 75 N.Y.2d 945, 555 N.Y.S.2d 689, 554 N.E.2d 1277.

52. Privileges—Attorney client

County failed to establish that information sought by newspaper pursuant to Freedom of Information Law (FOIL), descriptions of legal services provided on daily basis by county's outside counsel regarding landfill litigation, was necessarily protected by attorney work product

privilege or privilege for materials prepared for litigation, though in camera view of requested materials was warranted to determine what portions, if any, materials sought may have been exempt under FOIL; while preparation and submission of bill for fees due and owing at all dependent on legal expertise, opinion or training, cannot be attributed unique skills of attorney, billing records sought may have contained specific references to legal issues researched, conferences with witnesses not yet identified interviewed by county's adversary in litigation, and other legal services rendered as part of representation in ongoing litigation. *Orange County Publications, Inc., a Div. of Ottaway Newspapers v. County of Orange*, 1995, Misc.2d 346, 637 N.Y.S.2d 596.

54. — Public interest

After father was convicted of murder based on fire that killed his child, county department of social services records relating to family would be not available pursuant to Freedom of Information Law (FOIL) request, unless department requested in camera inspection where county commissioner of social services had determined that disclosure in public interest, no specific reasons given for lack of disclosure, much of information had already been released through criminal proceedings, and there were surviving children whose best interests had to be considered. *Gannett Co., Inc. v. County of Ontario*, 1997, 173 Misc.2d 641 N.Y.S.2d 920.

55a. Stipulation

Agency seeking to prevent disclosure of documents under Freedom of Information Law (FOIL) bears burden of demonstrating applicability of particular exemption claimed; agency must articulate particularized and specific justification for de-

§ 88. Access to state legislative

[See main

2. The state legislature shall, in addition to the provisions of section 87(2)(b), be available for public inspection and

[See main

(j) [Eff. until Jan. 1, 1999.] except that ninety-two of the legislative law as amended by section ninety of the legislative

(k) [Eff. until Jan. 1, 1999.] and any other law required by law to be made available

[See mg

ons concerning inmate's conduct in *Dory v. Scully* (2 Dept. 1989) 152 570, 543 N.Y.S.2d 497, appeal 75 N.Y.2d 701, 551 N.Y.S.2d 905, 72d 106, affirmed 76 N.Y.2d 725, 52d 876, 557 N.E.2d 112.

in program and security assessments in possession of, or accessibility under section of Public Officers permitting agencies to deny access to of certain interagency or intra-agency records. *Stronza v. Hoke* (3 Dept. 48 A.D.2d 900, 539 N.Y.S.2d 528, denied 74 N.Y.2d 611, 546 N.Y.S.2d 5 N.E.2d 869.

Identical investigatory files of State Education Department, Office of Professional Discipline, containing name of commit against dental license applicant, exempt from disclosure under Freedom of Information Law. *Murphy v. New York State Educ. Dept., Office of Professional Discipline* (1 Dept. 1989) 148 A.D.2d 13 N.Y.S.2d 70.

Magazine was not entitled, under Freedom of Information Law, to obtain police records concerning officers' use of firearms in that such records were intramural materials which were not statistical tabulations or data, instructions or determinations. *Newsday, Inc. v. New York City Police Dept.* (1 Dept. 1989) 133 A.D.2d 4, 518 N.Y.S.2d 966.

Examination questions or answers
Attorney's request for his bar examination scores pursuant to Freedom of Information Law was rendered moot by decision of examination by State Board of Examiners and did not fit within exception to mootness doctrine; it was held that attorney would again sit for examination that he had passed; attorney did not request test results for approximately ten months after learning he passed examination; and issue was not significant nor important enough for merit review. *Duban v. State Bd. of Examiners* (3 Dept. 1990) 157 A.D.2d 550 N.Y.S.2d 207, appeal dismissed 75 N.Y.2d 945, 555 N.Y.S.2d 689, 554 N.E.2d 112.

Privileges—Attorney client

County failed to establish that information sought by newspaper pursuant to Freedom of Information Law (FOIL), depicting legal services provided on a basis by county's outside counsel regarding landfill litigation, was necessarily protected by attorney work product

privilege or privilege for materials prepared for litigation, though in camera review of requested materials was warranted to determine what portions, if any, of materials sought may have been exempt under FOIL; while preparation and submission of bill for fees due and owing, not at all dependent on legal expertise, education or training, cannot be attributed to unique skills of attorney, billing records sought may have contained specific references to legal issues researched, conferences with witnesses not yet identified and interviewed by county's adversary in landfill litigation, and other legal services provided as part of representation in that ongoing litigation. *Orange County Publications, Inc., a Div. of Ottaway Newspapers v. County of Orange*, 1995, 168 Misc.2d 346, 637 N.Y.S.2d 596.

54. — Public interest

After father was convicted of murder based on fire that killed his children, county department of social services records relating to family would be made available pursuant to Freedom of Information Law (FOIL) request, unless department requested in camera inspection, where county commissioner of social services had determined that disclosure was in public interest, no specific reasons were given for lack of disclosure, much of information had already been released through criminal proceedings, and there were no surviving children whose best interests had to be considered. *Gannett Co., Inc. v. County of Ontario*, 1997, 173 Misc.2d 304, 661 N.Y.S.2d 920.

55. Stipulation

Agency seeking to prevent disclosure of documents under Freedom of Information Law (FOIL) bears burden of demonstrating applicability of particular exemption claimed; agency must articulate particularized and specific justification for denying

access to requested documents. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

Disclosure of settlement agreement between teacher and Board of Education pursuant to which charges of misconduct against teacher were settled would not have deprived teacher of significant part of bargain he made, where agreement provided only that, in event disclosure statute required dissemination of information, teacher would be notified in writing prior to disclosure, and contained no agreement to keep details of settlement agreement confidential. *Anonymous v. Board of Educ. for Mexico Cent. School Dist.*, 1994, 162 Misc.2d 300, 616 N.Y.S.2d 867.

56. Presumptions and burden of proof

Agency seeking to prevent disclosure of records pursuant to Freedom of Information Law (FOIL) bears burden of demonstrating that requested material falls squarely within particular exemption claimed by articulating a particularized and specific justification for denying access. *New York Times Co. v. New York State Dept. of Health* (3 Dept. 1998) — A.D.2d —, 674 N.Y.S.2d 826.

Under Freedom of Information Law (FOIL), government records are presumptively subject to disclosure unless they are specifically exempt by statute. *Daily Gazette Co. v. City of Schenectady* (3 Dept. 1998) 242 A.D.2d 164, 673 N.Y.S.2d 783.

Public agency bears burden of demonstrating that requested material falls squarely within statutory exemption to mandatory disclosure under Freedom of Information Law (FOIL), which is narrowly construed. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

§ 88. Access to state legislative records

[See main volume for 1]

2. The state legislature shall, in accordance with its published rules, make available for public inspection and copying:

[See main volume for (a) to (i)]

(j) [Eff. until Jan. 1, 1999.] external audits conducted pursuant to section ninety-two of the legislative law and schedules issued pursuant to subdivision two of section ninety of the legislative law;

(k) [Eff. until Jan. 1, 1999.] any other files, records, papers or documents required by law to be made available for public inspection and copying.

