SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

-against-

BOARD OF EDUCATION of the BEDFORD CENTRAL SCHOOL DISTRICT, SUSAN ELION WOLLIN, as President of the Board of Education of the Bedford Central School District, CAROLE LACOLLA, as District Clerk of the Board of Education of the Bedford Central School District and DR. DEBRA JACKSON,

Respondents.

VERIFIED ANSWER

Index No. 2008-25405

Assigned To:
Hon. Barbara Zambelli, A.J.S.C.

Respondents, the BOARD OF EDUCATION of the BEDFORD CENTRAL SCHOOL DISTRICT (the "Board of Education"), SUSAN ELION WOLLIN, as President of the Board of Education of the Bedford Central School District, CAROLE LACOLLA, as District Clerk of the Board of Education of the Bedford Central School District and DR. DEBRA JACKSON (collectively, the "Respondents"), by their attorneys, Keane & Beane, P.C., as and for their Answer to the Verified Petition in the above-captioned proceeding, respectfully allege as follows:

1. The allegations contained in the Petition's "Preliminary Statement" are conclusions of law and Petitioner's description of the case, and therefore they require no response. To the extent a response is deemed necessary, Respondents deny said allegations.

2. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "2" of the Verified Petition, except admit that Petitioner is a former member of the Board of Education.

3. Admit the allegations set forth in paragraph "3" of the Verified Petition.

4. The allegations contained in paragraph "4" of the Verified Petition are conclusions of law and therefore require no response. To the extent a response is deemed necessary, Respondents deny said allegations.

5. Deny the allegations set forth in paragraph "5" of the Verified Petition, except admit that Respondent Carole Lacolla is the District Clerk of the Board of Education ("the District Clerk").

6. Deny the allegations set forth in paragraph "6" of the Verified Petition, except admit that Respondent Susan Elion Wollin is the President of the Board of Education.

7. Deny the allegations set forth in paragraph "7" of the Verified Petition, except admit that Respondent Dr. Debra Jackson ("Dr. Jackson") is a former Superintendent of the Bedford Central School District and that Dr. Jackson and the Board of Education are parties to a certain agreement, denominated "Settlement Agreement and Mutual Releases," that was executed on or about June 12, 2007 (the "Settlement Agreement").

8. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "8" of the Verified Petition, except admit upon information and belief that Victoria Graboski, a former principal at the Bedford Hills Elementary

School, was arrested in connection with her alleged failure to report allegations of child abuse as required by law.

9. Admit the allegations set forth in paragraph "9" of the Verified Petition.

10. Admit the allegations set forth in paragraph "10" of the Verified Petition.

11. Admit the allegations set forth in paragraph "11" of the Verified Petition.

12. Deny the allegations contained in paragraph "12" of the Verified Petition, and refer the Court to the Settlement Agreement for a full recitation of its contents and a determination as to its legal effect.

13. Deny the allegations contained in paragraph "13" of the Verified Petition, and refer the Court to the Settlement Agreement (including the press release annexed thereto) for a full recitation of its contents and a determination as to its legal effect.

14. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "14" of the Verified Petition, and refer the Court to the email annexed to the Verified Petition as "Exhibit C" for a full recitation of its contents and a determination as to its legal effect.

15. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "15" of the Verified Petition, and refer the Court to the email annexed to the Verified Petition as "Exhibit C" for a full recitation of its contents and a determination as to its legal effect.

16. Deny the allegations contained in paragraph "16" of the Verified Petition, except admit that the Board of Education denied Petitioner's FOIL request and refer the Court to the denial letter from the District Clerk to Petitioner, dated July 10, 2008, for a full recitation of its contents and a determination as to its legal effect.

17. Deny the allegations set forth in paragraph "17" of the Verified Petition, and refer the Court to the email from Petitioner to the District Clerk, dated July 18, 2008, for a full recitation of its contents and a determination as to its legal effect.

18. Deny the allegations set forth in paragraph "18" of the Verified Petition, except admit that the Board of Education denied Petitioner's FOIL appeal and refer the Court to the letter from Susan Elion Wollin, President of the Board of Education, to Petitioner, dated August 7, 2008, for a full recitation of its contents and a determination as to its legal effect.

19. The allegations contained in paragraph "19" of the Verified Petition are conclusions of law and therefore require no response. To the extent a response is deemed necessary, Respondents deny said allegations.

20. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "20" of the Verified Petition.

21. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "21" of the Verified Petition.

22. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "22" of the Verified Petition.

23. Deny the allegations contained in paragraph "23" of the Verified Petition, and refer the Court to the Settlement Agreement for a full recitation of its contents and a determination as to its legal effect.

24. Deny the allegations contained in paragraph "24" of the Verified Petition.

25. Deny the allegations contained in paragraph "25" of the Verified Petition.

26. Deny the allegations contained in paragraph "26" of the Verified Petition.

27. Deny the allegations contained in paragraph "27" of the Verified Petition.

28. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "28" of the Verified Petition.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

29. The Verified Petition fails to state a cause of action for which relief can be granted.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

30. The claim raised in the Verified Petition is barred, in whole or in part, by the statute of limitations.

WHEREFORE, Respondents respectfully request that a judgment be entered denying the Verified Petition in its entirety, and granting Respondents such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
January 16, 2008

KEANE & BEANE, P.C.

