Memorandum to Presidents

Date: June 10, 1974

From: Office of the University Counsel and Vice Chancellor for Legal Affairs

Subject: Freedom of Information Law

The Governor has approved the Freedom of Information Law which, with two amending bills, will become effective on September 1, 1974. The attached copy represents the combined language of the three acts.

The new law defines the specific kinds of public records which shall be made available for inspection and copying. It requires each agency of government, including the University, to prepare a reasonably detailed index by subject matter so that the records covered by the statute may be located.

Subject to appropriate guidelines from the Trustees, each unit of the University will be required to publish notice as to when, where, and how the material indexed may be seen and copied. A schedule of fees to defray administrative costs must be developed.

The job of making an index and keeping it current, while burdensome, seems nevertheless manageable given the limited scope and particularity of the legislation. Section 88 of the new Article 6 of the Public Officers Law itemizes the records intended. The following comments on the new law may be helpful.

Subsection 1(a) of Section 88 may not apply to the University at all. The "adjudication of cases" appears to contemplate the same kind of "adjudicatory proceedings" as those defined by the proposed State Administrative Procedure Act. These cases involve proceedings in which "a determination of the legal rights, duties or privileges of named parties...is required by statute to be made only on a record and after an opportunity for a hearing" and exclude disciplinary actions before an agency. Nothing within that definition presently occurs at the campus level. Consequently, unless the committee on public access to
records (see subsection 9(a) of Section 88) adopts a broader interpretation of "adjudication," subsection 1(a) seems irrelevant to University operations.

Subsection 1(b) of Section 88 is sufficiently general to insur puzzlement. Strictly speaking, only the Trustees or their direct representative may state policy "adopted by the agency" conceived as a single corporate entity. It will be argued, nevertheless, that any policy pronouncement by a University official falls within the scope of this section. Since announcements of this kind will warrant and require publicity in any case, all doubts may be resolved in favor of disclosure. Legally, it seems clear that only an official statement is contemplated, one which will guide future institutional action. At the campus level, such pronouncements would ordinarily emanate only from the president or a spokesman representing the president.

It is important to note that documents, memoranda or other materials which have led to the formulation of the statement of policy are not included in the definition of documents required to be made public. The limited scope of this paragraph protects the full and candid exchange of written opinions among staff advisors during the period of policy gestation. The production of neutral data, such a statistical and factual tabulations, needs no encouragement and is not protected.

Subsection 1(c) of Section 88, technically, affects only the Board of Trustees, though each college council may wish to adopt a similar procedure regarding its official meetings. The same remark would apply to paragraph (h) and to subsection 5.

Subsection 2 requires the University to publish general rules, subject to guidelines to be issued by the committee on public access to records. I anticipate that the Trustees will await the initial guidelines of the committee and then promulgate generally conforming regulations for the University as a whole. Within these parameters, the Trustees will undoubtedly authorize presidents to issue local rules. I would also expect that the Vice Chancellor for Finance and Business will develop fee schedules to cover the cost of indexing, searching, copying, and certifying records.

The relationship between personal privacy and freedom of information is treated in subsections 3 and 7 of Section 88. These provisions derive from an earlier version of the Freedom
of Information Law which made almost all records available to the public with only itemized exceptions. The version which actually became law, you’ll note, reverses the logic and itemizes those records which are public. Inferentially, all other records fall outside the scope of this legislation.

For these reasons, the careful attempts to describe personal matters, disclosure of which would constitute "an unwarranted invasion of personal privacy" (subsection 3) is less important than it would have been in the earlier bill. Most of the items declared to be records available to the public under subsection 1 of the law, by their nature, will not involve the personal considerations itemized under subdivision 3. Student and employee records, for example, are not included among the items listed under subsection 1. Your communications to and from this office remain confidential, along with any legal work product developed in connection with such matters, under subsection 7(a).

Subsection 8 authorizes an appeal to the Chancellor following a denial of access to information by a University official and the usual provision for judicial review of final administrative determinations.

Subsection 9 creates a committee authorized to issue regulations and opinions. We will keep you advised of any pronouncements which may be issued by the committee and, of course, any action by the Trustees which may follow.

Walter J. Relihan, Jr.

Enclosure

This memorandum addressed to:

Presidents, State-operated campuses

Copies for information only sent to:

Presidents, Community Colleges
Deans, Statutory Colleges
AN ACT to amend the public officers law, in relation to public access to records of state and local agencies, and to repeal section sixty-six of such law relating thereto.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section sixty-six of the public officers law is hereby repealed.

§ 2. Article six of the public officers law is hereby renumbered to be article seven and a new article six is hereby added thereto, in lieu thereof, to read as follows:

ARTICLE 6

FREEDOM OF INFORMATION LAW

Section 85. Legislative intent.

86. Short title.

87. Definitions.

88. Access to records.

89. Severability.

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

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

The people's right to know the process of government decision-making and the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.
The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free news media, should have unimpaired access to the records of government.

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

§ 87. Definitions. As used in this article: 1. "Agency" means any state of municipal board, bureau, commission, council, department, public authority, public corporation, division, office or other governmental entity performing a governmental or proprietary function for the state of New York or one or more municipalities therein.

2. "Municipality" or "municipal" means or has reference to any city, county, town, village, school district, fire district, water district, sewage district, drainage district or special district established by law for any public purpose.