[See main volume for 3]

Historical and Statutory Notes

Effective Date of Amendment by L.1987, c. 814; Expiration. Section 14 of L.1987, c. 814; amended L.1993, c. 597, § 1, eff. Aug. 4, 1993, provided: "This act [which, in addition to the changes noted below, added State Finance Law § 2-a, amended this section and section 87, amended State Finance Law §§ 8 and 112, and enacted provisions set out as notes under State Finance Law § 2-a] shall take effect immediately [Aug. 7, 1987] and shall remain in full force and effect until January 1, 1999 at which time this act shall be deemed repealed, provided that sections seven [adding Executive Law §§ 950 to 954], nine [amending Judiciary Law § 211], ten [adding Judiciary Law §§ 249 to 249-c], and eleven [adding Public Authorities Law §§ 2930 to 2932] of this act shall take effect April 1, 1989, and section eight [adding Legislative Law §§ 89 to 92 and renumbering State Finance Law former article 6 as 7] of this act shall take effect January 1, 1990, except that commencing on and after the date on which this act shall have become a

law [Aug. 7, 1987], the state comptroller, state agencies, covered authorities, the state legislature and the judiciary are authorized to take all actions necessary to implement their respective internal control and audit responsibilities under such sections of this act, and provided that paragraph a of subdivision 2-b of section 8 of the state finance law, as added by section five of this act, and subdivision 1 of section 953 and subdivision 1 of section 954 of the executive law, as added by section seven of this act, and subdivision 1 of section 249-c of the judiciary law, as added by section ten of this act, shall take effect April 1, 1989, and subdivision 1 of section 92 of the legislative law, as added by section eight of this act, shall take effect January 1, 1990."

Effective Date of Amendment by L.1987, c. 813. Amendment by L.1987, c. 813, eff. Jan. 1, 1989, pursuant to section 26 of L.1987, c. 813, as amended, set out as a note under section 73.

Notes of Decisions

Disclosure denied 2
Factual tabulation 1

1. Factual tabulation

"Factual tabulation" as used in Freedom of Information Law (FOIL) means statement or group of statements of objective fact, and facts and figures memorializing expenditure of public funds for legislative printings and mailings can be characterized as "factual tabulations" for purposes of FOIL. *Weston v. Sloan*, 1994, 84 N.Y.2d 462, 619 N.Y.S.2d 255, 643 N.E.2d 1071.

2. Disclosure denied

To extent "factual tabulations" were maintained of expenditures of public money for posting and printing incurred by members of State Senate, they were subject to disclosure under the Freedom of Information Law (FOIL) as data "with respect to" material made available by the Legislative Law; however, because copies of newsletters and information on targeted mailings would not be included in such factual tabulations, those items were not subject to mandatory disclosure. *Weston v. Sloan*, 1994, 84 N.Y.2d 462, 619 N.Y.S.2d 255, 643 N.E.2d 1071.

§ 89. General provisions relating to access to records; certain cases

The provisions of this section apply to access to all records, except as hereinafter specified:

[See main volume for 1]

2. (a) The committee on public access to records 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:

[See main volume for i to iv]

v. [Eff. until Jan. 1, 1999. See, information of a personal nature reported relevant to the ordinary work of such agency.]

v. [Eff. Jan. 1, 1999. See, also, section of a personal nature reported in the ordinary work of such agency.]

vi. [Eff. Jan. 1, 1999.] information workers' compensation record, except as of the workers' compensation law.

[See main volume]

8. Any person who, with intent to pursuant to this article, willfully conceal a violation.

(As amended L.1989, c. 705, § 2; L.1998, c. 545, § 3, added subpar. (vi).)

Historical and

L.1998, c. 545 legislation

Subd. 2, par. (b), subpar. (vi). L.1998, c. 545, § 3, added subpar. (vi).

L.1998, c. 545, § 4, eff. Jan. 1, 1999, provides:

"This act shall take effect on the first day of January next succeeding the date upon which it shall have become a law;

Legislative

L.1981, c. 890: For memorandum of the 1981 Session Laws of New York, p. 23

Cross R

Confidentiality of, adoption information, see Confidential prevention of public access to records

West's McK

The following forms appear in Selected (1994)

Notice of Petition in Article 78 proceeding information law of curricula vitae of last five years, see SCL, PUB OFF § 89, Form 2.

Petition in Article 78 proceeding to compel disclosure of curricula vitae of all faculty promoted by SCL, PUB OFF § 89, Form 2.

Reply affidavit in opposition to cross-motion to compel disclosure under freedom of information law of curricula vitae of all faculty promoted to full professor during last five years, see SCL, PUB OFF § 89, Form 3.

Judgment in Article 78 proceeding compel disclosure of curricula vitae of all faculty promoted by SCL, PUB OFF § 89, Form 4.

Order to show cause in Article 78 proceeding and payment of reasonable attorneys' fees in Article 78 proceeding requesting payment of reasonable attorneys' fees, Attorney's affidavit in support of petition proceeding requesting access to certain records, see SCL, PUB OFF § 89, Form 5.

Attorney's affidavit in support of petition proceeding requesting access to certain records, see SCL, PUB OFF § 89, Form 5.

atory Notes

[Aug. 7, 1987], the state comptroller, agencies, covered authorities, the legislature and the judiciary are authorized to take all actions necessary to implement their respective internal control and audit responsibilities under such provisions of this act, and provided that paragraph a of subdivision 2-b of section 8 of the state finance law, as added by section 5 of this act, and subdivision 1 of section 953 and subdivision 1 of section 10 of the executive law, as added by section 7 of this act, and subdivision 1 of section 249-c of the judiciary law, as added by section 10 of this act, shall take effect April 1, 1989, and subdivision 1 of section 92 of the legislative law, as added by section 8 of this act, shall take effect January 1, 1990."

Effective Date of Amendment by 1987, c. 813. Amendment by L.1987, c. 813, eff. Jan. 1, 1989, pursuant to section 1 of L.1987, c. 813, as amended, set out a note under section 73.

sions

Disclosure denied

To extent "factual tabulations" were obtained of expenditures of public monies for posting and printing incurred by members of State Senate, they were subject to disclosure under the Freedom of Information Law (FOIL) as data "with respect to" material made available by the legislative law; however, because copies of newsletters and information on targeted billings would not be included in such factual tabulations, those items were not subject to mandatory disclosure. *Weston Sloan*, 1994, 84 N.Y.2d 462, 619 N.Y.S.2d 255, 643 N.E.2d 1071.

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for i to iv]

v. [Eff. until Jan. 1, 1999. See, also, subpar. v below.] disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency.

v. [Eff. Jan. 1, 1999. See, also, subpar. v above.] 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. [Eff. Jan. 1, 1999.] information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten of the workers' compensation law.

[See main volume for (c); 2-a to 7]

8. Any person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation.

(As amended L.1989, c. 705, § 2; L.1998, c. 545, §§ 2, 3, eff. Jan. 1, 1999.)

Historical and Statutory Notes

L.1998, c. 545 legislation

Subd. 2, par. (b), subpar. (vi). L.1998, c. 545, § 3, added subpar. (vi).

L.1998, c. 545, § 4, eff. Jan. 1, 1999, provides:

"This act shall take effect on the first day of January next succeeding the date upon which it shall have become a law;

provided, however, the chair of the workers' compensation board is authorized to immediately adopt rules and regulations so that the provisions of this act may be fully implemented on such date."

L.1998, c. 705 legislation

Subd. 8. L.1989, c. 705, § 2, eff. Nov. 1, 1989, added subd. 8.

Legislative Histories

L.1981, c. 890: For memorandum of the State Executive Department, see McKinney's 1981 Session Laws of New York, p. 2376.

Cross References

Confidentiality of, adoption information, see Public Health Law § 4138-c.

Unlawful prevention of public access to records, see Penal Law § 240.65.

West's McKinney's Forms

The following forms appear in Selected Consolidated Laws under Public Officers Law § 89:

Petition in Article 78 proceeding to compel disclosure under freedom of information law of curricula vitae of all faculty promoted to full professor during last five years, see SCL, PUB OFF § 89, Form 1.

Petition in Article 78 proceeding to compel disclosure under freedom of information law of curricula vitae of all faculty promoted to full professor during last five years, see SCL, PUB OFF § 89, Form 2.

