Memorandum to Presidents

Date: December 10, 1974

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

Subject: Freedom of Information Law III

The Committee on Public Access to Records created by the Freedom of Information Law has issued new regulations and a series of advisory resolutions effective November 29, 1974. Copies of the regulations and pertinent resolutions are attached for your information and files.

In two important respects, the regulations vary the advisory Memorandum to Presidents dated August 27, 1974 (Vol. 74, No. 30). The Committee has ruled that payroll information must be made available to "any person" rather than to "bona fide members of the news media" only. This data must include name, address and title as well as salary. The address information, however, may be restricted to the office location only. Secondly, uniform maximum fees for copying documents have been prescribed. Accordingly, a new schedule of fees (attached) has been promulgated by the Vice Chancellor for Finance and Business effective immediately.

The remaining significant changes and interpretations may be summarized as follows:

1. Section 1401.1(c) states that agencies shall make available those records described by the Freedom of Information Law "and those which were furnished to the public prior to its enactment." This provision is intended to preserve prior custom and practice; see Memorandum to Presidents of August 27, 1974, at paragraph 3.

The statutory authority for this regulation is found at section 88, subsection 1, paragraph 1 and at subsection 10. The latter provision states that "nothing in this article shall be construed to limit or abridge any existing right of access at law or in equity...."

Hence, the regulation may be construed to encourage the continuance of pre-September 1, 1974, voluntary disclosure
practices, even though the record is not identified under section 88, subdivision 1. Note, however, that prior voluntary practice may be compelled only in the event that disclosure is required by the Freedom of Information Law itself or by some other provision found elsewhere in the law.

2. Section 1401.2(a) implies that Records Access Officers may not supersede other agency sources which had been available to the public prior to enactment if the result is to impede or defeat the purpose of the law. Nothing, however, suggests that the central management of document duplication and fee collection by your designated Records Access Officer need be modified.

3. Section 1401.6 and its subdivisions require a reasonably prompt response by the Records Access Officer. Sections 1401.2(b) and 1401.7(b) require that any denial of access by that officer shall be explained in writing. For the first time, the regulations offer some assistance in defining the kind of index required for post-September 1, 1974, documents. The list need only include subject matter headings, not individual items. "The list shall be sufficiently detailed to permit the requestor to identify the filed category [emphasis supplied] of the record sought"; Section 1401.6(c)(1). The burden is placed upon the inquirer, (paragraph [d]) to "supply information regarding dates, titles, file designations or other information which may help identify the records."

In all other respects, it appears that prior advisories have correctly anticipated the Committee's wishes. The Trustee regulations on the subject distributed with the Memorandum to Presidents of August 27, 1974 and now found codified at 8 NYCRR Part 311 will not require amendment but should be read together with the new Committee regulations which will be codified at 25 NYCRR Part 1401.

Walter J. Relihan, Jr.

Enclosures

This memorandum addressed to:

Presidents, State-operated campuses
Copies for information only sent to:

Presidents, Community Colleges
Deans, Statutory Colleges
Chancellor Kibbee
Dean McGrath
President Rose
President Corson
Mr. Tobin
CHAPTER XXV
COMMITTEE ON PUBLIC ACCESS TO RECORDS
PART 1401

PUBLIC ACCESS TO RECORDS OF STATE AND LOCAL AGENCIES, INCLUDING COUNTIES, CITIES, TOWNS, VILLAGES, SCHOOL DISTRICTS AND FIRE DISTRICTS

(Statutory authority: Public Officers Law, § 88(9) a [ii])

1401.1 Purpose and scope.

(a) 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.

(b) This Part provides information concerning the procedures by which records may be obtained from agencies and municipalities. No agency or municipality regulation shall be more restrictive than this Part.

(c) Agency and municipal personnel shall furnish to the public the information and records required by the Freedom of Information Law and those which were furnished to the public prior to its enactment.

(d) Any conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records.

