STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-174

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

COMMITTEE MEMBERS
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GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 17, 1978

Mr. Garv J. Veeder
Supervisor
Town of Pleasant Valley
Pleasant Valley, New York 12569

Dear Mr. Veeder:

Thank you for your interest in complying with the Open Meetings Law.

Your letter raises two questions. First, a situation was described in which you among others elected to serve the Town of Pleasant Valley met before taking your oaths of office. Your question is whether the gathering that was convened prior to the taking of office constituted a violation of the Open Meetings Law since it was closed to the public. Second, you have asked whether interviewing of applicants for a Town position may be held during an executive session.

With respect to the first question, it would appear that the gathering did not constitute the convening of a public body since those in attendance had not yet become public officials. Consequently, the gathering was not reflective of the convening of a public body and as such was not subject to the Open Meetings Law.

With regard to your second question, after having convened an open meeting, a public body may enter into an executive session pursuant to a vote taken in an open meeting identifying generally the subject matter to be discussed passed by a majority vote of its total membership. Among the subjects that may be considered are matters leading to the appointment of any person [see Open Meetings Law, §100(1)(f)]. Therefore, although a meeting to discuss the appointment of individuals to Town positions would have to be convened in an open meeting, an executive session could be held to discuss the potential appointees.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-175

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

January 25, 1978

Edward A. Vrooman, Esq.
Travis Corners Road
Garrison, New York 10524

Dear Mr. Vrooman:

I apologize for the delay in responding to your letter. Several attempts to contact you were made without success.

Your inquiry pertains to the propriety of holding an executive session for the purpose of discussing the value and method of the disposal of real property. As you are aware, one of the grounds for executive session includes the discussion of the proposed acquisition, sale or lease of real property, but only when public discussion of such an issue would substantially affect the value of the property [see attached, Open Meetings Law as renumbered, §100(1)(h)]. Under the circumstances described in your letter it is doubtful that a discussion of the disposal of the real property in question would in any way affect the value of the property. If that is the case, the issue must be discussed in public, for its substance would not appropriately fall within any of the categories of matters listed for executive session in §100(1) of the Open Meetings Law.

I hope that I have been of some assistance. If you would like to discuss the matter further, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-176

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 25, 1978

Mr. Donald Loggins
[redacted]

Dear Mr. Loggins:

I apologize for the delay in responding to your letter. Your inquiry again concerns the status of the Council on the Environment of New York City under the Open Meetings Law.

According to your most recent letter, the Council was created by executive order of the Mayor of New York City and all of the members of the Council are designated by the Mayor and serve at his pleasure.

Under the circumstances described, the Council is in my opinion a public body subject to the Open Meetings Law. It is an entity consisting of more than two members that performs a governmental function for a public corporation, the City of New York. Although the order creating the Council may not have made specific reference to the requirement that it act my means of a quorum, §41 of the General Construction Law requires that all boards, commissions, councils and the like act only by means of a quorum. As such, it appears that the Council is clearly a public body subject to the Open Meetings Law in all respects.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-177

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

January 24, 1978

Mr. Donald K. Ross
Director
NYPIRG
1 Columbia Place
Albany, New York 12207

Dear Mr. Ross:

Thank you for your interest in the Open Meetings Law. Your inquiry concerns the status of the Temporary Commission on the Regulation of Lobbying under the Open Meetings Law.

In my opinion, the Commission is a public body and therefore is subject to the provisions of the Open Meetings Law. Section 97(2) of the Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

According to Chapter 937 of the Laws of 1977, the Commission is an entity consisting of six members that clearly performs a governmental function for the state. Although Chapter 937 does not make specific reference to the requirement of a quorum, §41 of the General Construction Law permits the Commission to act only by means of a quorum. In addition, §4 of Chapter 937 states that:

> "[A]ny matter upon which the commission must act by a vote of the membership must be by an affirmative vote of a

majority of the members of the commission."