Reply affidavit in opposition to cross-motion to dismiss petition in Article 78 proceeding to compel disclosure under freedom of information law of curricula vitae of all faculty promoted to full professor during last five years, see SCL, PUB OFF § 89, Form 3.

Judgment in Article 78 proceeding compelling disclosure under freedom of information law of curricula vitae of all faculty promoted to full professor during last five years, see SCL, PUB OFF § 89, Form 4.

Order to show cause in Article 78 proceeding requesting access to certain public records and payment of reasonable attorneys' fees, see SCL, PUB OFF § 89, Form 5.

Petition in Article 78 proceeding requesting access to certain public records and payment of reasonable attorneys' fees, see SCL, PUB OFF § 89, Form 6.

Attorney's affidavit in support of petition and order to show cause in Article 78 proceeding requesting access to certain public records and payment of reasonable attorneys' fees, see SCL, PUB OFF § 89, Form 7.

- Judgment in Article 78 proceeding directing disclosure of certain public records and denying payment of attorneys' fees, see SCL, PUB OFF § 89, Form 8.
- Notice of motion for attorneys' fees in Article 78 proceeding to compel access to prison records on ground that denial of access was unreasonable, see SCL, PUB OFF § 89, Form 9.
- Affirmation in support of motion for attorneys' fees in Article 78 proceeding to compel access to prison records on ground that denial of access was unreasonable, see SCL, PUB OFF § 89, Form 10.
- Judgment on motion for attorney's fees in Article 78 proceeding to compel access to prison records on ground that denial of access was unreasonable, see SCL, PUB OFF § 89, Form 11.

Notes of Decisions

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Criminal records 9a

Death certificate 3a

Diligent search 12b

Maintenance of records 10a

Marriage license, personal privacy, invasion of 2a

Parole records 9b

Personal privacy, invasion of

Marriage license 2a

Redaction of records 7a

Social security numbers 5a

Redaction of records 7a

Remedies 12a

Review

Time for 18a

Social security numbers 5a

k. Construction and application

Freedom of Information Law (FOIL) exemptions are to be narrowly construed. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

Freedom of Information Law (FOIL) exemptions are to be narrowly construed. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

1. Personal privacy, invasion of—Generally

Press releases previously issued by State Division of the Lottery concerning lottery winners were subject to disclosure, pursuant to Freedom of Information Law (FOIL), in form in which they were publicly disseminated, without regard to use for which such information was sought. *Corwin, Solomon & Tanenbaum v. New York State Div. of the Lottery* (3 Dept. 1997) 239 A.D.2d 763, 657 N.Y.S.2d 803.

What constitutes unwarranted invasion of personal privacy for purposes of personal privacy protection law is measured by what would be offensive and objectionable to reasonable person of ordinary sensibilities, and determination requires balancing competing interests of public access and individual privacy. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

Inmate who judicially surrendered all rights to child, and surrendered her for adoption, could not meet burden of demonstrating that disclosure to him of social services records relating to child would be "proper," such that they could be disclosed despite general rule of confidentiality. *Wise v. Battistoni* (2 Dept. 1994) 208 A.D.2d 755, 617 N.Y.S.2d 506.

Disclosure of terms of settlement of charges of misconduct against teacher by Board of Education would not have constituted unwarranted invasion of teacher's privacy; teacher had no reasonable expectation of privacy, as agreement contained his admission to much of misconduct charged, and information was of significant interest to public. *Anonymous v. Board of Educ. for Mexico Cent. School Dist.*, 1994, 162 Misc.2d 300, 616 N.Y.S.2d 867.

2. — Employment records

Employment, medical, and credit histories are exempt from disclosure under the Freedom of Information Law regardless of whether they are included in applications for employment; in the statutory exemption for "employment, medical or credit histories or personal references of applicants for employment," the phrase "applicants for employment" modifies only "personal references." *Hanig v. State Dept. of Motor Vehicles*, 1992, 79 N.Y.2d 106, 580 N.Y.S.2d 715, 588 N.E.2d 750.

District attorney and police department satisfied their obligation under Freedom of Information Law (FOIL), where they

certified that after diligent search, remaining documents requested by petitioner could not be found in police department or district attorney's files. *Swinton Record Access Officers for City of New York Police Dept.* (1 Dept. 1993) 100 A.D.2d 165, 694 N.Y.S.2d 59.

Information does not become protected employment, medical, or credit history, purposes of Freedom of Information Law (FOIL), by virtue of fact that it is stored in employee's personnel file. *Anonymous v. Board of Educ. for Mexico Cent. School Dist.*, 1994, 162 Misc.2d 300, 616 N.Y.S.2d 867.

Negotiated settlement agreement imposing of disciplinary charges against principal was "employment record" with meaning of freedom of information statute permitting committee on public access records to withhold employment records to prevent unwarranted invasion of personal privacy. *LaRocca v. Board of Ed. of Jericho Union Free School Dist.*, 1995, 159 Misc.2d 90, 602 N.Y.S.2d 1009.

Promotional examination results of persons on supplementary list for Black and Hispanic members on civil service examination for police sergeant were not exempt from disclosure as an unwarranted invasion of personal privacy under Freedom of Information Law given that names of officers on supplemental list had already been disclosed. *Rainey, Levitt*, 1988, 188 Misc.2d 962, 601 N.Y.S.2d 551.

Member of board of education sought employee list including names, address, job titles, and job descriptions of all employees in district, which does not constitute personnel records. 1990, 29 Ed. Dept. Rep. 375.

— Marriage license

Disclosure of names of marriage license applicants to journalistic organization would not constitute "unwarranted invasion of personal privacy" within meaning of Freedom of Information Law (FOIL), particularly as publishing names, by itself, would not constitute "commercial use." *Gannett Co., Inc. v. City Clerk's Office of City of Rochester*, 1993, 157 Misc.2d 349, 696 N.Y.S.2d 968, affirmed 197 A.D.2d 619, 604 N.Y.S.2d 848.

— Medical records

Portion of motorist's drivers license application in which he responded to questions as to whether he was receiving treatment for certain disabilities was properly redacted from the license application when

disclosure of certain public records and L. PUB OFF § 89, Form 8.

78 proceeding to compel access to prison was unreasonable, see SCL, PUB OFF

fees in Article 78 proceeding to compel denial of access was unreasonable, see SCL,

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Discussions

What constitutes unwarranted invasion of personal privacy for purposes of personal privacy protection law is measured by what would be offensive and objectionable to reasonable person of ordinary sensibilities, and determination requires balancing competing interests of public access and individual privacy. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 70, 657 N.Y.S.2d 504.

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certified that after diligent search, remaining documents requested by petitioner could not be found in police department's or district attorney's files. *Swinton v. Record Access Officers for City of New York Police Dept.* (1 Dept. 1993) 198 A.D.2d 165, 604 N.Y.S.2d 59.

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— Medical records

Portion of motorist's drivers license application in which he responded to questions as to whether he was receiving treatment for certain disabilities was properly redacted from the license application when

it was requested under the Freedom of Information Law by attorney representing personal injury plaintiff in action against the motorist, as those answers fell within the exemption from disclosure for medical records whose disclosure would be an unwarranted invasion of personal privacy. *Hanig v. State Dept. of Motor Vehicles*, 1992, 79 N.Y.2d 106, 580 N.Y.S.2d 715, 588 N.E.2d 750.

Medical records may not be obtained under freedom of information law (FOIL), on ground that their availability would be unwarranted invasion of privacy. *Huston v. Turkel* (1 Dept. 1997) 236 A.D.2d 283, 653 N.Y.S.2d 584, leave to appeal denied 90 N.Y.2d 809, 664 N.Y.S.2d 270, 686 N.E.2d 1365.

Hospital records of witness against Article 78 petitioner were not disclosable materials under Freedom of Information Law. *Newton v. District Atty., Bronx County* (1 Dept. 1992) 186 A.D.2d 57, 588 N.Y.S.2d 269.