By: _____
Edward J. Phillips
Attorneys for Respondents
445 Hamilton Avenue, Suite 1500
White Plains, New York 10601
(914) 946-4777

TO: LAW OFFICE OF ROBERT A. STERNBACH
Attn: Robert A. Sternbach, Esq.
Attorneys for Petitioner
274 Madison Avenue, Suite 1303
New York, NY 10016
(212) 661-4040

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

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-against-

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Respondents.
---------- x

VERIFICATION

Index No. 2008-25405

Assigned To:
Hon. Barbara Zambelli, A.J.S.C.

STATE OF NEW YORK)
)SS.:
COUNTY OF WESTCHESTER)

SUSAN ELION WOLLIN, being duly sworn, deposes and says:

I am the President of the Board of Education of the Bedford Central School District; I have read the foregoing Verified Answer and know the contents thereof; that the same is true to the best of my knowledge, except as to matters stated therein on information and belief and, as to those matters, I believe them to be true.

SUSAN ELION WOLLIN

Sworn to before me this
13th day of January, 2009

Notary Public

LYNN E. WEDGES
Notary Public
WE6016887
County, New York
-7-

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------x

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

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BOARD OF EDUCATION of the BEDFORD CENTRAL SCHOOL DISTRICT, SUSAN ELION WOLLIN, as President of the Board of Education of the Bedford Central School District, CAROLE LACOLLA, as District Clerk of the Board of Education of the Bedford Central School District and DR. DEBRA JACKSON,

Respondents.

----------x

AFFIDAVIT

Index No. 2008-25405

Assigned To:

Hon. Barbara Zambelli, A.J.S.C.

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

DEBRA JACKSON, being duly sworn, deposes and says:

1. I am a former Superintendent of the Bedford Central School District and a Respondent in the above-captioned proceeding. I submit this Affidavit in opposition to the Verified Petition, which challenges the denial of Petitioner's request under the N.Y. Freedom of Information Law ("FOIL") for all records "relating to the 'certain dispute' between the Bedford Central Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement." (Petition, Exhibit C). Except where otherwise stated, I am personally familiar with the facts set forth in this Affidavit.

2. I am advised that in August 2008, Petitioner appealed the denial of the aforementioned FOIL request to the Board of Education. (Petition, Exhibit E). I am further

advised that by letter dated August 7, 2008, the Board of Education denied Petitioner's appeal on two grounds: (i) that the records in question constituted intra-agency material, and (ii) that disclosure would constitute an unwarranted invasion of privacy. (Petition, Exhibit F).

3. I respectfully submit that the Board of Education's denial of Petitioner's FOIL appeal was entirely proper and, to my knowledge, consistent with applicable law.

4. As Petitioner's FOIL request states, a dispute arose in 2007 between myself and the Board of Education. The dispute related to my job performance as Superintendent of the Bedford Central School District and resulted in the Board of Education preparing disciplinary charges against me. Although I was never formally served with disciplinary charges, I was advised at that time that a set of draft charges had been prepared by the Board of Education.

5. Thereafter, the Board of Education and I agreed to voluntarily settle our differences. The terms and conditions of the settlement are set forth in the "Settlement Agreement and Mutual Releases" (the "Settlement Agreement"), a copy of which is annexed to the Petition as Exhibit B.

6. Following execution of the Settlement Agreement, no further action was taken by the Board of Education with respect to the draft disciplinary charges. The Board of Education never commenced any disciplinary proceeding against me pursuant to N.Y. Education Law § 3020-a.

7. As set forth in the Settlement Agreement, it was (and remains) my position that the Board of Education had no grounds to pursue disciplinary charges against me and seek the termination of my services as Superintendent. At that time, I made it clear to the Board of

Education that I would respond to such action by asserting all of my legal rights, including the commencement of litigation against the School District.

8. For the reasons set forth in the accompanying Memorandum of Law, I submit that the Board of Education's denial of Petitioner's FOIL request was proper and should not be disturbed. The public disclosure and dissemination of the draft disciplinary charges prepared by the Board of Education in 2007 would be particularly unfair and inappropriate because I would have no means of effectively responding to them.

WHEREFORE, I respectfully request that the Verified Petition be denied, and that Respondents be awarded such other and further relief as may be just and proper.

DEBRA JACKSON

Sworn to before me this
14th day of January, 2009

Moira Liardi
Notary Public

MOIRA LIARDI
Notary Public - State of New York
No. 01LI6073453
Qualified in Orange County
My Commission Expires Apr. 22, 2010

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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-against-

BOARD OF EDUCATION of the BEDFORD CENTRAL SCHOOL DISTRICT, SUSAN ELION WOLLIN, as President of the Board of Education of the Bedford Central School District, CAROLE LACOLLA, as District Clerk of the Board of Education of the Bedford Central School District and DR. DEBRA JACKSON,

Respondents.

AFFIDAVIT

Index No. 2008-25405

Assigned To:

Hon. Barbara Zambelli, A.J.S.C.