In view of the foregoing, the Commission is in my opinion a public body subject to the Open Meetings Law in all respects.

With regard to your second question, a meeting of the Commission held for the purpose of selecting a chairman or for the transaction of any of its other business must be preceded by compliance with the notice provisions of the Open Meetings Law (see §99). In brief, notice must be given to the public and the news media prior to any meeting of a public body.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

cc Stanley Kreutzer, Chairman
Temporary Commission in the Regulation of Lobbying
80 Centre Street
New York, New York 10007

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-178

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

January 31, 1978

William J. Spampinato, Esq.
County Attorney
Columbia County
10-12 South Fourth Street
Hudson, New York 12534

Dear Mr. Spampinato:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry pertains to the status of Standing Committees of the Columbia County Board of Supervisors under the Open Meetings Law.

In my opinion, committees are public bodies that fall within the scope of the Open Meetings Law. The law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty".

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law nevertheless mandates that all public bodies act only by means of a statutory quorum.

Second, does a committee "transact public business"? While it has been argued that committees do not take final action and therefore do not transact public business, the Committee on Public Access to Records has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Appellate Division, Second Department (Orange County Publications v. Council of City of Newburgh, N.Y.L.J., January 12, 1978, p. 1).

Third, the committees in question perform a governmental function for a public corporation, Columbia County.

And fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

In sum, the Standing Committees are in my view public bodies that fall within the purview of §97(2) of the Open Meetings Law and therefore must comply with each of the provisions of the statute.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-179

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

January 31, 1978

Mr. Martin Eisenberg
Program Research
United Community Centers
819 Van Siclen Avenue
Brooklyn, New York 11207

Dear Mr. Eisenberg:

Thank you for your interest in the Open Meetings Law. Your inquiry pertains to the status of so-called "informal discussions" and "discussion meetings" held by a Community School Board in New York City.

Your letter includes reference to a recent decision of the Appellate Division, Second Department, which held that "work sessions" and similar gatherings are indeed meetings subject to the Open Meetings Law, even if there is no intent to take action at such gatherings. The Committee fully concurs with the holding by the Appellate Division, which cited the advice of the Committee contained in its report to the Legislature on the Open Meetings Law, issued February 1, 1977.

In determining the status of "work sessions," the Committee dealt with the issue in its report as follows:

> "The Law defines 'meeting' as 'the formal convening of a public body for the purpose of officially transacting public business.' Numerous questions have arisen regarding this definition, particularly with respect to the phrases 'formal convening' and 'officially transacting public business.' Many reports indicate that the two phrases have been used by public bodies as a means of circumventing the Law.

> Several public bodies have adopted practices whereby they meet as a body in closed 'work sessions,' 'agenda sessions,' 'organizational meetings' and the like, during which they discuss public business but take no action. It is during these 'work sessions' that the true deliberative process which is at the heart of the Open Meetings Law occurs. Stated simply, if work sessions and the like are closed to the public, the Open Meetings Law may in many cases be all but meaningless.
>
> "It is the opinion of the Committee that 'meeting' should currently be construed to include any situation wherein each member of a public body is given reasonable notice that the body will meet at a specific time and place and that, following notification, at least a quorum of the body convenes for the purpose of discussing public business. As such, the Committee believes that 'work sessions' and similar gatherings are meetings within the scope of the Law."

In sum, if each of the ingredients described in the paragraph quoted above is present, the gathering is in the opinion of the Committee a meeting subject to the Open Meetings Law that must be open to the public.