Information such as medical patient's name, address, social security number, Medicaid number, Medicare number, medical record number, admit number, patient identification number utilized by third-party payors, and room number are "identifying details" under Freedom of Information Law (FOIL), thus obliging agency to delete such information in response to FOIL request, inasmuch as information is traceable to and/or closely connected with particular individual. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

Under Freedom of Information Law (FOIL), newspapers were entitled to disclosure of physician identifier information in statewide centralized health care system, despite Department of Health's (DOH) claim that disclosure would lead to identification of patients. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

On review of Freedom of Information Law (FOIL) determination by Department of Health (DOH), issues related to privacy interests of physicians could not be used to justify DOH determinations that newspapers were not entitled to disclosure of all data in statewide centralized health care system, where determinations made no mention of such matters and were confined in reasoning to issues related to privacy interests of patients. *New York Times Co. v. New York State Dept.*

of Health, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

Department of Health's (DOH) conditions and/or limitations on disclosure of health care data under Freedom of Information Law (FOIL), which conditions related to identity of applicant and intended use for information sought, would not be countenanced. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

3a. Death certificate

Disclosure of death certificate of person who allegedly had acquired immune deficiency syndrome would not constitute invasion of personal privacy exempt from disclosure mandates of Freedom of Information Law. *Tri-State Pub. Co., A Div. of Ottaway Newspapers, Inc. v. City of Port Jervis*, 1988, 138 Misc.2d 147, 523 N.Y.S.2d 954.

4. — Names and addresses

New York Teachers Pension Ass'n, Inc. v. Teachers' Retirement System of City of New York, 1979, 98 Misc.2d 1118, 415 N.Y.S.2d 561, affirmed 71 A.D.2d 250, 422 N.Y.S.2d 389, [main volume] appeal denied 49 N.Y.2d 701, 426 N.Y.S.2d 1025, 403 N.E.2d 187.

Nonprofit pro-gun organization was not entitled to names and addresses of persons holding permits for rifles and shotguns pursuant to request under Freedom of Information Law in order to solicit membership dues; solicitation of dues was form of "fund-raising" as term was used in Public Officers Law and thus, release would constitute unwarranted invasion of personal privacy for which disclosure could be withheld. *Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept.*, 1989, 73 N.Y.2d 92, 538 N.Y.S.2d 226, 535 N.E.2d 279.

Member of city board of education was entitled to list of names, home addresses, job titles, and salaries of all employees of board upon his request, even though board is not required to disclose home addresses of its employees, where board had chosen to provide the public with access to home addresses. *Buffalo Teachers Federation, Inc. v. Buffalo Bd. of Educ.* (4 Dept. 1989) 156 A.D.2d 1027, 549 N.Y.S.2d 541, appeal denied 75 N.Y.2d 708, 555 N.Y.S.2d 691, 554 N.E.2d 1279.

Borough president did not demonstrate that disclosure of names of individuals included in his counsel's memorandum or

his memorandum describing investigation of employee for racial insensitivity would constitute an unwarranted invasion of personal privacy, and thus list of names was not exempt from disclosure under Freedom of Information Law (FOIL) based upon confidentiality considerations where there were no statements by any individual with personal knowledge that certain individuals were promised confidentiality, and promise of confidentiality is not one of examples of unwarranted invasion of personal privacy listed in statute. *New York 1 News v. Office of President of Borough of Staten Island*, 1995, 166 Misc.2d 270, 631 N.Y.S.2d 479, affirmed 231 A.D.2d 524, 647 N.Y.S.2d 270.

Names of guards accused of inappropriate behavior in prison disturbance were discoverable under freedom of information law. *Faulkner v. Del Giacco*, 1988, 139 Misc.2d 790, 529 N.Y.S.2d 255.

5. — Economic or personal hardship

Housing agency's records regarding days worked, leave taken with or without pay, and leave accrued by employees was not exempt from production as material which, if disclosed, would constitute unwarranted invasion of personal privacy; records were by their very nature relevant to day-to-day operations of the agency, and there was no showing that economic or personal hardship would result from release of these records. *Buffalo News v. Buffalo Mun. Housing Authority* (4 Dept. 1990) 163 A.D.2d 830, 558 N.Y.S.2d 364.

State correctional facility videotapes of inmates were not exempt from Freedom of Information Law disclosure on ground of invasion of inmate privacy, in that inmates had no legitimate expectation of privacy from any and all public portrayal of their persons in facility; any privacy exemption was limited to portrayals of inmates' situations which would be unduly degrading or humiliating, disclosure of which would result in personal hardship. *Buffalo Broadcasting Co., Inc. v. New York State Dept. of Correctional Services* (3 Dept. 1990) 155 A.D.2d 106, 552 N.Y.S.2d 712, on subsequent appeal 174 A.D.2d 212, 578 N.Y.S.2d 928, leave to appeal denied 79 N.Y.2d 759, 584 N.Y.S.2d 447, 594 N.E.2d 941.

5a. — Social security numbers

Release of correction officers' social security numbers in response to request pursuant to Freedom of Information Law section governing access to agency records, without express written consent of

officers, constituted unwarranted invasion of officers' privacy. *Seelig v. Sielaff* (3 Dept. 1994) 201 A.D.2d 298, 607 N.Y.S.2d 260.

— Deletion of identifying detail

Department of Health failed to establish that redaction of identities of physicians who had treated patients in release of health care data kept by Statewide Planning and Research Corporation (SPARC) was required to prevent unwarranted invasion of privacy, as would allow Department to redact identities from disclosure of data under exception to Freedom of Information Law (FOIL); in view of extensive patient information which was being disclosed by SPARCS, it was conceivable that patient's identity could be discovered. *New York Times Co. v. New York State Dept. of Health* (3 Dept. 1998) — A.D.2d —, 674 N.Y.S.2d 826.

Individual who brought Freedom of Information Law (FOIL) action was entitled to work performance evaluations and appraisals of law enforcement personnel with identifying details redacted; although work performance evaluations and appraisals constituted "employment histories" within meaning of section of FOIL defining unwarranted invasion of personal privacy, disclosure did not constitute invasion of personal privacy when identifying details were deleted. *Obiajulu v. City of Rochester* (4 Dept. 1995) 213 A.D.2d 105, 655 N.Y.S.2d 779.

Legal aid attorneys were entitled to receive redacted inmate health care services documents from State Department of Correctional Services; access would not violate inmates' privacy rights and documents were not within intra-agency exemption to disclosure. *Rold v. Coughlin* (3 Dept. 1989) 142 Misc.2d 877, 538 N.Y.S.2d 896.

— Redaction of records

In proceeding in which petitioner sought copies of fair hearing determinations from Department of Social Services under Freedom of Information Law (FOIL), Department was not required, in order to preserve client confidentiality, to redact county name from requested records; speculation, that individual who was intent on discovering particulars of given case could locate case sought by scanning only 20 to 30 decisions, did not rise to level of particularized and specific justification for denying access. *Legal Aid Soc. of Northeastern New York, Inc. v. New York State Dept. of Social Services* (3 Dept. 1993) 195 A.D.2d 150, 605 N.Y.S.2d 265.

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7. — Redaction of records

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8. Time for compliance

Public Officers Law contains no time limitation on grant or denial or access to records, but rather, merely requires that requester be furnished with statement of approximate date on which request would be granted or denied. *Lecker v. New York City Bd. of Educ.* (1 Dept. 1990) 157 A.D.2d 486, 549 N.Y.S.2d 673, appeal dismissed 75 N.Y.2d 946, 555 N.Y.S.2d 692, 554 N.E.2d 1280.

