STATE OF NEW YORK DEPARTMENT OF LAW OFFICE OF ATTORNEY GENERAL G. OLIVER KOPPELL

MEMORANDUM

TO: REF Attorneys & Legal Assistants

DATE: 04/28/94

FROM: Nancy Kramer

RE: Freedom of Information Law

I am writing this memo because there has been some confusion about what documents should or can be withheld from someone requesting them under the Freedom of Information Law (FOIL). These requests generally are handled by the Public Information Office, but you may become involved if a plan under your review or investigation in which you are involved contains the document requested.

The Freedom of Information Law (Article 6 of the Public Officers Law) requires state agencies to make documents in their possession available to the public unless the documents fall within certain enumerated exceptions. The presumption is that all documents are available (§84).

The exceptions, to which an agency may, but need not, deny access, are set out in §87. The relevant portion of §87 states:

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

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

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

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

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

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

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

(i) are computer access codes.

(j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven -a of the vehicle and traffic law.

Subdivision two of Section 89, referred to in Section 87(2)(b), provides:

(2). (a) The committee on public access to records may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.

(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

i. disclosure of employment, medical or credit histories or personal references of applicants for employment;

ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;

iii. sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes;

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

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency.

(c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

i. when identifying details are deleted;

ii. when the person to whom a record pertains consents in writing to disclosure;

iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him.

Documents may not be withheld for non-enumerated reasons. And, there is no exception in FOIL that allows the withholding of plans or amendments that have been submitted but not yet accepted for filing.

If you have any questions, please see me.

NK/fj
cc: Gary Connor