In addition, the Committee's second annual report to the Legislature issued today reiterates the stance taken in its first annual report and calls upon the Legislature to amend the Open Meetings Law in a manner consistent with the holding of the Appellate Division. Attached is a copy of the second annual report to the Legislature.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc Mrs. Francis Abbracciamento, President
Community School Board, District #19
2057 Linden Boulevard
Brooklyn, New York 11207

Mr. Oliver Gibson, Superintendent
School District #19
2057 Linden Boulevard
Brooklyn, New York 11207

Mr. Irving Anker
Chancellor
N.Y.C. Board of Education
110 Livingston Street
Brooklyn, New York 11201

Mr. Michael Rosen
Counsel to the Chancellor
N.Y.C. Board of Education
110 Livingston Street
Brooklyn, New York 11201

The Commissioner of Education
The State Education Department
Albany, New York 12234

Mr. Robert D. Stone
Counsel and Deputy Commissioner
for Legal Affairs
The University of the State of New York
Albany, New York 12234

Mr. Alfredo Matthew
Director
Department of Community School
District Affairs
N.Y.C. Board of Education
110 Livingston Street
Brooklyn, New York 11201

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-180

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 3, 1978

Mrs. Frederica Perera
[redacted]

Dear Mrs. Perera:

Thank you for your interest in the Open Meetings Law. Your inquiry concerns the ability of the Planning Board of the Town of Mt. Kisco to enter into executive session to discuss the zoning of a particular parcel of land.

As a general metter, the Open Meetings Law states that all meetings of public bodies "shall be open to the general public" [see attached, Open Meetings Law, §98(a)]. "Executive session" is defined as a portion of an open meeting during which the public may be excluded [see §97(3)]. Further, §100(1) of the Law states that: "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session..." to discuss only those matters listed in paragraphs (a) through (h) of the cited provision.

According to your letter, although the discussion would pertain to a particular parcel of real property, neither the acquisition, sale nor lease of real property are involved in the discussion. Since there appears to be no appropriate ground for entering into executive session, the subject matter in question must in my opinion be discussed during an open meeting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc Mr. Norman Westin
Chairman, Mt. Kisco Planning Board

Mayor Henry V. Kensing

Ms. Susan Auslander

Mr. Brad Purcell

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-181
FOIL-AO-699

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

February 9, 1978

Mr. Isidore Gerber
Executive Director
Liberty Taxpayers' Association
Liberty, New York

Dear Mr. Gerber:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law.

According to your letter of January 31, it appears that the Liberty Central School District has sought to comply with your most recent requests. Consequently, I do not believe that you are in need of advice at this juncture with respect to the correspondence attached to your letter concerning requests directed to the District.

The second area of inquiry, however, pertains to the ability to tape record meetings of the Town Board as well as your right to make copies of tape recordings made by the Board. First, it is important to note that the Open Meetings Law is silent with regard to the ability of the public to tape record meetings of public bodies. To date, there has been one judicial decision dealing with the subject. In Davidson v. Common Council of the City of White Plains [244 NYS 2d 385 (1963)], it was held that a public body has the authority to adopt reasonable rules to govern its own proceedings. Under the circumstances of that case, the court found that the presence of a tape recorder would detract from the deliberative processes of the Common Council. As such, the Court held that the rule prohibiting the use of tape recorders at the meeting was reasonable.

Nevertheless, the circumstances described in your letter appear to be somewhat different from those presented in the Davidson case. It appears that the Town Board itself uses a tape recorder at its meetings to record its

proceedings. In my opinion, if the presence of its tape recorder does not detract from the deliberative process, the presence of a tape recorder in the possession of a member of the public or the news media could not be found to detract from the deliberative process. I believe that a rule prohibiting the use of tape recorders must be consistent in its application. Therefore, if, for example, the Town Board precluded its own members from using a tape recorder at a meeting, as was the case in Davidson, such a rule could be applied to members of the public as well. Here, however, the use of tape recording equipment by the Board in my opinion precludes the Board from prohibiting members of the public from using similar equipment to record the proceedings.