9. Description of record

Kheel v. Ravitch (1 Dept. 1983) 93 A.D.2d 422, 462 N.Y.S.2d 182, [main volume] dismissal denied 60 N.Y.2d 681, 468 N.Y.S.2d 106, 455 N.E.2d 665, affirmed 62 N.Y.2d 1, 475 N.Y.S.2d 814, 464 N.E.2d 118.

Inmate who identified specific documents that he wished to receive under the Freedom of Information Law (FOIL) reasonably described the records so that a search could be made by the agency. *Cromwell v. Ward* (1 Dept. 1992) 183 A.D.2d 459, 584 N.Y.S.2d 295.

Freedom of information law (FOIL) did not require police department to solicit additional information from convicted defendant in order to enable department to identify documents possibly responsive to defendant's FOIL request; defendant had burden of reasonably describing documents requested so that they could be located. *Mitchell v. Slade* (1 Dept. 1991) 173 A.D.2d 226, 569 N.Y.S.2d 437, appeal denied 78 N.Y.2d 863, 578 N.Y.S.2d 877, 586 N.E.2d 60.

9a. Criminal records

Criminal history records in possession of Division of Criminal Justice Services were exempt from disclosure under Freedom of Information Law. *Bennett v. Girgenti* (3 Dept. 1996) 226 A.D.2d 792, 640 N.Y.S.2d 307, leave to appeal denied 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226.

9b. Parole records

Inmate was not entitled under Freedom of Information Law (FOIL) to obtain information and records pertaining to another individual's parole records, even if certain information was redacted, but, rather, such information was exempt from disclosure on ground that it was confidential and, if released, would be invasion of privacy. *Collins v. New York State Div. of Parole* (3 Dept. 1998) — A.D.2d —, 674 N.Y.S.2d 145.

10. Custody or control of records

Department of Correctional Services (DCS) adequately responded to petitioner's Freedom of Information Law (FOIL) request seeking disclosure of certain medical records pertaining to medical experiment conducted while he was inmate at correctional facility; petitioner was informed, prior to making formal FOIL request, that DCS could not locate subject records, and that information was again conveyed to petitioner via documents annexed to answer to petition in his Article 78 proceeding. *Scott v. Shepard* (3 Dept. 1996) 231 A.D.2d 759, 646 N.Y.S.2d 734, leave to appeal denied 89 N.Y.2d 858, 653 N.Y.S.2d 275, 675 N.E.2d 1228.

Freedom of Information Act proceeding brought to compel the district attorney to produce certain documents relating to petitioner's arrest record was properly dismissed without hearing, based on affirmation of assistant district attorney that his office had searched for and was not in possession of documents. *Ahlens v. Dillon* (2 Dept. 1988) 143 A.D.2d 225, 532 N.Y.S.2d 22.

10a. Maintenance of records

Freedom of Information Law (FOIL) did not require Superintendent of Insurance to comply with request for computer report detailing form number, type of form, kind of insurance and disposition for all health and life insurance policy forms filed with Insurance Department by all insurance companies for a specified period of time, although relevant tracking and approval information existed within Department's data base, where it would have been necessary for computer operator to create new records through a computer run and, thus, Department did not maintain the information in the form requested. *Gabriels v. Curiale* (3 Dept. 1995) 216 A.D.2d 850, 628 N.Y.S.2d 882.

11. Preparation of record

County sheriff, having furnished copies of state police booking reports, reports regarding clothes confiscated at time of arrest, and records relating to transfer of body tissue samples taken from victim and delivered to crime laboratory to either convicted inmate or his defense counsel, had no obligation to produce additional copies of Freedom of Information Law. *Walsh v. Wasser* (3 Dept. 1996) 225 A.D.2d 911, 639 N.Y.S.2d 506.

Fact that State Department of Correctional Services may maintain records for each correctional facility listing every inmate incarcerated therein did not require

Department to compile for party requesting records under Freedom of Information Law an alphabetical listing of all inmates, particularly where contention that requested record existed that was mere speculation without any evidentiary report. *Di Rose v. New York State Dept. of Correctional Services* (3 Dept. 1995) 216 A.D.2d 691, 627 N.Y.S.2d 850.

Applicant was not entitled to statement of specific reasons for his disqualification as candidate for position of state trooper, where he had already been provided with documents stating that he failed to meet requirements for the position; moreover, there was no record in the file which contained more specific statement of reasons, and Division of State Police was under no obligation to create such a record. *O'Shaughnessy v. New York State Div. of State Police* (2 Dept. 1994) 202 A.D.2d 508, 609 N.Y.S.2d 18, leave to appeal denied 94 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216.

Public entity is generally not required under Freedom of Information Law to prepare any record not possessed or maintained by it. *Wood v. Ellison* (3 Dept. 1993) 196 A.D.2d 933, 602 N.Y.S.2d 237.

Party seeking aggregate data on individuals employed by public entity was not entitled to have entity compile requested data from documents in its possession; under Public Officers Law, entity was not required to prepare any records not possessed or maintained by it. *Reubens v. Murray* (1 Dept. 1993) 194 A.D.2d 492, 599 N.Y.S.2d 580.

Freedom of Information Law did not require Deputy Commissioner and Counsel for State Department of Correctional Services to compile or maintain statistics on number of inmates who were in work release program and who were sentenced for murder; although Deputy Commissioner apparently listed inmate's participating in work release programs and included information on each inmate's crimes, the Deputy Commissioner did not have computer program that would analyze the relevant data and compile the requested statistics. *Guerrier v. Hernandez-Cuebas* (3 Dept. 1991) 165 A.D.2d 218, 566 N.Y.S.2d 406, appeal denied 78 N.Y.2d 853, 573 N.Y.S.2d 466, 577 N.E.2d 1058.

12. Reasons for denial

Applicant lacked standing to contest validity of local response rule on Freedom of Information Law (FOIL) requests or its possible conflict with Public Officers Law; respondents, who acknowledged appli-

cant's request with the advice that a determination would be reached in approximately 120 days, did not rely on local rule and it was unclear why applicant believe himself injured by rule and sought its nullification. *O'Donnell v. Donadio* (3 Dept. 1998) — A.D.2d —, 674 N.Y.S.2d 301.

Use of information in maintenance of civil action to redress alleged tortious wrong is not "commercial" activity, so as to be protected from disclosure under Freedom of Information Law (FOIL) a unwarranted invasion of privacy. *De Corse v. City of Buffalo* (4 Dept. 1997) 23 A.D.2d 949, 659 N.Y.S.2d 604.

City erred in refusing to release undated copies of General Offense Report to petitioner in her Freedom of Information Law (FOIL) request on ground that names and addresses of complainants and witnesses were sought for commercial or fundraising purpose, where she was using information to redress alleged tortious wrong, and she was not seeking to solicit clients or membership dues. *De Corse v. City of Buffalo* (4 Dept. 1997) 239 A.D.2d 949, 659 N.Y.S.2d 604.

Assistant district attorney's conclusion, affirmation "on information and belief" that prosecutor's office did not have report by another assistant district attorney despite diligent search, was valueless and therefore, did not justify summary dismissal of petition for disclosure under Freedom of Information Law (FOIL); affidavit was insufficient to permit determination of factual question whether diligent search had been conducted. *Key v. Jones* (2 Dept. 1994) 205 A.D.2d 779, 613 N.Y.S.2d 926.

Unsupported speculation that additional documents had not been turned over under Freedom of Information Law concerning police response to altercation between petitioner and representative of his landlord could not support a challenge to release of information. *Corbin v. Ward* (1 Dept. 1990) 160 A.D.2d 596, 554 N.Y.S.2d 640, appeal denied 76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888, reargument denied 76 N.Y.2d 983, 563 N.Y.S.2d 770, 565 N.E.2d 519.