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

SUSAN ELION WOLLIN, being duly sworn, deposes and says:

1. I am the President of the Board of Education of the Bedford Central School District (the "Board of Education"), which is named as a Respondent in the above-captioned proceeding. I submit this Affidavit in opposition to the Verified Petition, which challenges the Board of Education's denial of Petitioner's request under the N.Y. Freedom of Information Law ("FOIL") for all records "relating to the 'certain dispute' between the Bedford Central Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement." (Petition, Exhibit C). I am personally familiar with the facts set forth in this Affidavit.

2. In August 2008, Petitioner appealed the denial of the aforementioned FOIL request to the Board of Education. (Petition, Exhibit E). By letter dated August 7, 2008, the Board of Education denied Petitioner's appeal on two grounds: (i) that the records in question constituted intra-agency material, and (ii) that disclosure would constitute an unwarranted invasion of privacy. (Petition, Exhibit F).

3. I respectfully submit that the Board of Education's denial of Petitioner's FOIL appeal was entirely proper and consistent with applicable law. As Petitioner's FOIL request states, a dispute arose in 2007 between the Board of Education and the former Superintendent of the Bedford Central School District, Respondent Debra Jackson ("Dr. Jackson"), involving the performance of her job duties. This dispute resulted in the Board of Education preparing draft disciplinary charges against Dr. Jackson. However, before the Board of Education served Dr. Jackson with the charges and commenced the disciplinary procedures prescribed under N.Y. Education Law § 3020-a, the parties were able to voluntarily settle the dispute. The terms and conditions of the settlement are set forth in the "Settlement Agreement and Mutual Releases" that was executed on or about June 12, 2007 (the "Settlement Agreement"). The Settlement Agreement has always been available to the public, and indeed a copy is annexed to the Verified Petition. (Petition, Exhibit B).

4. The Board of Education interpreted Petitioner's FOIL request as seeking disclosure of the draft disciplinary charges that were the basis of the "certain dispute" between the Board and Dr. Jackson. Because the disciplinary charges were never formally served upon Dr. Jackson and no final determination was ever rendered upon them, the Board of Education concluded that it was not required to disclose the charges under FOIL for the above-mentioned reasons. I submit that the Board of Education's decision was proper and should not be disturbed.

WHEREFORE, I respectfully request that the Verified Petition be denied, and that Respondents be awarded such other and further relief as may be just and proper.

SUSAN ELION WOLLIN

Sworn to before me this
13th day of January, 2009

Notary Public

LYNN E. WEDGES
Notary Public
Exp. November, 30 2010
No. 01WE6016837
Westchester County, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

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-against-

BOARD OF EDUCATION of the BEDFORD CENTRAL SCHOOL DISTRICT, SUSAN ELION WOLLIN, as President of the Board of Education of the Bedford Central School District, CAROLE LACOLLA, as District Clerk of the Board of Education of the Bedford Central School District and DR. DEBRA JACKSON,

Respondents.

Index No. 2008-25405

Assigned To:
Hon. Barbara Zambelli, A.J.S.C.

MEMORANDUM OF LAW
IN OPPOSITION TO PETITION

KEANE & BEANE, P.C.
Attorneys for Respondents
445 HAMILTON AVENUE, 15TH FLOOR
WHITE PLAINS, NEW YORK 10601
(914) 946-4777

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SUPREME COURT OF THE STATE OF NEW YORK
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In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

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Index No. 2008-25405

Assigned To:
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BOARD OF EDUCATION of the BEDFORD CENTRAL SCHOOL DISTRICT, SUSAN ELION WOLLIN, as President of the Board of Education of the Bedford Central School District, CAROLE LACOLLA, as District Clerk of the Board of Education of the Bedford Central School District and DR. DEBRA JACKSON,

Respondents.
----------x

MEMORANDUM OF LAW
IN OPPOSITION TO PETITION

I. Preliminary Statement

Respondents, the Board of Education of the Bedford Central School District (the "Board of Education"), Susan Elion Wollin, as President of the Board of Education of the Bedford Central School District, Carole LaColla, as District Clerk of the Board of Education of the Bedford Central School District and Dr. Debra Jackson (collectively, the "Respondents"), submit this Memorandum of Law in opposition to the Petition in the above-captioned proceeding.

The Petition challenges the Board of Education's denial of Petitioner's appeal under the N.Y. Freedom of Information Law ("FOIL"), N.Y. Public Officer's Law § 84, *et seq.* Petitioner's underlying FOIL request sought the disclosure of all records "relating to the 'certain dispute' between the Bedford Central Board of Education *(sic)* and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement." (Petition, Exhibit C).

In August 2008, Petitioner appealed the denial of the aforementioned FOIL request to the Board of Education. (Petition, Exhibit E). By letter dated August 7, 2008, the Board of Education denied Petitioner's appeal on two grounds: (i) that the records in question constituted intra-agency material, and (ii) that disclosure would constitute an unwarranted invasion of privacy. (Petition, Exhibit F). This proceeding followed.