§ 88. Access to records. 1. Each agency, in accordance with its published rules, shall make available for public inspection and copying:

a. final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

b. those statements of policy and interpretations which have been adopted by the agency and any documents, memoranda, data, or other materials constituting statistical or factual tabulations which led to the formulation thereof;

c. minutes of meetings of the governing body, if any, of the agency and of public hearings held by the agency;

d. internal or external audits and statistical or factual tabulations made by or for the agency;

e. administrative staff manuals and instruction to staff that affect members of the public;

f. police blotters and booking records;

g. an itemized record setting forth name, address, title, and salary of every officer or employee of an agency except officers and employees of the state law enforcement agencies shall be compiled by each fiscal officer charged with the duty of preparing payrolls for such officers and such records shall be made available for inspection by the officer charged with the duty of certifying such payrolls to bona fide members of the news media upon written notice. In the case of the state police and
other law enforcement agencies, the records shall list the officials or employees' titles and salary only, without identifying individual employees. Said written notice shall be made upon a form to be prescribed by the comptroller of the state and shall be reasonable and specify what records are to be requested with particularity. The records may be inspected under the supervision of the particular fiscal officers' office and only in the particular fiscal officers' office during regular working hours and regular working days or at such other place as may be convenient to the particular fiscal officers;

h. final determinations and dissenting opinions of members of the governing body, if any, of the agency; and

i. any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying.

2. Each agency shall make and publish rules and regulations in conformity with this article, pursuant to such general rules as may be issued by the committee on public access to records, pertaining to the availability, location and nature of such records, including, but not limited to:

a. The times and places such records are available;

b. The persons from whom such records may be obtained;

c. The fees, to the extent authorized by this article or other statute, for copies of such information; and

d. The procedures to be followed.

The governing body of a municipality may make and publish uniform rules for any group of or all agencies in that municipality.

3. To prevent an unwarranted invasion of personal privacy, the committee on public access to records may promulgate guidelines for the deletion of identifying details for specified records which are to be made available. In the absence of such guidelines, an agency or municipality may delete identifying details when it makes records available. An unwarranted invasion of personal privacy includes, but shall not be limited to:

a. Disclosure of such personal matters as may have been reported in confidence to an agency or municipality and which are not relevant or essential to the ordinary work of the agency or municipality;

b. Disclosure of employment, medical, or credit histories or personal references of applicants for employment, except such records may be disclosed when the applicant has provided a written release permitting such disclosure;
c. Disclosure of items involving the medical or personal records of a client or patient in a hospital or medical facility;

d. The sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial or fund-raising purposes;

e. Disclosure of items of a personal nature when disclosure would result in economic or personal hardship to the subject party and such records are not relevant or essential to the ordinary work of the agency or municipality.

4. Each agency or municipality shall maintain and make available for public inspection and copying, in conformity with such regulations as may be issued by the committee on public access to records, a current list, reasonably detailed, by subject matter of any records which shall be produced, filed, or first kept or promulgated after the effective date of this article. Such list may also provide identifying information as to any records in the possession of the agency or municipality on or before the effective date of this article.

5. In addition to the requirements imposed by subdivision one of this section each agency or municipality controlled by a board, commission or other group having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding in which he votes.

6. Each agency or municipality on request for identifiable records made in accordance with the published rules, shall make the records promptly available to any persons, and, upon payment of, or offer to pay, the fees allowed by law or rule, either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search for such records, or certify that a record, of which that agency is legal custodian, cannot be found.

7. Notwithstanding the provisions of subdivision one of this section, this article shall not apply to information that is:

a. specifically exempted by statute;

b. confidentially disclosed to an agency and compiled and maintained for the regulation of commercial enterprise, including trade secrets, or for the grant or review of a license to do business and if openly disclosed would permit an unfair advantage to competitors of the subject enterprise, but this exemption shall not apply to records the disclosure or publication of which is directed by other statute;
c. if disclosed, an unwarranted invasion of personal privacy, pursuant to the standards of subdivision three of this section; or

d. part of investigatory files compiled for law enforcement purposes.

8. Any party denied access to a record or records of an agency or municipality may appeal such denial to the head or heads, or an authorized representative, of the agency or municipality. If that person further denies such access, his reasons therefore shall be explained fully in writing within seven business days of the time of such appeal. Such denial shall be subject to review in the manner provided in article seventy-eight of the civil practice law and rules.

9.a. A committee on public access to records is hereby created, to consist of the commissioner of the office of general services or his delegate whose office shall act as secretariat for the committee, the director of the division of the budget or his delegate, the commissioner of the office for local government or his delegate and four other persons who are not elected or appointed officials or employees of any other agency, appointed by the governor, at least two of whom are or have been representatives of the news media. Of the four other persons first appointed, one shall be appointed for a term of four years, one for a term of three years, one for a term of two years and one for a term of one year. Thereafter their respective successors shall each be appointed for terms of four years. The committee shall meet from time to time to:

i. advise agencies and municipalities regarding this article by means of guidelines, advisory opinions, regulations or other means deemed advisable;

ii. promulgate and issue rules and regulations in conformity with this article in relation to subdivisions two and three of this section; and

iii. recommend changes in the freedom of information law in order to further the purposes of this article.

b. The four persons appointed by the governor shall be entitled to receive reimbursement for actual expenses incurred in the discharge of their duties.

10. Nothing in this article shall be construed to limit or abridge any existing right of access at law or in equity of any party to public records kept by any agency or municipality.
§ 89. Severability. If any provision of this article or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the article or the application thereof to other persons and circumstances.

§3. This act shall take effect September first, nineteen hundred seventy-four.