FROM: Bill Lofquist
59 North St.
Geneseo, NY 14454
TO: Jean Bennett, Clerk, Town of Geneseo
DATE: August 28, 2007

FOIL REQUEST

Pursuant to the New York State Freedom of Information Law (FOIL) I hereby request all of the following documents.

All documents submitted by Newman Development Group, its partners, or its contracted agents to the Town of Geneseo Planning Board on or after August 1, 2007, related to the Planning Board's ongoing review of Newman's Draft Environmental Impact Statement (DEIS).

Specifically, at the August 27 meeting of the Town Planning Board, Newman presented comments in response to the reviews of its DEIS prepared on behalf of the Town by MRB Group and Stantec. I am interested in receiving copies of those comments.

As I understand it, because these comments were submitted by an applicant to the Town Planning Board in the course of a public meeting they are a matter of public record. Based on my knowledge of FOIL, I do not believe they are subject to any of the exemptions found in that law.

In support of this position, I attach several Advisory Opinions of the Committee on Open Government (COOG) that pertain directly to the public status of Environmental Impact Statements and materials related to them submitted by applicants and the agents of applicants. Consistent throughout these opinions is the position that such materials are fully public and subject to no protection from disclosure, regardless of the status of their review by a planning board. Any EIS-related materials submitted by an applicant to a planning board are public from the moment they are submitted.

This position is stated most concisely in an Advisory Opinion written by COOG Executive Director Robert Freeman in response to an appeal by Mr. Gregory Yatzyshyn. In that case, which also involved a DEIS not yet determined to be "complete," Mr. Freeman stated that: "It is my understanding the Mr. Yatzyshyn's request for a draft environmental impact statement (DEIS) was denied because it has not yet been 'accepted' by the Town's Environmental Quality Review Commission 'as complete.' From my perspective, if the record sought is in possession of the Town, irrespective of whether it has been accepted or is complete, it must be disclosed."

Extending this point to cover all DEIS or EIS-related materials submitted by an applicant to a public agency, including those of the type Newman submitted to the Town at the meeting of August 27, Freeman went on to state: "Once a record is submitted to or in possession of a Town office or officer, even if it is incomplete or has not been 'accepted', it constitutes a 'record' subject to rights of access."

As this is a matter of significant public interest, a matter currently under review with a pending final decision date of September 10, and a matter on which the applicable law appears to be clear, I urge you to release these materials with all possible speed.

Thank you for your attention to this request.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

November 27, 2000

FOIL-AO-12388

Dear

I appreciate having received your determination of October 4 of an appeal made under the Freedom of Information Law by Mr. Gregory Yatzyshyn. It is my understanding the Mr. Yatzyshyn's request for a draft environmental impact statement (DEIS) was denied because it has not yet been "accepted" by the Town's Environmental Quality Review Commission "as complete." From my perspective, if the record sought is in possession of the Town, irrespective of whether it has been accepted or is complete, it must be disclosed. In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" to mean:

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

Based on the foregoing, once a record is submitted to or in possession of a Town office or officer, even if it is incomplete or has not been "accepted", it constitutes a "record" subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records

or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could properly be asserted to withhold the record in question.

Although one of the grounds for denial may frequently be cited to withhold records or portions of records characterized as "draft" or "preliminary", for example, that provision would not be applicable in the situation in question. Specifically, §87(2)(g) deals with "inter-agency and intra-agency materials." Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). If the record sought consists of documentation sent to the Town by a developer, it would not constitute inter-agency or intra-agency materials. In short, the developer would not be an agency, and its communications with the Town would be neither inter-agency nor intra-agency materials.

The remaining exceptions to rights of access would not, in my view, be applicable or pertinent. If that is so, none of the grounds for denial would serve to enable the Town to withhold the record sought.

I hope that the foregoing enhances your understanding of the Freedom of Information Law and that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

STATE OF NEW YORK
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June 4, 1998

Mr. James Bacon, Esq.
10 Little Brittain road
Newburgh, NY 12550

The staff of the Committee 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. Bacon:

I have received your letter of May 12 in which you sought and advisory opinion relating to
a request made under the Freedom of Information Law to the Town of Southeast.

You asked initially whether that statute requires disclosure of "an incomplete draft of a Final
Environmental Impact Statement (FEIS) being reviewed by its consultants and Planning Board
members prior to a Planning Board's final acceptance." You added that the Planning Board secretary
"claims that she has no copy of the draft in the Planning Board office."

As I understand the matter, the document in question was prepared by or for Hoyts Cinema
and, in your words, "is under review by the Town's consultants and certain Planning Board
members." Nevertheless, you wrote that the Board "does not intend to release this document until
formally accepted..."

