STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 13, 2005

Hon. Frederick J. Amato
Monroe County Legislator
268 Morrow Drive
Rochester, NY 14616

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

Dear Legislator Amato:

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

You have sought an advisory opinion concerning the applicability of the Freedom of Information and Open Meetings Laws to the Monroe County Internal Audit Committee (hereafter "the Committee"), for you have been told that the Committee's meetings, its reports and its "Audit Committee Plan" are "not open to public scrutiny."

From my perspective, the meetings of the Committee fall within the requirements of the Open Meetings Law, and its records are subject to rights conferred by the Freedom of Information Law. This is not intended to suggest that meetings of the Committee must necessarily be open to the public in their entirety or that the records to which you referred must be accessible to the public *in toto,* but rather that the meetings of the Committee must be held in accordance with the Open Meetings Law and that its records may be accessible or deniable in whole or in part in accordance with the Freedom of Information Law. In this regard, I offer the following comments.

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

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

It is noted that several decisions indicate generally that ad hoc entities consisting of persons other than members of public bodies having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In this instance, the entity in question is not ad hoc, for it has a continual existence and has certain legally imposed powers and duties. Moreover, it has been held that an advisory body created by law, which is so in this instance, is a public body subject to the Open Meetings Law [see MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977)].

The Monroe County Code indicates, however, that the functions of the Committee are not solely advisory. According to excerpts from the Code, copies of which you attached, the Committee is a creation of law [§C6-5(4)(a)], it consists of seven members, and "[a] majority vote of the total Audit Committee (i.e., four votes) is required for Committee approval of any matter" [§C6-5(4)(b)]. The ensuing provision entitled "Powers and duties" states in part that the Committee shall "receive from the Director of Finance on or before March 15, and approve within 30 days of receipt, the presentation of the County's annual internal audit plan...."

In consideration of the foregoing, I believe that the Committee possesses the attributes necessary to conclude that it is a "public body" required to comply with the Open Meetings Law. In short, it consists of seven members, it functions and can carry out its duties only by means of a quorum, i.e., a majority vote of its total membership (see also, General Construction Law, §41), it clearly conducts public business and performs a governmental function for a public corporation, Monroe County, by means of its legal obligation to receive and approve the finance director's internal audit plan.

Second, you asked whether "documents produced" by the Committee, particularly "Internal Audit Reports", are "public documents." In my view, all such documents fall within the coverage of the Freedom of Information Law; their content, however, is the primary factor in determining the extent to which they must be disclosed pursuant to that law.

By way of brief background, the Freedom of Information Law pertains to agency records, and §86(4) defines the term "record" expansively to mean:

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

Based on the definition quoted above, any documents maintained, acquired or produced by the Committee constitute "records" that fall within the scope of the Freedom of Information Law.

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

I note that §C6-5(c)(2) of the County Code states in part that:

> "...the confidentiality of employee records cited in any audit shall be strictly maintained within the Committee. Such records shall be restricted solely to use within the Committee for informational purposes only and shall not be transmitted to the Legislature nor released to the public."

Insofar as the provision quoted above is inconsistent with the Freedom of Information Law, I believe that it is invalid and of no effect. The state's highest court, the Court of Appeals, has held that a request for, a promise or any assertion of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available.

Moreover, it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as a county code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. In short, a local enactment cannot confer, require or promise confidentiality.

There may, however, be portions of the records referenced in §C6-5(c)(2) that may be withheld. I point out that there is nothing in the Freedom of Information Law that deals specifically with employee records or personnel files. The nature and content of those records may differ from one agency to another and from one employee to another. Neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the

contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

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

There are numerous instances in which portions of employee records are available, while others are not. By means of example, items within a record indicating a public employee's gross pay would be accessible, but items involving charitable contributions, alimony, deductions and the like would be exempt; those latter items are unrelated to the performance of one's official duties. Attendance records indicating time in and out, days and dates of leave claimed have been found to be accessible (see Capital Newspapers, supra), but portions of those records indicating an employee's medical condition could be withheld.

With respect to internal audits and other internal governmental communications, the provision of primary significance §87(2)(g). That provision permits an agency to withhold records that:

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

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

Because the provision cited above refers to "external audits", it has been contended that internal audits, such as those that are the subject of your inquiry, may be withheld in their entirety. Nevertheless, there is nothing in the language of the Freedom of Information Law that pertains specifically to internal audits or that exempts them from disclosure. The fact that external audits must be disclosed does not suggest other records, such as internal audits, are exempt, in their entirety, from disclosure. On the contrary, as stated earlier, all records are presumed to be available, and silence in the law concerning a certain kind of record does not confer confidentiality, but rather a presumption of access. In this instance, an internal audit constitutes "intra-agency" material that is accessible or deniable, in whole or in part, based on its contents.

The paragraph quoted above, other than the first sentence, was quoted in full in Gannett Co. v. Rochester City School District [684 NYS 2d 757, 759 (1998)], and the Supreme Court, Monroe County, agreed with my opinion that portions of internal audits consisting of "statistical or factual tabulations or data" must be disclosed pursuant to subparagraph (i) of §87(2)(g), unless some other basis for denial, i.e., §87(2)(b), may properly be asserted.

I note, too, that the Court of Appeals dealt with a similar contention relating to a different aspect of §87(2)(g). In Gould et al. v. New York City Police Department [89 NY2d 267 (1996)], the agency denied access on the basis of §87(2)(g)(iii), which grants access to "final agency policy or determinations", on the ground that the records sought were not final and did not relate to any event whose outcome had been finally determined. As in Gannett, in which the agency contended that because external audits are accessible, internal audits can be withheld in their entirety, the New York City Police Department argued that because final determinations are public, records other than final may be withheld in their entirety. The Court of Appeals rejected that argument and stated that:

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

> [Gould et al. v. New York City Police Department, 89 NY2d 267, 276 (1996); emphasis added by Court].

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

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

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

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

Based on the language of the law and especially its judicial interpretation, again, those portions of internal audits consisting of statistical or factual information, in my view, must be disclosed, except to the extent that a different exception may be properly asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

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