Moreover, the definition of "record" in the Freedom of Information Law includes tape recordings [§86(4)]. Consequently, the tape recording in possession of the Town Supervisor is a record subject to rights of access granted by the Freedom of Information Law. Consequently, so long as the Town Supervisor or any other town official maintains possession of a tape recording of a meeting, it is subject to rights of access granted by the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

cc Peter Gozza, Supervisor
Town of Liberty

Thomas A. Stroup
Business Administrator
Liberty Central School

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-182

COMMITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

February 15, 1978

Mr. S. Stanley Kreutzer
Chairman
New York Temporary State Commission on
Regulation of Lobbying
Room 342
80 Center Street
New York, New York

Dear Mr. Kreutzer:

Thank you for your interest in complying with the Open Meetings Law. I am in receipt of your memorandum of February 10, which outlines the action taken by the Temporary State Commission on the Regulation of Lobbying with regard to compliance with the notice provisions of the Open Meetings Law.

I have one further suggestion to offer. When we discussed the notice provisions (§99), I believe that I mentioned that a distinction is made in the Law between notice to the public and notice to the news media. Although the action described in your memorandum would in my view be adequate with regard to notice to the news media, it is suggested that notice to the public be accomplished by means of posting notices in designated locations indicating the time and place of meetings. For example, when this Committee holds a meeting, notices are posted on bulletin boards in every building in which the Department of State has an office. It is suggested that notices be posted in both your New York City and Albany offices to insure that an interested member of the public or news media may be apprised of the time and place of a meeting. It is also noted that the Office of General Services has placed bulletin boards to be used for posting notices of meetings in state office buildings throughout the state.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

cc Mary Witbeck

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-183

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 21, 1978

Senator Norman J. Levy
District Office
119 N. Park Avenue
Suite 402
Rockville Centre, New York 11570

Dear Senator Levy:

Thank you for your continued interest in the Open Meetings Law. The question raised in the correspondence appended to your letter pertains to the status of the Nassau Library System under the Open Meetings Law.

The central question is whether the System is a "public body" as defined by the Open Meetings Law. Section 97(2) of the Law defines "public body" as

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for a public corporation as defined in section sixty-six of the general construction law."

Based upon case law, the System neither transacts public business nor performs a governmental function. Although the System has many of the trappings of a governmental entity (i.e., funding from government, participation in state health and retirement plans), it is a private, separate legal entity controlled by a board of trustees which has the power to hire and fire its employees without any governmental infringement. Neither the System nor its trustees possess governmental powers; they merely provide a service (see New York Public Library v. New York State, 357 NYS 2d 522, 533 1974).

Decisional law upholds this conclusion. The Appellate Division has held that the New York public library is not a government or public employer within the Taylor Law (New York Public Library, supra). The Comptroller has held that a co-operative library is not governmental in nature (Op. State Compt. 67-543) and that cooperative library service systems although established under grant of a charter by the State Board of Regents, are not municipal corporations. (Op. State Compt. 67-200). Further, neither a library system nor an association library has state sovereignty, and the Commissioner of the State Department of Education has held that obligations executed by a free association library do not in any way encumber the faith or credit of a school district from which it receives funds (Matter of Appeal of Richard L. Boyle, 1968, 7 Education Department Rep. 102).

In view of the opinions cited and their various sources, in my opinion, the Nassau Library System is not a public body as defined by the Open Meetings Law and is therefore not within the scope of the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-184

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

February 24, 1978

Mr. Richard M. Kessel
Long Island Consumer Action
P.O. Box 504
Merrick, New York 11556

Dear Mr. Kessel:

Thank you for your continued interest in the Open Meetings Law.

Your inquiry concerns whether the Nassau County Board of Supervisors is required to compile minutes. According to your letter, although transcripts of meetings are created and records of votes are maintained, the Board does not create minutes.

In this regard, §101 of the Open Meetings Law states that:

> " 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..."