If my interpretation of the facts is accurate, the document must be disclosed. In this regard
I offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to agency records, and

§86(4) of that statute defines the term "record" expansively to mean:

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

Assuming that the document at issue is in the possession of one or more Planning Board members
or the Board consultants, I believe that it would constitute a Town record that falls within the
converge of the Freedom of Information Law. Any of those persons presumably would have acquired
the document due to and in the performance of their duties performed for the Town. The fact that
the document might not have been "accepted" is of no moment; that it is kept or held for the Town
brings it within the scope of the Freedom of Information Law.

In a case in which an agency contended, in essence, that it could choose which documents it
considered to be "records" for purposes of the Freedom of Information Law, the state's highest court
rejected that claim. As stated by the Court of Appeals:

"...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give

effect to all of its provisions...

"...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

Again, the record would not come into the possession of a Planning Board member or consultant except in that person's capacity as a government official or agent acting in the performance of duties for the Town. That being so, it is my opinion that a record used or acquired in the performance of those duties is subject to rights conferred by the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial would be pertinent.

That the record may not have been accepted or considered final may be relevant in determining rights of access to inter-agency or intra-agency materials that fall within §87(2)(g). However, I believe that the cited provision is irrelevant in this instance, for the record was prepared for Hoyts Cinemas, a private entity that is not an "agency". Because it is not an agency, the exception concerning inter-agency and intra-agency materials is inapplicable.

Second, you asked whether a planning board must provide copies of a final FEIS "or whether the public can be denied copies and forced by a planning board to seek copying an FEIS [sic] at the local library." In short, assuming that a member of the public is willing to pay the requisite fees for copying, an agency, in my view, is required to prepare a copy of a record in its possession. I note that it has been held that an agency is required to comply with a request made under the Freedom of Information Law and to disclose records, even though the records may be available from another source [Muniz v. Roth, 620 NYS 2d 700 (1994)]

In an effort to enhance compliance with and understanding of the Freedom of Information
law, copies of this opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Planning Board
Hon. Ruth Mezzei, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 9, 2002

The staff of the Committee 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 of June 6 addressed to David Treacy of this office, as well as the materials attached to it. You have sought an opinion concerning the propriety of a denial of access to a "preliminary FEIS" by the Village of Briarcliff Manor.

In his response to your request, the attorney for the Village, Mr. Daniel Pozin, wrote that:

"As the lead agency's document, we believe that all draft versions of the FEIS are intra-agency documents which are not subject to FOIL, as they do not yet represent final agency policy or determinations. Notwithstanding the fact that the FEIS is in large measure, being produced on behalf of the lead agency by the Applicant's consultants, it remains subject to final review, comment and modification at the request of the lead agency and the lead agency's consultants. As such, the documentation you have request is an incomplete, non-final working draft of a document upon which a decision will ultimately be made."

He added that:

"...the SEQRA regulations, which are promulgated pursuant to the Environmental Conservation Law of the State of New York provide a specific sequencing for preparation, distribution, and comment on an FEIS. While the SEQRA regulations do require that the document be 'readily available for public inspection' (NYCRR 617.10(h)), we note that

such public inspection is accorded once the FEIS has been accepted as complete by the lead agency and a notice of completion has been issued."

In this regard, I offer the following comments.

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

Second, although one of the grounds for denial may frequently be cited to withhold records characterized as "draft" or "preliminary", for example, that provision would not be applicable in a situation in which records are not prepared by an agency or a consultant retained by the agency. Specifically, §87(2)(g) deals with "inter-agency and intra-agency materials." Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). Further, it has been held by the state's highest court, the Court of Appeals, that records prepared by a consultant retained by an agency should be treated as though they were prepared by agency staff and that the records, therefore, constitute "intra-agency" materials [Xerox Corp. v. Town of Webster, 65 NY2d 131 (1985)].

It is unclear whether the preliminary FEIS has been prepared by a consultant retained by the Village or by or for the applicant. If it was prepared by or for the applicant and submitted to the Village, even in draft form, I do not believe that any of the grounds for denial would be applicable. In short, neither the applicant nor the applicant's consultant would constitute an agency, and if the record in question was prepared by either, the exception regarding intra-agency materials would not apply.

Third, even if the preliminary FEIS was prepared by the Village or its consultant and may properly be characterized as "intra-agency" material, it is unlikely that the document could be withheld in its entirety. Due to the structure of the provision dealing with inter-agency and intra-agency materials, it is clear that the contents of those materials determine the extent to which they may be withheld, or conversely, must be disclosed. Section 87(2)(g) enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

In this vein, the Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (Matter of Fink v. Lefkowitz, supra, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to

determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (see, Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

If the record sought indeed consists of intra-agency material, that it is preliminary does not remove it from rights of access. One of the contentions offered by the agency in Gould was that certain reports could be withheld because they are not final and because they relate to matters for which no final determination had been made. The Court rejected that finding and stated that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][iii)]. However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." (id., 276).