13. Remedies

Violation of Freedom of Information Law (FOIL) does not give rise to private cause of action to recover money damages; submitting such cause of action would be inconsistent with carefully crafted remedies set forth in FOIL. *Warburton v.*

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Department to compile for party requesting records under Freedom of Information Law an alphabetical listing of all inmates, particularly where contention that requested record existed that was mere speculation without any evidentiary report. *Di Rose v. New York State Dept. of Correctional Services* (3 Dept. 1995) 216 A.D.2d 691, 627 N.Y.S.2d 850.

Applicant was not entitled to statement of specific reasons for his disqualification as candidate for position of state trooper, where he had already been provided with documents stating that he failed to meet requirements for the position; moreover, there was no record in the file which contained more specific statement of reasons, *ar...* Division of State Police was under no obligation to create such a record. *O'Shaughnessy v. New York State Div. of State Police* (2 Dept. 1994) 202 A.D.2d 508, 609 N.Y.S.2d 18, leave to appeal denied 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216.

Public entity is generally not required under Freedom of Information Law to prepare any record not possessed or maintained by it. *Wood v. Ellison* (3 Dept. 1993) 196 A.D.2d 933, 602 N.Y.S.2d 237.

Party seeking aggregate data on individuals employed by public entity was not entitled to have entity compile requested data from documents in its possession; under Public Officers Law, entity was not required to prepare any records not possessed or maintained by it. *Reubens v. Murray* (1 Dept. 1993) 194 A.D.2d 492, 599 N.Y.S.2d 580.

Freedom of Information Law did not require Deputy Commissioner and Counsel for State Department of Correctional Services to compile or maintain statistics on number of inmates who were in work release program and who were sentenced for murder; although Deputy Commissioner apparently listed inmate's participating in work release programs and included information on each inmate's crimes, the Deputy Commissioner did not have computer program that would analyze the relevant data and compile the requested statistics. *Guerrier v. Hernandez-Cuebas* (3 Dept. 1991) 165 A.D.2d 218, 566 N.Y.S.2d 406, appeal denied 78 N.Y.2d 553, 573 N.Y.S.2d 466, 577 N.E.2d 1058.

12. Reasons for denial

Applicant lacked standing to contest validity of local response rule on Freedom of Information Law (FOIL) requests or its possible conflict with Public Officers Law respondents, who acknowledged appli-

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cant's request with the advice that a determination would be reached in approximately 120 days, did not rely on local rule, and it was unclear why applicant believed himself injured by rule and sought its nullification. *O'Donnell v. Donadio* (1 Dept. 1998) — A.D.2d —, 674 N.Y.S.2d 391.

Use of information in maintenance of civil action to redress alleged tortious wrong is not "commercial" activity, so as to be protected from disclosure under Freedom of Information Law (FOIL) as unwarranted invasion of privacy. *De Corse v. City of Buffalo* (4 Dept. 1997) 239 A.D.2d 949, 659 N.Y.S.2d 604.

City erred in refusing to release unredacted copies of General Offense Reports to petitioner in her Freedom of Information Law (FOIL) request on ground that names and addresses of complainants and witnesses were sought for commercial or fundraising purpose, where she was using information to redress alleged tortious wrong, and she was not seeking to solicit clients or membership dues. *De Corse v. City of Buffalo* (4 Dept. 1997) 239 A.D.2d 949, 659 N.Y.S.2d 604.

Assistant district attorney's conclusory affirmation "on information and belief" that prosecutor's office did not have report by another assistant district attorney, despite diligent search, was valueless and, therefore, did not justify summary dismissal of petition for disclosure under Freedom of Information Law (FOIL); affidavit was insufficient to permit determination of factual question whether diligent search had been conducted. *Key v. Lynex* (2 Dept. 1994) 205 A.D.2d 779, 613 N.Y.S.2d 926.

Unsupported speculation that additional documents had not been turned over under Freedom of Information Law concerning police response to altercation between petitioner and representative of his landlord could not support a challenge to release of information. *Corbin v. Ward* (1 Dept. 1990) 160 A.D.2d 596, 554 N.Y.S.2d 240, appeal denied 76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888, reargument denied 76 N.Y.2d 983, 563 N.Y.S.2d 770, 565 N.E.2d 519.

13. Remedies

Violation of Freedom of Information Law (FOIL) does not give rise to private cause of action to recover money damages; permitting such cause of action would be inconsistent with carefully crafted remedies set forth in FOIL. *Warburton v.*

State, 1997, 173 Misc.2d 879, 662 N.Y.S.2d 706.

12b. Diligent search

Assistant district attorney provided sufficiently detailed basis to support and demonstrate that office conducted diligent search for records requested by inmate under Freedom and Information Law (FOIL) and was unable to locate them. *Anzalone v. Bonanno*, 1998, 176 Misc.2d 159, 670 N.Y.S.2d 1013.

13. Burden of proof

Where counsel for agency responding to request under Freedom of Information Law affirms that review of pertinent records failed to disclose any documents of types requested, burden shifts to petitioner to come forward with factual proof that items sought actually exist. *Pennington v. McMahon* (3 Dept. 1996) 234 A.D.2d 624, 650 N.Y.S.2d 492, leave to appeal denied 89 N.Y.2d 816, 659 N.Y.S.2d 857, 681 N.E.2d 1304.

Burden of demonstrating that records requested under freedom of information law are exempt rests upon government agency asserting exemption. *Moore v. Santucci* (2 Dept. 1989) 151 A.D.2d 677, 543 N.Y.S.2d 103.

Trial court improperly dismissed petition for disclosure pursuant to freedom of information law on ground that much or all of materials sought from district attorney could have been obtained by petitioner in his status as a defendant in a previously pending criminal prosecution; district attorney failed to show that any requested documents were protected from disclosure by statutory exemptions and failed to meet his burden of showing precisely which, if any, of the documents requested had been previously furnished to petitioner or his attorney. *Billups v. Santucci* (2 Dept. 1989) 151 A.D.2d 663, 542 N.Y.S.2d 726.

Agency seeking to prevent disclosure of documents under Freedom of Information Law (FOIL) bears burden of demonstrating applicability of particular exemption claimed; agency must articulate particularized and specific justification for denying access to requested documents. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

14. Attorney fees

Taxpayer was not entitled to award of attorney fees in connection with his request under Freedom of Information Law (FOIL) to compel town to produce records

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relating to tentative property tax assessment, in light of determination that his request was moot due to town's production of records, and lack of public interest in request. *Corvetti v. Town of Lake Pleasant* (3 Dept. 1997) 239 A.D.2d 841, 657 N.Y.S.2d 536.

Denying requests for counsel fees in Freedom of Information Law (FOIL) action against Department of Public Service was not abuse of discretion, even if requesting party satisfied criteria for such award, in view of evidence of confusion and possible misunderstanding involved in Department's efforts to comply with request. *Urac Corp. v. Public Service Com'n of State of N.Y.* (3 Dept. 1996) 223 A.D.2d 906, 636 N.Y.S.2d 480.

Department of Transportation (DOT) was not substantially justified in refusing to provide successful bidder's response to request for proposal for high-speed ferry service after contract was awarded, in response to Freedom of Information Law (FOIL) request, and in providing requesting party only redacted copy, supporting award of attorney fees. *Cross-Sound Ferry Services Inc. v. Department of Transp.* (3 Dept. 1995) 219 A.D.2d 346, 634 N.Y.S.2d 575.

Petitioner who was not a lawyer and did not retain a lawyer to represent him in proceeding under Freedom of Information Law was not entitled to award of attorney fees incurred in the proceeding. *Leeds v. Burns* (2 Dept. 1994) 205 A.D.2d 540, 613 N.Y.S.2d 46, leave to appeal denied 84 N.Y.2d 811, 622 N.Y.S.2d 914, 647 N.E.2d 120.