As set forth below, the Board of Education's denial of Petitioner's FOIL request was entirely proper and should be upheld. The "dispute" referenced in Petitioner's FOIL request relates to disciplinary action that the Board of Education contemplated taking against the former superintendent of the Bedford Central School District, Respondent Dr. Debra Jackson ("Dr. Jackson"). To that end, the Board of Education prepared a set of draft disciplinary charges for the purpose of commencing a disciplinary proceeding against Dr. Jackson pursuant to N.Y. Education Law § 3020-a. (Wollin Affid., ¶ 3). However, before those disciplinary charges were finalized and served upon Dr. Jackson, the parties agreed to voluntarily settle their dispute. (Id.). The terms and conditions of the settlement are set forth in the "Settlement Agreement and Mutual Releases" that was executed on or about June 12, 2007 (the "Settlement Agreement"). A copy of the Settlement Agreement was previously made available to Petitioner and is annexed to his Petition as Exhibit B.

Case law and advisory opinions issued by the New York State Committee on Open Government uniformly hold that records relating to non-final and/or unsubstantiated disciplinary charges against a public employee may be withheld from disclosure under FOIL based upon the statute's intra-agency and privacy exemptions. See Public Officer's Law §§ 87(2)(g), 87(2)(b) and 89(2)(b). Accordingly, the Board of Education's denial of Petitioner's FOIL appeal on these grounds was entirely appropriate and should not be disturbed.

II. Argument

POINT I

DRAFT DISCIPLINARY CHARGES ARE EXEMPT FROM FOIL DISCLOSURE

A. Standard of Review

Because FOIL is based on a presumption of access to the records, an agency denying access carries the burden of demonstrating that an exemption applies to the FOIL request in question. See Public Officers Law § 89[4][b]; Matter of Hanig v. State of New York Department of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 717 (1992). To meet this burden, the agency must show that the requested information "falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." Matter of Capital Newspapers Division of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 578 (1986); see also Bahnken v. New York City Fire Department, 17 A.D.3d 228, 229, 794 N.Y.S.2d 312, 313 (1st Dep't), leave to appeal denied, 6 N.Y.3d 701, 810 N.Y.S.2d 415 (2005) (stating that the "normal article 78 'arbitrary and capricious' standard of review" is inapplicable in proceedings challenging the denial of a FOIL request).

Applying this standard here, the Board of Education's denial of Petitioner's FOIL appeal must be upheld. All pertinent case authorities and advisory opinions[1] squarely hold that records relating to unproven disciplinary charges may be withheld by an agency under FOIL's privacy

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[1] Courts generally defer to advisory opinions issued by the Committee on Open Government regarding the interpretation of FOIL, provided that the opinion is not irrational or arbitrary. See Matter of Miracle Mile Associates v. Yudelson, 68 A.D.2d 176, 181, 417 N.Y.S.2d 142, 146 (4th Dep't 1979); Gannett Co., Inc. v. Rochester City School District, 179 Misc.2d 502, 684 N.Y.S.2d 757 (Sup. Ct. Monroe Cty. 1998), aff'd, 267 A.D.2d 964, 701 N.Y.S.2d 679 (4th Dep't 1999).

and intra-agency exemptions. None of the cases cited in Petitioner's moving papers hold to the contrary.

B. The Draft Disciplinary Charges Constitute Intra-Agency Material And Their Disclosure Would Compromise Protected Privacy Interests

FOIL expressly authorizes an agency to deny access to records that, if disclosed, would constitute an "unwarranted invasion of personal privacy." Public Officers Law § 87(2)(b). FOIL defines an "unwarranted invasion of personal privacy" by providing a non-exclusive list of examples. See Public Officers Law § 89(2)(b)(i)-(vi). Case law and advisory opinions rendered by the Committee on Open Government make it clear that disciplinary charges that were never adjudicated, and never resulted in the imposition of any penalty upon the employee in question, may be withheld under FOIL pursuant to this statutory exemption.

At least two decisions of the Appellate Division, Second Department, are directly on point and controlling authority here. In LaRocca v. Board of Education of Jericho Union Free School District, 220 A.D.2d 424, 632 N.Y.S.2d 576 (2d Dep't 1995), written disciplinary charges were filed against a school principal pursuant to Education Law § 3020-a. Thereafter, the Board of Education of the Jericho Union Free School District and the school principal entered into a written settlement agreement stipulating that the charges were withdrawn. The Second Department ruled in LaRocca that portions of this settlement agreement were subject to FOIL disclosure, but that "the release of that portion of the agreement which contains references to charges which were denied and/or not admitted by [the employee] or which contain the names of any teachers, would constitute an unwarranted invasion of privacy as defined by Public Officers Law § 87(2)." LaRocca, 220 A.D.2d at 427, 632 N.Y.S.2d 579. In a similar case involving a school district superintendent, the Second Department cited LaRocca and held that

the lower court had "erred in authorizing . . . release of certain pages of the sealed record on appeal filed herein which recite unproven disciplinary charges." Western Suffolk Board of Cooperative Educational Services v. Bay Shore Union, 250 A.D.2d 772, 672 N.Y.S.2d 776, 776 (2d Dep't 1998). In sum, LaRocca and Western Suffolk leave no doubt that unproven disciplinary charges may be withheld from FOIL disclosure.