1401.2 Designation of records access officer.

(a) The head of an agency or municipality shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who
shall have the duty of coordinating the agency response to public requests for access to records. However, the public shall not be denied access to records through agency and municipal officials who have in the past been authorized to make records or information available.

(b) The records access officer is responsible for assuring that agency personnel:

1. Maintain an up-to-date subject matter list.

2. Assist the requester in identifying requested records, if necessary.

3. Upon locating the records, take one of the following actions:
   
   - Make records promptly available for inspection; or,
   
   - Deny access to the records in whole or in part and explain in writing the reasons therefor.

4. Upon request for copies of records:
   
   - Make a copy available upon payment or offer to pay established fees, if any; or,
   
   - Permit the requester to copy those records.

5. Upon request, certify that a transcript is a true copy of records copied.

6. Upon failure to locate records, certify that:
   
   - The agency is not the legal custodian for such records.
   
   - The records of which the agency is a legal custodian cannot be found.

1401.3 Designation of fiscal officer.

(a) Each agency and municipality shall designate a fiscal officer by name or specific job title and business address. He shall be the person charged with certifying the payroll. He shall respond to requests for an itemized record setting forth the name, address, title and salary of every officer or employee of the agency.
(b) The fiscal officer shall make the payroll items listed above available to any person including bona fide members of the news media as required under sections 88 (1)(g), (1)(i), and (10) of the Freedom of Information Law.

1401.4 Location. Each agency and municipality shall designate the locations where records shall be available for public inspection and copying.

1401.5 Hours for public inspection.

(a) Each agency and municipality shall accept request for public access to records and produce records during all hours they are regularly open for business.

(b) In agencies and municipalities which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedures shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment.

1401.6 Requests for public access to records.

(a) Where a request for records is required, such request may be oral or in writing. However, written request shall not be required for records that have been customarily available without written request.

(b) (1) An agency or municipal official shall respond promptly to a request for records. Except under extraordinary circumstances, his response shall be made no more than five working days after receipt of the request by the agency or municipality, whether the request is oral or in writing.

(2) If for any reason more than five days is required to produce records, an agency or municipal official shall acknowledge receipt of the request within five working days after the request is received. The acknowledgment should include a brief explanation of the reason for delay and an estimate of the date production or denial will be forthcoming.

(c) (1) Each agency and municipality shall maintain and make available for public inspection and copying a current list, by subject matter, of all records produced, filed, or first kept or promulgated after September 1, 1974. The list shall be sufficiently detailed to permit the requester to identify the file category of the record sought.
Denial of access to records.

(a) The head or heads of each agency and municipality shall designate a person or persons or body to hear appeals for denial of access to records under the Freedom of Information Law.

(b) Denial of access shall be in writing stating the reason therefor and advising the requester of his right to appeal to the individual or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number.

(c) If an agency or municipality fails to provide requested records promptly, as required in section 1401.6(b) of this Part, such failure shall be deemed a denial of access by the agency or municipality.

(d) The time for deciding an appeal by the individual or body designated to hear appeals shall commence upon receipt of written appeal identifying:

1. The date and location of requests for records;
2. The records to which the requester was denied access; and,
3. The name and return address of the requester.

(e) The individual or body designated to hear appeals shall inform the requester of its decision in writing within seven business days of receipt of an appeal.
A final denial of access to a requested record, as provided for in subdivision (e) of this section, shall be subject to court review, as provided for in article 78 of the Civil Practice Laws and Rules.

1401.8 Fees. Except where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974:

(a) There shall be no fee charged for the following:

(1) Inspection of records.

(2) Search for records.

(3) Any certification pursuant to this Part.

(b) An agency may provide copies of records without charging a fee; or,

(c) An agency may charge a fee for copies of records provided that:

(1) The fee for copying records shall not exceed 25 cents per page for photocopies not exceeding 8 1/2 by 14 inches. This section shall not be construed to mandate the raising of fees where agencies in the past have charged less than 25 cents for such copies.