In short, that a record is in draft or preliminary would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of its contents.

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

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

In sum, if the preliminary FEIS was prepared by the applicant or the applicant's consultant, the exception regarding inter-agency or intra-agency materials, in my view, would not serve as a basis for a denial of access. If the document was prepared by the Village or its consultant, I believe that it would constitute intra-agency material, but that those portions consisting of statistical or factual information must be disclosed, despite the status of the document as "preliminary."

Lastly, with respect to the remaining contention offered by Mr. Pozin, that certain records subject to the SEQRA process are accessible only at certain times or in a particular sequence, I do not believe that there is any legal basis for such a conclusion. The regulations promulgated by the Department of Environmental Conservation to implement SEQRA specify that certain records must be available to the public at certain times, but I have located no provision stating that the records cannot be disclosed at other times. Based on judicial interpretations involving exceptions to rights of access in the state Freedom of Information Law, the record at issue would not be "specifically exempted from disclosure by...statute" pursuant to §87(2)(a). The Court of Appeals has determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language or legislative intent that clearly confers or requires confidentiality, stating that:

"Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

I am unaware of any statute that specifies that a preliminary FEIS is exempt from disclosure. Moreover, a statute, based upon judicial interpretations of the Freedom of Information Law, is an act of the State Legislature or Congress [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)], and it has been found that agencies' regulations are not the equivalent of statutes for purposes of §87 (2)(a) [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. Therefore, insofar as an agency's regulations render records or portions of records deniable in a manner inconsistent with the Freedom of Information Law or some other statute, those regulations would, in my opinion, be invalid. In short, a state agency's regulations do not constitute a statute or statutes and would not serve to exempt records from disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-15297

May 11, 2005

The staff of the Committee 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 and the materials attached to it. Please accept my apologies for the delay in response.

In a request made to the Town of Mamakating Planning Board on behalf of your clients, you sought records "with respect to a Final Environmental Impact Statement or that may refer to such a Final Environmental Impact Statement for the Yukiguni Maitake Manufacturing Company of America", including "records from Lanc & Tully Engineering and Surveying, Alan Sorenson, and any and all records from Fire Chief Richard Dunn." In denying the request in its entirety, the attorney for the Planning Board contended that "correspondence and recommendations between the Planning Board and its Engineer and/or Planner would be classified as intra-agency materials." He added that "less clear...is the applicability of the intra-agency exemption to your request for the a copy of the draft FEIS prepared for the benefit of the Planning Board by the applicant", and he expressed the belief that the draft FEIS prepared by the applicant also constitutes intra-agency material that may be withheld.

From my perspective, records prepared for an agency by its employees or consultants constitute intra-agency materials that should likely have been disclosed in part. I disagree with the contention that records submitted by or on behalf of an applicant may be characterized as intra-agency materials. On the contrary, I believe that they are accessible. In this regard, I offer the following comments.

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

The Court of Appeals confirmed its general view of the intent of the Freedom of Information Law most recently in Gould v. New York City Police Department, stating that:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (Matter of Fink v. Lefkowitz, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the New York City Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

While §87(2)(g) potentially serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

The same kind of analysis would apply with respect to records prepared by consultants for agencies, for the Court of Appeals has held that:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency.

It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency or, for example, by the Town's Fire Chief, would be accessible or deniable, in whole or in part, depending on its contents.

I note that in Gould, supra, one of the contentions was that certain intra-agency materials could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that records are characterized as "draft" or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access.

Second, it is reiterated that Xerox, supra, dealt with reports prepared "by outside consultants retained by agencies" (id. 133). In such cases, it was found that the records prepared by consultants should be treated as if they were prepared by agency staff and should, therefore, be considered intra-agency materials. As the term "consultant" is ordinarily used and according to an ordinary dictionary definition of that term, a consultant is an expert or a person or firm providing professional advice or services. In the context of the Xerox decision, I believe that a consultant would be a person or firm "retained" for compensation by an agency to provide a service.

Neither the applicant nor the applicant's agent's representatives or agents would be retained for compensation or paid by the Town to provide advice or recommendations. That being so, the records prepared by or for the

applicant, in my opinion, could not be characterized as "intra-agency materials" that fall within the scope of §87(2)(g). Further, because that exception would not apply, considerations concerning the status of records as drafts or in relation to finality are irrelevant. In short, I believe that those records must be made available in their entirety, for none of the exceptions to rights of access may properly be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board
Ira J. Cohen