These decisions are consistent with New York's strong public policy of preserving the right to confidentiality with respect to unproven allegations of professional misconduct. In Johnson Newspaper Corp. v. Melino, 77 N.Y.2d 1, 563 N.Y.S.2d 380 (1990), the Court of Appeals explained that "our statutes and case law reflect a policy of keeping disciplinary proceedings involving licensed professionals confidential until they are finally determined. The policy serves the purpose of safeguarding information that a potential complainant may regard as private or confidential and thereby removes a possible disincentive to the filing of complaints of professional misconduct." Id. at 10, 563 N.Y.S.2d at 385. See also Sinicropi v. County of Nassau, 76 A.D.2d 832, 428 N.Y.S.2d 312 (2d Dep't 1980), lv. to appeal denied, 51 N.Y.2d 704, 432 N.Y.S.2d 1028 (1980) (materials pertaining to disciplinary proceedings against probation officer were exempt from disclosure under FOIL as intra-agency material). Section 3020-a of the Education Law itself evinces a legislative intent to preserve confidentiality of non-final or unproven disciplinary charges. See Education Law § 3020-a(2)(a) [disciplinary charges are voted on in executive session]; § 3020-a(3)(c)(i) [educator has right to a private hearing]; and § 3020-a(4)(b) [charges resulting in acquittal must be expunged from employment record].

The Committee on Open Government has rendered numerous advisory opinions likewise recognizing that "[w]hen allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such

allegations may, according to judicial pronouncement, be withheld, for disclosure would result in an unwarranted invasion of personnel privacy." Advisory Opinion 3978-03, at *2-3. See also Advisory Opinion AO-16764 (August 29, 2007) (making the same observation as to the prevailing law); Advisory Opinion AO-12802, at *2 (July 13, 2001) (same observation); Advisory Opinion AO-10192, at *7 (July 11, 1997) (same observation); Advisory Opinion AO-7826, at *3 (July 27, 1993) (same observation). Copies of these Advisory Opinions are attached to this Memorandum of Law for ease of reference.

Applying this body of authorities here, the Board of Education's denial of Petitioner's FOIL request must be sustained. The draft disciplinary charges withheld by the Board of Education were never formally served upon Dr. Jackson, and no final determination was ever rendered upon them. (Wollin Affid., ¶ 4; Jackson Affid., ¶¶ 4-6). The release of the draft disciplinary charges would therefore "constitute an unwarranted invasion of privacy as defined by Public Officers Law § 87(2)." LaRocca, 220 A.D.2d at 427, 632 N.Y.S.2d 579.

FOIL also allows an agency to withhold records that constitute intra-agency materials. See Public Officers Law § 87(2)(g). The statute defines intra-agency materials as records that 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." Public Officers Law § 87(2)(g). The purpose of FOIL's intra-agency exemption is "to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure." Matter of New York Times Company v. City of New York Fire Department, 4 N.Y.3d 477, 488, 796 N.Y.S.2d 302, 308 (2005). See also Herald Company v.

School District of City of Syracuse, 104 Misc.2d 1041, 430 N.Y.S.2d 460 (Sup. Ct. Onondaga Cty. 1980).

This statutory exemption for intra-agency materials likewise authorized the Board of Education to withhold disclosure of the draft disciplinary charges against Dr. Jackson. Because the draft disciplinary charges remained preliminary and non-final in nature, they cannot be regarded as "factual data" or a "final determination." As the Committee on Open Government observed in an analogous situation involving records prepared in connection with a disciplinary investigation, such materials reflect "opinions, advice, conjecture, recommendations and the like," and therefore may be withheld as intra-agency records. Advisory Opinion AO-13978, at *3 (March 31, 2003) (copy attached); see also Advisory Opinion AO-9383, at *4 (March 26, 1996) (copy attached).

The cases cited by Petitioner on pages 7-8 of his Memorandum of Law are not to the contrary. For instance, Petitioner attempts to distinguish Herald Company, supra, based upon his apparent misapprehension that the dispute involving Dr. Jackson did not involve disciplinary charges (notwithstanding that page 1 of the Settlement Agreement bears the caption of an administrative proceeding). That is not the case -- whether Dr. Jackson's draft disciplinary charges must be disclosed under FOIL is, in fact, the issue at bar. Herald Company actually supports the Board of Education's denial of Petitioner's FOIL appeal because the court's decision was premised upon the non-final nature of the disciplinary proceeding in question (the proceeding remained pending and incomplete). See Herald Company, 104 Misc.2d at 1043, 430 N.Y.S.2d 462. Thus, the court held that "at this stage, the name and charges constitute a material part of the unproved allegation before the hearing panel and are pre-determination materials exempt from disclosure under subparagraph (2)(g) of Section 87 of the Public Officers Law." Id.

at 1046, 430 N.Y.S.2d at 464 (emphasis added). The same principle supports the Board of Education's decision to withhold the draft disciplinary charges in the instant matter.

None of the other cases cited by Petitioner on page 8 of his Memorandum of Law involved the accessibility of non-final disciplinary charges. To summarize, New York Times Company, supra, involved materials related to the September 11, 2001 attacks on the World Trade Center. The records in New York 1 News v. Office of President of Borough of Staten Island, 231 A.D.2d 524, 647 N.Y.S.2d 270 (2d Dep't 1996), related to a disciplinary matter in which the employee had been found guilty. In Matter of Jasmine G., 35 A.D.3d 604, 828 N.Y.S.2d 107 (2d Dep't 2006), the court ruled that materials relating to a "Probation Assessment Tool" used by the New York City Department of Probation was subject to disclosure because, among other reasons, a testifying witness in a related juvenile delinquency proceeding had relied upon them. Mothers on the Move, Inc. v. Messer, 236 A.D.2d 408, 652 N.Y.S.2d 773 (2d Dep't 1997), involved a form used by a school district interview committee, and Miracle Mile Associates v. Yudelson, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dep't 1979), involved documents generated in connection with the construction of a proposed shopping mall. None of these cases have any applicability to the instant matter.