Plaintiff was not entitled to attorney fees in civil rights action to compel disclosure of agency records where she failed to prevail on any issues in proceeding. *Bosshart v. Perales* (2 Dept. 1994) 202 A.D.2d 498, 609 N.Y.S.2d 30, leave to appeal denied 85 N.Y.2d 801, 624 N.Y.S.2d 371, 648 N.E.2d 791.

Petitioners seeking town documents under Freedom of Information Law were not entitled to award of attorney fees, where their application was resolved in lower court by stipulation, and town did not summarily deny application, but rather granted some requests and asked for clarification as to others. *Stockdale v. Hughes* (3 Dept. 1991) 173 A.D.2d 1075, 570 N.Y.S.2d 412.

Counsel fees are recoverable in freedom of information law proceeding only if solicitor of information "substantially prevailed," agency from which information was sought "lacked a reasonable basis in

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law" for withholding it, and information was of "clearly significant interest to the general public." *Wurster v. Le Fevre* (3 Dept. 1989) 152 A.D.2d 810, 543 N.Y.S.2d 591.

Freedom of Information Law claimant was not entitled to award of counsel fees absent showing that agency released documents and records requested because of commencement of litigation; evidence demonstrated that agency commenced working on claimant's complex request on day it was received and was unable to sooner complete task because of difficulty in locating and assembling extensive and complex records. *Friedland v. Maloney* (3 Dept. 1989) 148 A.D.2d 814, 538 N.Y.S.2d 650.

Party may receive counsel fees in a proceeding under the freedom of information law when it is established that the party clearly prevailed, that the record requested was of significant interest to the public, and that the agency lacked a reasonable basis in law for withholding the record but, even if all those requirements are met, award of counsel fees is still discretionary. *Powhida v. City of Albany* (3 Dept. 1989) 147 A.D.2d 236, 542 N.Y.S.2d 865.

Newspapers that substantially prevailed in Freedom of Information Law (FOIL) action against Department of Health (DOH) were not entitled to attorney fees, as DOH's argument relating to what information fell within definition of "identifying details" under FOIL was not wholly lacking in merit, and interpretation of term from newspapers' standpoint was unduly narrow. *New York Times Co. v. New York State Dept. of Health*, 1997, 173 Misc.2d 310, 660 N.Y.S.2d 810, affirmed 674 N.Y.S.2d 826.

Nonprofit animal welfare organization and attorney were not entitled under Freedom of Information Law (FOIL) to attorney fees award in their Article 78 proceeding seeking to annul state university's determination denying request of organization and attorney, pursuant to FOIL, for disclosure of records pertaining to source of dogs and cats acquired by university health science center; although organization and attorney were furthering the public interest in bringing proceeding, prior decision of Supreme Court, Appellate Division, provided at least an arguable basis for denial of their FOIL request. *Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of State University of New York*, 1996, 169 Misc.2d 210, 643 N.Y.S.2d 323, appeal dismissed 240

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A.D.2d 430, 658 N.Y.S.2d 653, leave to appeal granted 91 N.Y.2d 810, 67 N.Y.S.2d 714, 694 N.E.2d 883.

16. Review—Generally

Capital Newspapers Div. of Hearst Corp. v. Burns (3 Dept. 1985) 109 A.D.2d 92, 490 N.Y.S.2d 651, appeal granted 69 N.Y.2d 603, 498 N.Y.S.2d 1023, 489 N.E.2d 256, [main volume] affirmed 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665.

City's untimely response to petitioner's Freedom of Information Law (FOIL) request and administrative appeal did not entitle her to relief; city's failure to respond to petitioner's initial request within five days was deemed denial, triggering her right to appeal, and, even though not within ten days, city made determination on petitioner's administrative appeal, for which her remedy was proceeding for review of determination. *De Corse v. City of Buffalo* (4 Dept. 1997) 239 A.D.2d 949, 659 N.Y.S.2d 804.

Trial court was not required to conduct hearing on inmate's request under Freedom of Information Law for inventory of items found in homicide victim's car, which inmate alleged was in possession of State Police; agency provided unrefuted proof that, ordinary practice notwithstanding, actual inventory sought did not exist. *Pennington v. McMahon* (3 Dept. 1996) 234 A.D.2d 624, 650 N.Y.S.2d 492, leave to appeal denied 89 N.Y.2d 816, 659 N.Y.S.2d 557, 681 N.E.2d 1304.

Article 78 proceeding in which criminal defendant sought production of documents under Freedom of Information Law was rendered moot where prior to determination of proceeding prosecutor denied defendant's document request and acknowledged defendant's right to take administrative appeal. *Johnson v. Morrenthau* (1 Dept. 1995) 214 A.D.2d 348, 625 N.Y.S.2d 21.

Agency fulfilled its obligation under Freedom of Information Law by granting plaintiff, who requested to be sent free copies of draft model "form", fair hearing decisions and final fair hearing decisions addressing use of emergency assistance to families funds to replace stolen or lost cash, access to fair hearing decisions maintained by agency for inspection and photocopying. *Bosshart v. Perales* (2 Dept. 1994) 202 A.D.2d 498, 609 N.Y.S.2d 30, leave to appeal denied 85 N.Y.2d 801, 624 N.Y.S.2d 371, 648 N.E.2d 791.

Issues concerning further disclosure by State Department of Human Rights of terms of stipulated settlement of age dis-

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Issues concerning further disclosure by State Department of Human Rights of terms of stipulated settlement of age dis-

crimination claim were rendered moot by employer's failure to appeal from portion of order converting its Article 78 proceeding into civil action and state defendants' affirmative representation to court that conduct complained of was not continuing, and injunction would be modified to reflect the only area of disclosure that was not moot, that involving the Freedom of Information Law. *Paul Smith's College of Arts and Sciences v. Cuomo* (3 Dept. 1992) 185 A.D.2d 888, 589 N.Y.S.2d 106.

Freedom of information law petitioner must show by more than speculation that all responsive documents were not produced. *Mitchell v. Slade* (1 Dept. 1991) 173 A.D.2d 226, 569 N.Y.S.2d 437, appeal denied 78 N.Y.2d 863, 578 N.Y.S.2d 877, 586 N.E.2d 60.

There is no jurisdictional bar to a court reviewing a ground for denial of Freedom of Information Law (FOIL) request raised for first time before the court on appeal, as compliance with FOIL does not involve discretionary agency determination and does not generally implicate particular expertise of any agency, and thus, rationale behind rule limiting court review to ground invoked by agency during administrative proceedings does not apply, despite FOIL's statutory preference for agency to state its reasons for denial. *Harvey v. Hynes*, 1997, 174 Misc.2d 174, 665 N.Y.S.2d 1000.

Argument that Grand Jury minutes were court records, as basis for denial of Freedom of Information Law (FOIL) request by defendant for grand jury testimony of all witnesses who testified against him, that was presented for first time on appeal by state, was addressable by court on review; judiciary was not party during administrative proceeding, and policy excluding courts from FOIL's coverage merited protection. *Harvey v. Hynes*, 1997, 174 Misc.2d 174, 665 N.Y.S.2d 1000.

17. — Persons entitled to maintain proceeding

Community board established by New York City Charter lacked capacity to bring Article 78 proceeding challenging city planning department's denial of access to certain documents sought under Freedom of Information Law in connection with proposed development, notwithstanding possibility that board had standing to seek such documents; Charter and its provisions relating to uniform land use review procedure did not expressly authorize board to bring suit, and board's role in land use review procedure was limited.

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Community Bd. 7 of Borough of Manhattan v. Schaffer, 1994, 84 N.Y.2d 148, 615 N.Y.S.2d 644, 639 N.E.2d 1.

Freedom of Information Law did not entitle indigent inmate to court records, free of charge, in order to aid him in challenge to his conviction. Whitehead v. Morgenthau, 1990, 146 Misc.2d 865, 552 N.Y.S.2d 518.