In view of the foregoing, it is clear that the Board of Supervisors is required to compile and make available minutes of its meetings in accordance with the requirements quoted above.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ph

cc Chairman
Board of Supervisors
County of Nassau

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-185

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 28, 1978

Mr. A. A. Rossiter
[redacted]

Dear Mr. Rossiter:

Thank you for your interest in the Open Meetings Law and the Freedom of Information Law.

First, the Open Meetings Law pertains to meetings of all public bodies in New York, including town boards. Second, requests for records made under the Freedom of Information Law should be directed to the agencies in possession of the records. This Committee is merely an advisory body; it does not have possession of government records generally. Therefore, if you are interested in obtaining records from a particular town, it is suggested that you make a request in writing, reasonably describing the records sought. The request should be directed to the designated records access officer. To assist in explaining your rights and the duties of government under the Freedom of Information Law, I have enclosed copies of the Law, the regulations governing the procedural aspects of the statute and an explanatory pamphlet entitled "The New Freedom of Information Law and How to Use It."

Your third question pertains to what are characterized as "final decisions made in secluded caucus meetings in recess." It appears that so-called caucus meetings are portions of town board meetings. In this regard, §103(2) of the Law states that political caucuses are exempt from the provisions of the Open Meetings Law. Nevertheless, if the entire board convenes in a "caucus," such a convening in my opinion is in fact a meeting that must be open to the public. Similarly, if a board desires to recess to discuss a particular matter, it may not do so unless an executive session is convened. It is noted

that an executive session is a portion of an open meeting during which the public may be excluded and only those matters listed in §100(1)(a) through (h) of the Open Meetings Law may be discussed.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-186
FOIL-AO-713

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 2, 1978

Mr. Robert E. Link
[redacted]

Dear Mr. Link:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. Your letter raises general questions concerning the interpretation of both statutes.

First, although an agency such as a school district, need not grant access to all information of a personal nature, records relevant to the performance of the official duties of public employees are generally available. With respect to a record reflective of the reasons for suspension of a classroom teacher, such a record would in my opinion be accessible. While the Law states that an agency may act to protect against an "unwarranted invasion of personal privacy," a determination by a school board or administrator to suspend a teacher would in my view be available since the determination is relevant to the performance of the duties of the school board, the administrator and the teacher. A judicial decision rendered regarding a similar situation held that a reprimand of a public official constituted an accessible record on the ground that disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy [Farrell v. Board of Trustees, 372 NYS 2d 905 (1975)].

Secondly, you asked whether it is within the rights of a resident to "ask questions" concerning salaries, contracts and similar matters. The Freedom of Information Law grants access to information of this nature. Specifically, §87(3)(b) of the Law requires each agency to compile a payroll record consisting of the names, public office addresses, titles and salaries of all employees of the agency. In addition, the

contract of a school district administrator is available, for it is reflective of the policy or a determination of a district.

Your third question deals with the amount of time spent by a school board in executive session. In this regard, the Open Meetings Law provides that all meetings of public bodies must be convened as open meetings and that executive sessions, which are portions of an open meeting, may be held to discuss one of eight subjects specified in the Law. Moreover, a public body must identify the general areas of discussion publicly prior to entry into executive session. Enclosed for your consideration are copies of several documents regarding both subjects, including the new Freedom of Information Law, the regulations promulgated by the Committee which govern the procedural aspects of the Law, an explanatory pamphlet regarding the Freedom of Information Law and a pocket outline of the statute. In addition, enclosed are copies of the Open Meetings Law and the Committee's second annual Report to the Legislature on the subject.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph
Enc.

cc School Board
Union Free School District #6

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO- 187

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 6, 1978

Andrew J. Gilday, Esq.
Corporation Counsel
City of Kingston
City Hall
Kingston, New York 12401

Dear Mr. Gilday:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry concerns the status of so-called "bench conferences" held by the Kingston Zoning Board of Appeals and applicants for a variance.