Respondents stand ready to submit the draft disciplinary charges for *in camera* review should the Court deem this necessary and issue such a directive.

III. Conclusion

For these reasons, the Petition should be denied in its entirety, and Respondents should be awarded such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
January 16, 2009

KEANE & BEANE, P.C.

By: _____

Edward J. Phillips
Attorneys for Respondents
445 Hamilton Avenue, Suite 1500
White Plains, New York 10601
(914) 946-4777

EXHIBIT A

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

FOIL-AO-16764

August 29, 2007

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

Dear

I have received a variety of correspondence from you relating to your request to the New Castle Fire District, which you serve as a member of the Board of Commissioners, involving the "conduct and actions of the Fire Chief." Based on a review the materials, I offer the following general remarks.

First, you cited the Personal Privacy Protection Law in your request. That statute pertains only to state agencies and specifically excludes local government from its coverage [see definition of "agency" for purposes of the Personal Privacy Protection Law, §92(1)]. The Freedom of Information Law, however, includes entities of state and local government within its coverage [see definition of "agency", §86 (3)].

Second, the responses to your request indicate that the item of interest may be withheld because it an "intradepartmental communication." In my view, the characterization of a document as "intradepartmental" does not necessarily mean that it may be withheld under the Freedom of Information Law. That statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Although one of the exceptions to rights of access deals with communications between or among government officers or employees, the extent to which those communications may be withheld or,

conversely, must be disclosed, is dependent on their content. Specifically, §87(2)(g) authorizes an agency, such as a fire department, to withhold records that:

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

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

The record at issue appears to be a final determination relating to the conduct of the Chief. If that is so, it must be disclosed, except to the extent that a different exception might apply. Pertinent is §87(2)(b), which permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear that those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a such person's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD d 309 (1977), aff'd 45 NY2d 954 (1978); Sinicropi v. County of Nassau, 76 AD2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS2d 309, 138 AD2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk

Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS2d 460 (1980)].

In sum, if indeed there is a written determination indicating misconduct or a penalty imposed in the context of the situation to which you referred, I believe that the determination would be accessible to the public under the Freedom of Information Law, with the possibility of the deletion of certain portions. While there is no judicial decision of which I am aware dealing with such a situation, it has been advised that portions of determination indicating misconduct or discipline may be withheld that refer to a medical or mental health condition. For instance, if part of a determination requires that an individual enter a program or seek treatment involving drug or alcohol abuse, I believe that portion of the record may be withheld on the ground that disclosure of so intimate a personal detail would constitute an unwarranted invasion of privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Daniel A. Doran

EXHIBIT B

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

July 13, 2001

FOIL-AO-12802

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

Dear

I have received your letter in which you questioned the propriety of a denial of access to records by Delaware County. The request involved "records pertaining to an investigation performed by John Trela with regard to sexual harassment by William R. Moon of female employees." The request was denied in its entirety under §87(2)(g) of the Freedom of Information Law.

From my perspective, rights of access would be dependent on the outcome of the investigation. In this regard, I offer the following comments.

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

Section 87(2)(b) states that an agency may withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy. Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts

have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available.

However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

In short, if there was no determination to the effect that an employee engaged in misconduct, I believe that a denial of access to the records based upon considerations of privacy would be

consistent with law. I note, however, that there are several decisions indicating that the terms of settlement agreements reached in lieu of disciplinary proceedings must generally be disclosed [see Geneva Printing, supra; Western Suffolk BOCES v. Bay Shore Union Free School District, Appellate Division, Second Department, NYLJ, May 22, 1998, ___ AD2d ___; Anonymous v. Board of Education for Mexico Central School District, 616 NYS2d 867 (1994); and Paul Smith's College of Arts and Science v. Cuomo, 589 NYS2d 106, 186 AD2d 888 (1992)].

The exception pertaining to the protection of personal privacy could also be invoked in my opinion to shield the identities of alleged victims and perhaps others, such as witnesses.

The other provision of significance is that cited by the County, §87(2)(g), which permits an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

In sum, if there was a final determination indicating misconduct on the part of a public employee, based on judicial determinations, such a determination

would be accessible. In that event, other aspects of the records consisting of factual information would be available, except to the extent that disclosure would constitute an unwarranted invasion of personal privacy. Again, however, if there was no finding of misconduct, it appears that the request could have been denied to protect personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James E. Eisel, Sr.
Christa Schafer

[redacted]BIT C

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 11, 1997

Mr. Mark Streb
Assistant to Mayor
City of Troy
Office of the Mayor
City Hall
Monument Square
Troy, NY 12180

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

Dear Mr. Streb:

As you are aware, I have received your letter of June 10. Please accept my apologies for the delay in response. You have sought an advisory opinion concerning a request made under the Freedom of Information Law for "disciplinary records" involving employees of the City of Troy Department of Public Works "pertaining to trash pick up and removal during the year of 1997." In response to the request, you disclosed the records without the names of those who were disciplined. The materials attached to your letter indicate that three employees of the Department of Public Works "were suspended without pay" for one day "for failure to follow departmental rules concerning trash removal", that the suspensions "were the result of a negotiated settlement between the workers, their union (CSEA) and the city", and that as part of the settlement, "the city agreed not to release the names of the individuals to the public."