18. — Exhaustion of administrative remedies

Dismissal, for failure to exhaust administrative remedies, of Article 78 proceeding brought to compel district attorney to disclose under freedom of information law documents concerning indictment charging petitioner with possession of weapons and controlled substances, was not warranted, where district attorney failed to advise petitioner of availability of administrative appeal and failed to demonstrate that procedures for such appeal had, in fact, even been established. Barrett v. Morgenthau, 1989, 74 N.Y.2d 907, 549 N.Y.S.2d 649, 548 N.E.2d 1300.

Article 78 petition would not lie to compel production of copy of transcript of inmate's resentencing, even assuming such transcript existed, where inmate failed to exhaust administrative remedies by filing request under Freedom of Information Law. Bentley v. Demskie (3 Dept. 1998) — A.D.2d —, 673 N.Y.S.2d 226.

Inmate law clerk failed to exhaust his administrative remedies with regard to his claim that prison's policy prohibiting inmate law clerks from reviewing tapes of other inmates' disciplinary hearings violated Freedom of Information Law (FOIL) where inmate filed FOIL request for the relevant disciplinary tape in name of inmate whom he had been assigned to assist, but did not subsequently apply for access to that inmate's tape under his own name. Graziano v. Coughlin (3 Dept. 1995) 221 A.D.2d 684, 633 N.Y.S.2d 232.

Party seeking data on public entity's employees under state Freedom of Information Law who did not appeal denial of his request as required under Public Officers Law failed to exhaust his administrative remedies and, accordingly, could not bring judicial action to compel release of records he requested. Reubens v. Murray (1 Dept. 1993) 194 A.D.2d 492, 599 N.Y.S.2d 580.

18a. — Time for

Landowner's claim against town attorney in connection with landowner's Freedom of Information Law request was not

filed within four months of denial and, thus, was time-barred, even though attorney's response to request was disingenuous at best and could not be sanctioned by court. Cerro v. Town of Kingsbury (3 Dept. 1998) — A.D.2d —, 672 N.Y.S.2d 953, appeal dismissed.

In Article 78 proceeding to enforce compliance with Freedom of Information Law, order denying application for relief as moot would be modified on appeal to permit petitioner to take administrative appeal from respondents' partial production of documents despite lapse of 30-day period to take such appeal, in view of respondents' laxity in not addressing petitioner's request until he commenced present proceeding. Malerba v. Kelly (1 Dept. 1995) 211 A.D.2d 479, 621 N.Y.S.2d 318.

Petitioner's Freedom of Information Law (FOIL) application seeking order directing police department record access officers to produce personnel files of officers who testified at petitioner's trial was untimely, where petitioner's order to show cause was not served until more than four months after his appeal of police department's refusal to provide him with requested records was denied by police department. Swinton v. Record Access Officers for City of New York Police Dept. (1 Dept. 1993) 198 A.D.2d 165, 604 N.Y.S.2d 59.

Police department's laxity in responding to freedom of information law request for records related to criminal indictment until legal action had been commenced warranted that petitioner be permitted to appeal partial production of documents despite running of statutory 30-day limit, but petitioner would not be entitled to judicial relief with respect to indictment unless and until he perfected his administrative appeal. Newton v. Police Dept. (1 Dept. 1992) 183 A.D.2d 621, 585 N.Y.S.2d 5.

Failure of bank to appeal denial of disclosure of confidential, nonpublic portions of document submitted by competitor to Banking Board in connection with application to allow hostile takeover of bank within seven business days precluded judicial review of denial, even though appeal was taken within time period permitted under Banking Department rules. Irving Bank Corp. v. Considine, 1988, 138 Misc.2d 849, 525 N.Y.S.2d 770.

20. Access by public officials

Community board established by New York City Charter lacked capacity to bring Article 78 proceeding challenging

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city planning department's denial of access to certain documents sought under Freedom of Information Law in connection with proposed development, notwithstanding possibility that board had standing to seek such documents; Charter provisions relating to uniform land review procedure did not expressly authorize board to bring suit, and board's in land use review procedure was limited. Community Bd. 7 of Borough of Manhattan v. Schaffer, 1994, 84 N.Y.2d 148, N.Y.S.2d 644, 639 N.E.2d 1.

22. In camera inspection

To same effect as Fink v. Lefkowitz, 1979, 47 N.Y.2d 567, 419 N.Y.S.2d 467, N.E.2d 463. Moore v. Santucci (2 D. 1989) 151 A.D.2d 677, 543 N.Y.S.2d 1013.

In camera review of documents requested by inmate under Freedom of Information Law (FOIL) was not necessary, as district attorney provided sufficient detailed basis to support claims of nonproduction of documents and exemption, inmate failed to offer factual basis for claim to the contrary. Anzalone v. Borough of Buffalo, 1998, 176 Misc.2d 159, 670 N.Y.S.2d 1013.

District attorney could not satisfy duty under Freedom of Information Law following convicted defendant's request for copies of investigative reports, by asserting general privilege and turning documents over to court for in camera inspection. Brownell v. Grady, 1990, 154 Misc.2d 105, 554 N.Y.S.2d 382.

23. Commercial or fundraising purposes

Petitioner was not required to seek subpoena on public agency before filing Freedom of Information Law (FOIL) request. De Corse v. City of Buffalo Dept. 1997) 239 A.D.2d 949, 659 N.Y.S.2d 584.

Disclosure under Freedom of Information Law (FOIL) of lists of names and addresses of residence of lottery winners who have been subject of publicly disseminated press release is limited to only that information which was contained in original press release disclosing identity of lottery winner, and does not include changes

ARTICLE 6-A—PERSONA

Rules of the

Department of juvenile justice, see 41 R.C.N.Y. sentence reports, see 42 R.C.N.Y. Cha. Public attendance at city planning meet-

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within four months of denial and, was time-barred, even though attorney's response to request was disingenuous at best and could not be sanctioned by *Cerro v. Town of Kingsbury* (3d Cir. 1998) ___ A.D.2d ___, 672 N.Y.S.2d appeal dismissed.

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Disclosure under Freedom of Information Law (FOIL) of lists of names and cities of residence of lottery winners who have been subject of publicly disseminated press release is limited to only that information which was contained in original press release disclosing identity of lottery winner, and does not include changes of

name or cities of residence where winners have changed their marital status or moved since announcement. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

Disclosure by Department of the Lottery of lists of lottery jackpot winners who were already subject of publicly disseminated press release and their cities of residence is not unwarranted invasion of personal privacy of winners in violation of personal privacy protection law, and thus, such lists are discoverable under Freedom of Information Law (FOIL); expectation of privacy on part of lottery participants is tempered by acknowledgement on ticket that they agree to be subject to lottery rules, one of which requires winners to allow use of his or her name and city of residence to publicize winnings. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

Request for lists of names and cities of residence of lottery winners by company which purchased lottery prize winnings in exchange for lump-sum payment did not come within statutory exception to mandatory disclosure under Freedom of Information Law (FOIL) for information sought for commercial purposes, even though request was for commercial purposes; information was routinely released by Division of the Lottery at time winners were announced, and was defined as "public information" in Division's own regulations. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

Freedom of Information Law (FOIL) grants public agency authority to deny access to records if request seeks release of lists of names and addresses for commercial or fund-raising purposes because no governmental purpose is served by such disclosure, and rights of individuals to be free from unwanted commercial contacts can be given precedence without undercutting purpose of FOIL. *Empire Realty Corp. v. New York State Div. of the Lottery* (3 Dept. 1997) 230 A.D.2d 270, 657 N.Y.S.2d 504.

ARTICLE 6-A—PERSONAL PRIVACY PROTECTION LAW

Rules of the City of New York

Department of juvenile justice, see 41 RCNY Chapter 1.

Sentence reports, see 42 RCNY Chapter 1.

Public attendance at city planning meetings, see 62 RCNY §§ 2-03, 2-05 and 2-06.