(2) In agencies or municipalities which do not have photocopying equipment, a transcript of the requested records shall be made upon request. Such transcripts may either be typed or hand written. In such cases, the requester may be charged for the clerical time involved in making the transcript.

(3) The fee for copies of records not covered by paragraphs (1) and (2) of this subdivision, shall not exceed the actual copying cost which is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries.

1401.9 Public notice. Each agency and municipality shall publicize by posting in a conspicuous location wherever records are kept and/or by publication in a local newspaper of general circulation:

(a) The location where public records shall be made available for inspection and copying.

(b) The name, title, business address and business telephone number of the designated records access officer and fiscal officer.
(c) The right to appeal by any requester denied access to a record for whatever reason and the name and business address of the person or persons or body to whom an appeal is to be directed.

1401.10 Severability. If any provision of this Part 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 this Part or the application thereof to other persons and circumstances.
COMMITTEE ON PUBLIC ACCESS TO RECORDS
October 31, 1974

RESOLUTION: SCOPE OF COMMITTEE'S REGULATORY AUTHORITY

WHEREAS, "Advice" recommends a course of action while "regulation" requires action by force of law; and

WHEREAS, Section 88(9)(a)(ii) of the Freedom of Information Law empowers this Committee to issue rules and regulations pertaining to the availability, location, and nature of records [Section 88(2)] and subject matter lists [Section 88(4)] and

WHEREAS, Section 88(9)(a)(i) permits this Committee to advise agencies and municipalities through guidelines, advisory opinions, or by other means; but

RESOLVED, That this Committee has and will exercise its authority to regulate agency and municipal action with respect to the availability, location and nature of records [Section 88(2)] and subject matter lists [Section 88(4)]; and further be it

RESOLVED, That this Committee has and will, upon the request of any person, advise agencies and municipalities regarding the law pursuant to its authority under Section 88(9)(a)(i).
COMMITTEE ON PUBLIC ACCESS TO RECORDS
October 31, 1974

RESOLUTION: ACCESS TO RECORDS TO ANY PERSON

WHEREAS, Prior to passage of the Freedom of Information Law, restrictions existed limiting access to specified records to particular members of the public; and

WHEREAS, Section 85 of the Freedom of Information Law states "that the public, individually and collectively and represented by a free news media, should have unimpaired access to the records of government"; and

WHEREAS, Section 88(6) of the Freedom of Information Law specifically states that agencies and municipalities are required to make their records available to "any person"; now, therefore, be it

RESOLVED, That information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest.
RESOLUTION: RETROSPECTIVE APPLICATION OF FREEDOM OF INFORMATION LAW

WHEREAS, Section 88(4) of the Freedom of Information Law requires agencies to maintain a current list, reasonably detailed, by subject matter, of any record produced, filed, first kept or promulgated after September 1, 1974, and such list may include records in the possession of the agency before September 1, 1973, and

WHEREAS, Many agencies have concluded that the Freedom of Information Law does not apply to documents that were on file prior to the Law's effective date, September 1, 1974, and

WHEREAS, The Committee through its staff memorandum entitled Freedom of Information Law Historical Perspective, has explained the remedial nature of the law, now therefore, be it

RESOLVED, That the provisions of Section 88(4) of the law can apply only to subject matter lists and do not limit the records available under the Law to those first kept, filed or promulgated after September 1, 1974, and, be it further

RESOLVED, That this Committee pursuant to its authority in Section 88(9)(a)(i) and 88(9)(a)(ii) of the Freedom of Information Law, declares that all records in possession of an agency and municipality are subject to the mandates of the Law, without regard to the date of their production, filing or promulgation.
December 10, 1974

TO: Presidents - State-operated Campuses
FROM: Harry K. Spindler
SUBJECT: Freedom of Information Law

For purposes of the Freedom of Information Law, effective 29 November, 1974, a minimum fee of 15¢ per page is hereby established for the copying of public records.

Harry K. Spindler