You added that you informed the applicant that you requested

an opinion from the Committee, and that upon its receipt, you "will comply."

From my perspective, the identities of the employees who were disciplined must be disclosed. However, I note that while your reliance on the Committee on Open Government is gratifying, opinions rendered by this office are not binding. With regard to the substance of the matter, I offer the following comments.

It is emphasized at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, two of the grounds for denial are relevant in consideration of rights of access to the records in question.

Perhaps most significant to an analysis of the ability to withhold the information sought is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

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

The other ground for denial of relevance, §87(2)(g), states

that an agency may withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

In terms of the judicial interpretation of the Freedom of Information Law, in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

With respect to the agreement to withhold the names of the employees, in Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that

"the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

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

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

"It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

In another more recent decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

"...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

In the context of the situation at issue, I believe that the outcome, the settlement, represents an acceptance of discipline on the part of the employees in question. It is my understanding that disciplinary action can be imposed only after charges have been made, a hearing held and a determination indicating a finding of misconduct has been rendered, i.e., as in a proceeding conducted pursuant to §75 of the Civil Service Law, or, as in this case, when

in lieu of the initiation of charges and a formal disciplinary proceeding, a public employee agrees to some sort of sanction, penalty or punishment. As suggested by the Court in Anonymous, there is no distinction in substance between a finding of guilt after a hearing and an admission of guilt as a means of avoiding such a proceeding.

The same decision also referred to contentions involving privacy as follows:

"Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

"This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters

within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (Johnson Newspaper Corp. v. Melino, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

Most recently, in LaRocca v. Board of Education of Jericho Union Free School District [632 NYS 2d 576 (1995)], the Appellate Division held that a settlement agreement was available insofar as it included admissions of misconduct. In that case, charges were initiated under §3020-a of the Education Law, but were later "disposed of by negotiation and settled by an Agreement" (id., 577) and withdrawn. The court rejected claims that the record could be characterized as an employment history that could be withheld as an unwarranted invasion of privacy, and found that a confidentiality agreement was invalid. Specifically, it was stated that:

"Having examined the settlement agreement, we find that the entire document does not constitute an 'employment history' as defined by FOIL (see, Matter of Hanig v. State of New York Dept. of Motor Vehicles, supra) and it is therefore presumptively available for public inspection (see, Public Officers Law § 87[2]; Matter of Farbman & Sons v. New York City Health and Hosps. Corp., supra, 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437). Moreover, as a matter of public policy, the Board of Education cannot bargain away the public's right of access to public records (see, Board of Educ., Great Neck Union Free School Dist. v. Areman, 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943)" (id., 578, 579).

In contrast, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company

v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld. As stated earlier, the records in this instance do not involve mere allegations; admissions have been made, and disciplinary action has been or will be taken.

Pertinent is one of the first decisions rendered under the Freedom of Information Law, a case cited earlier, which dealt specifically with reprimands of three police officers. In that holding, the Court concluded that:

"To disclose these will not result in an unwarranted invasion of personal privacy; they are 'relevant to the ordinary work of the municipality'. In effect, they are 'final opinions' and 'final determinations' which the Legislature directed be made available for public inspection. Disclosure, of course, will reveal the names of the police officers who were reprimanded but also let it be known, by implication, which others were not censured" (Farrell, supra, 908-909).

Lastly, the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals more than a decade ago:

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

In a decision that was cited earlier, the Court of Appeals found

that:

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

For the reasons described above, it is my opinion that the names of the employees must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

EXHIBIT D

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 27, 1993

Mr. Daniel Petigrow
Anderson, Banks, Curran & Donoghue
Attorneys & Counsellors at Law
61 Smith Avenue - P.O. Box 240
Mount Kisco, N.Y. 10549-0240

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

Dear Mr. Petigrow:

I have received your letter of July 21 and the materials attached to it.

You have requested an advisory opinion:

"on whether a school district is obligated under the Freedom of Information Law, and to what extent, to release the transcript and complete record, including exhibits, from a proceeding held pursuant to §3020-a of the Education Law wherein: (i) students testified at the hearing and exhibits that were introduced contain numerous references to students' names; and (ii) the determination that was made sustained some, but not all of, the charges preferred against the teacher."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all

records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions of thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report, for example, might include both accessible and deniable information. In addition, that phrase in my opinion imposes an obligation upon an agency to review requested records in their entirety to determine which portions, if any, may justifiably be withheld and to disclose the remainder.

Second, from my perspective, three of the grounds for denial may be relevant to an analysis of rights of access to records in question.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, the federal Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. §1232g), generally requires that "education records" identifiable to students be kept confidential with respect to the public. The regulations promulgated by the U.S. Department of Education define the phrase "education records" (34 CFR 99.3) to mean:

"those records that are -
(1) Directly related to a student; and
(2) Maintained by an educational agency or institution or by a party acting for the agency or institution."