As you are aware, §103(1) of the Open Meetings Law states that the provisions of the statute do not apply to judicial or quasi-judicial proceedings. Pursuant to this exemption, the Zoning Board of Appeals of the City of Kingston may close its doors to the public only to the extent that it engages in quasi-judicial proceedings. Based upon case law rendered to date, it appears that the "bench conferences" to which you referred cannot be considered quasi-judicial and therefore must be open to the public.

This contention is based upon the language of the decision rendered by the Appellate Division, Second Department, in Orange County Publications, Division of Ottaway Newspaper, Inc. v. Council of the City of Newburgh [401 NYS 2d 84 (1978)]. In discussing the exemption, the Court dealt with a factual situation in which a reporter was permitted to listen to presentations made by members of the public for zoning variances, but was ordered to leave when the Zoning Board convened for the purpose of deliberation and determination. The Court determined that

> "...there is a distinction between that portion of a meeting of the zoning board wherein the members collectively weigh

> evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the votes of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals... Accordingly, pursuant to subdivision one of section 103 of the Public Officers Law, the deliberations of the Newburgh Zoning Board of Appeals as to the zoning variances are not subject to the Open Meetings Law" [id. at. 90-91].

Based upon the direction given by the Appellate Division, the bench conferences held by the zoning board with applicants for variances are not quasi-judicial and therefore are within the scope of the Open Meetings Law. However, after the bench conferences are held and the board deliberates in a judicial manner, as a court, such deliberations are in my opinion quasi-judicial and consequently may be held behind closed doors.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

FOIL-AO-719
OML-AO-188

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 6, 1978

Mr. Frederick T. Hover
Mrs. Arlene L. Hover
[redacted]

Dear Mr. and Mrs. Hover:

Thank you for your letter of February 28. Your inquiry raises questions concerning both the Freedom of Information Law and the Open Meetings Law.

First, your letter questions the propriety of a charge of two dollars assessed for copies of minutes of the Town of Tioga. In this regard, both the Freedom of Information Law [see attached, §87(1)(b)(iii)] and the regulations promulgated by the Committee (see attached, §1401.8), state that no more than twenty-five cents per photocopy may be assessed for copies up to 9" by 14".

Second, as we discussed, I believe that minutes are accessible to the public as soon as they are compiled, whether or not they are approved by the Town Board. In such circumstances, it has been suggested that the unapproved minutes be marked as "draft," "non-final," or "unapproved." By so doing, the public is given notice that the minutes are subject to change and the public body is also given a measure of protection.

Third, you asked whether the public may be excluded from a meeting absent a motion to go into executive session passed by the Board. Section 100(1) of the Open Meetings Law provides a specific procedure for entering into executive session. To comply with the Open Meetings Law, a motion must be made during an open meeting identifying the subject or subjects to be discussed in executive session, and the motion must be passed by a majority vote of the total membership of the public body. It is also important to note that the subjects appropriate for discussion in executive session are limited and specified by the Law [see attached, §100(1)(a) through (h)].

Fourth, you asked for advice concerning the jurisdiction of the Town Attorney with regard to the procedural obligations of the office of the Town Clerk. Since your question does not deal with either the Freedom of Information Law or the Open Meetings Law, it would be inappropriate to respond, for the question deals with matters outside the scope of the Committee's authority. To obtain legal advice regarding the duties of the Town Clerk, perhaps you should contact the Division of Community Affairs, Legal Bureau, in the Department of State.

And fifth, you asked for an explanation concerning the difference between a legal certification and the certification made upon request under the Freedom of Information Law. A legal certification, for which a fee may be assessed, involves a finding that the contents of a record are accurate. A certification made under the Freedom of Information Law, for which no charge may be assessed [see regulations, §1401.8], simply involves a finding that a copy is a true copy. It does not assert in any way that the contents of the record are accurate.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

cc Shirley L. Mayer, Town Clerk
Charles Ayers

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-189

COMMITTEE MEMBERS
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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 6, 1978

Jon H. Hammer, Esq.
Cabell & Hammer
175 Main Street
White Plains, New York 10601

Dear Mr. Hammer:

Thank you for your continued interest in the Open Meetings Law.