The regulations exclude from the scope of education records:

"Records relating to an individual who is employed by an educational agency or institution, that -
(A) Are made and maintained in the normal course of business..."

In my opinion, records prepared in conjunction with a proceeding conducted pursuant to §3020-a of the Education Law would not have been made and maintained in the ordinary course of business. If that is so, insofar as the records in question are identifiable to particular students, I believe that they would constitute education records that are specifically exempted from disclosure by means of a federal statute, the FERPA.

Also relevant is §87(2)(b) of the Freedom of Information Law,

which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Even if the FERPA is inapplicable, I believe that disclosure of portions of the records identifiable to students could be withheld on the basis of §87(2)(b).

Further, although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others, and the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations or unsubstantiated charges may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Therefore, to the extent that charges were dismissed or were found to be without merit, I believe that those charges and records relating to them may be withheld.

Lastly, §87(2)(g) states that an agency may withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Records prepared in conjunction with the proceeding would in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like offered by public officers or employees, I believe that they could be withheld. For instance, opinions offered by public employees who testified could in my view be withheld. However, I believe that factual information would be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy or would otherwise be exempted from disclosure by statute. A final agency determination, insofar as it includes findings of misconduct, would in my opinion be accessible.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

EXHIBIT E

STATE OF NEW YORK
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March 31, 2003

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

Dear

I have received your letter in which you questioned whether certain records must be disclosed pursuant to the Freedom of Information Law.

In your capacity as attorney for the Enlarged City School District of Middletown, you wrote that the request involves "counseling memos" pertaining to the District's Superintendent, Robert Sigler. You added that the President of the Board of Education informed the public that two counseling memos had been prepared last year, but that Mr. Sigler has not been reprimanded, nor is he the subject of any final determination indicating misconduct. Mr. Sigler was arrested in January of this year and charged with sexual abuse of a student, and you expressed the belief that the request involves an effort to ascertain the extent to which information may have been in the Board's possession prior to the arrest. Since the matter is under investigation by the Police Department and the District Attorney, you wrote that District officials are concerned with respect to the effect of release of the memos on their investigation.

In this regard, as I understand the general sense of the phrase, a "counseling memo" does not represent or serve as a determination to the effect that an employee has been found to have engaged in misconduct; rather, a counseling memo is essentially a warning, an admonition, or advice offered to an employee. If my interpretation of the nature of the records at issue is accurate, based on the ensuing analysis, the counseling memos may be withheld.

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

(i) of the Law.

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

Perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

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

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. When allegations or charges of misconduct have not yet

been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, according to judicial pronouncement, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Counseling memos in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they may be withheld. However, factual information would be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

In sum, if indeed a counseling memo is essentially a warning rather than a conclusion reflective of a finding of misconduct, it would not constitute a final agency determination, and I believe that it could be withheld under §87(2)(g).

With respect to the impact on the investigation by law enforcement authorities, I do not believe that the exception typically relevant in that context would be applicable. Section 87(2)(e) permits an agency to withhold records "compiled for law enforcement purposes" when, for example, disclosure would interfere with an investigation. From my

perspective, the records in question, although perhaps pertinent to an investigation, would not have been "compiled for law enforcement purposes."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

EXHIBIT F

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

41 State Street, Albany, New York 12231
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March 26, 1996

Ms. Betsy Sullivan
29 Route 416
Montgomery, NY 12549

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

Dear Ms. Sullivan:

I have received your letter of March 7, as well as a variety of related correspondence.

In brief, you and others have alleged that an employee of the New York State Department of Transportation has engaged in misconduct, and you wrote that Department officials provided "assurances...that appropriate action would be taken." Although you were apparently informed that the subject of your allegations was issued a "counseling memo", you indicated that you have attempted since January, without success, to obtain the results of the Department's investigation and answers to your inquiries. You have asked for assistance in obtaining the information sought.

In this regard, I offer the following comments.

First, it is noted at the outset that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may in many circumstances choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of

the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. In short, Department officials in my view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive.

Second, as I understand the matter, the "result" of the Department's investigation was the issuance of a counseling memo. As that phrase is commonly used, a counseling memo does not represent a determination to the effect that an employee has been found to have engaged in misconduct; rather, a counseling memo is essentially a warning, an admonition, or advice offered to an employee. If my interpretation of the matter is accurate, based on the ensuing analysis, the counseling memo and much of the documentation leading to its preparation could justifiably be withheld.

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

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

Perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that,

in general, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977]. One of the decisions cited above, Capital Newspapers, involved an element of your request that was granted. That case dealt with a request for records indicating the days and dates of sick leave claimed by a particular employee, and it was held that those records were relevant to the performance of the employee's duties and, therefore, were accessible. On the basis of that decision, it is clear that time and attendance records must be disclosed.

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Records prepared in conjunction with an investigation would in my

view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. For instance, recommendations concerning the course of an investigation or opinions offered by witnesses or employees interviewed could be in my opinion withheld. However, factual information would in my view be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Further, if indeed a counseling memo is essentially a warning rather than a conclusion reflective of a finding of misconduct, it would not constitute a final agency determination, and I believe that it could be withheld under §87(2)(g).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: William T. Bonacum
John B. Dearstyne
Peter Shawhan