Your letter raises questions concerning the provisions for compilation of minutes in the Open Meetings Law (§101). In addition, you mentioned the "practical problem" that involves your inability to know what in fact is being discussed in executive session after a public body has entered into an executive session. In this regard, I can only respond to the effect that I feel that there must be a degree of trust between the public and public officials. When a public body asserts in public that it is entering into executive session to discuss specific subject matter, trust in public officials is the sole guarantee that only that subject matter will in fact be discussed.

With respect to minutes, I agree with your interpretation of the Law. Subdivision (1) of §101 requires that a record or summary be compiled that makes reference to motions, proposals, resolutions and any other matter voted upon. Subdivision (2), which pertains to minutes of executive sessions, states that a record must be compiled only with respect to matters "formally" voted upon. As such, the requirements concerning the compilation of minutes are more expansive with respect to those portions of meetings that are open than executive sessions that are closed to the public.

It is important to note that according to your letter, it appears that the Town continues to make distinctions between meetings and "work sessions." In my view, the recent judicial decisions, of which you are aware, are

based upon the notion that there is no distinction between a meeting and a work session under the Open Meetings Law. If certain ingredients are present, a gathering is a meeting that must be open to the public, despite its characterization or denomination.

With respect to notice, meetings scheduled a week in advance must be preceded by notice to the public and news media at least seventy-two hours before the meeting [§99(1)]. Since "media" is plural, notice must be given to at least two representatives of the news media. It is preferable that notice be given to the news media in writing, so that a record that notice was in fact provided is established. Notice to the public should be given by means of posting in one or more conspicuous locations, such as an official town bulletin board. If a meeting is scheduled less than a week in advance, notice must be given "to the extent practicable" to the public and news media at a reasonable time prior to the meeting [§99(2)]. What is "practicable" in one situation may not be "practicable" in another. As a general rule, it has been suggested that notice of an emergency meeting, for example, be given to the news media that would likely make contact with those interested in attending. Notice to the public should again be accomplished by means of posting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

cc Town Board
Town of Greenburgh

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-190

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 7, 1978

Kenneth J. Finger, P.C.
[redacted]

Dear Mr. Finger:

Thank you for your interest in the Open Meetings Law. Your inquiry pertains to the extent to which the exemption for quasi-judicial proceedings in the Open Meetings Law [§103(1)] may be applicable to a health systems agency.

In my opinion, a health systems agency does not engage in quasi-judicial proceedings and therefore cannot rely upon the exemption regarding such proceedings in the Open Meetings Law.

First, based upon my understanding of the functions of health systems agencies, it appears that such agencies perform what may be classified as administrative functions, rather than functions of a quasi-judicial nature. Second, one of the ingredients that must be present in classifying a proceeding or a body as quasi-judicial is the ability to render a final determination. Since a health systems agency merely recommends a course of action that may be accepted or rejected, it does not make final determinations and therefore does not act in a quasi-judicial capacity. And third, although the scope of the provision is unclear, Public Law 93-641 states that a health systems agency shall "conduct its business meetings in public, give adequate notice to the public of such meetings, and make its records and data available, upon request, to the public" [P.L. 93-641, Sec. 1512(b)(3)(B)(viii)]. The provision quoted above neither makes reference to executive sessions nor a quasi-judicial function of a health systems agency, and its clear intent is that such agencies conduct their business in full view of the public. In view of the direction provided by the federal legislation, even if a health systems agency engages in quasi-judicial proceedings, the

provision of federal law would appear to be less restrictive than the exemption for quasi-judicial proceedings contained in the New York Open Meetings Law. Since it is a less restrictive provision of law than §103 of the Open Meetings Law, its effect would be preserved pursuant to §105(2) of the Open Meetings Law.

In view of the foregoing, it is my contention that health systems agencies do not engage in quasi-judicial proceedings and as such cannot invoke the exemption concerning such proceedings under the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO- 191

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 7, 1978

Mr. Thomas L. Hoffman, Chairman
The Committee for a Responsive
Park Commission
430 East 65th Street
New York, New York 10021

Dear Mr. Hoffman:

Thank you for your interest in the Open Meetings Law. Your inquiry concerns the propriety of entry into executive session on three occasions by the Palisades Interstate Park Commission.

Based upon a review of the documents attached to your letter as well as the assumption that the Commission is a public body subject to the Open Meetings Law, its entry into executive session appears to have been questionable.

First, with respect to the executive session held on April 18, the minutes state that the executive session was held "to enable the Commission to address the matter of the Bear Mountain Inn and Stands Concession contract." It appears that the procedural requirements contained in §100(1) of the Open Meetings Law were satisfied with respect to the executive session of April 18, as well as those discussed in the ensuing paragraphs. A motion was made during an open meeting, passed unanimously by the Commissioners and cited the nature of the discussion to be held in executive session. Based upon the motion, there may have been an applicable ground for entry into executive session. Section 100(1)(f) states that a public body may enter into an executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

If the financial history of a corporation was discussed, the executive session was proper. If, on the other hand, the discussion did not relate to any of the matters set forth in paragraph (f), the discussion should have been conducted in public.

Second, the minutes of the meeting of May 16, 1977 indicate that action was taken with respect to the designation of a concessionaire on April 18. It appears that the vote to designate the concessionaire was conducted during executive session. In this regard, when a public body is appropriately convened during an executive session, it may vote in executive session, so long as the vote does not pertain to an appropriation of public monies. Therefore, if the matter was properly discussed during executive session and the vote taken in executive session did not deal with the appropriation of public monies, there was no violation of law. Conversely, if the matter was not appropriate for executive session or if there was a vote to appropriate, the Open Meetings Law was violated.

Third, according to the minutes of the meeting held on June 20, 1977 the Commission entered into executive session "to address the matters of State Purposes, Capital and Rehabilitation Budgets for Fiscal 1978-79 and the Audit Report of the New York State Office of Audit and Control..." The description of the discussion in the motion to enter into executive session does not appear to be consistent with any of the grounds for executive session listed in §100(1) of the Open Meetings Law. Since none of the grounds in my view was applicable, the executive session was held in violation of the Law and the issues should have been discussed in public.

Fourth, the minutes of the meeting of September 19, 1977 indicate that an executive session was held "to enable the Commission to address a concession problem, a developing land acquisition opportunity and a matter pertaining to the terms and conditions of employment of specific Commission employees." The discussions concerning the concession problems and the terms and conditions of employment of Commission employees may have been properly discussed in executive session pursuant to §100(1)(f). Nevertheless, without additional information concerning the nature of the discussions, it is impossible to determine from the minutes whether the discussions in fact were consistent with the intent of the provision cited in the previous sentence. With regard to a "land acquisition opportunity," the Open Meetings Law states that a public body may enter

into executive session to discuss "the proposed acquisition, sale or lease of real property, but only when publicity would substantially affect the value of the property." In view of the quoted provision, the executive session would have been proper only if public discussion of the matter would substantially affect the value of real property. Therefore, if public disclosure would have had no effect or doubtful effect upon the value of a particular parcel of real property, the discussion should have been in public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

cc Albert E. Caccese, Counsel
Department of Parks and Recreation

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-192

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 8, 1978

Henry Wm. Barnett
Village Attorney
Village of Mount Kisco
Office of the Village Attorney
104 Main Street
Mount Kisco, New York 10549

Dear Mr. Barnett:

Thank you for your letter of February 22. Your inquiry deals with the status of a discussion under the Open Meetings Law of the annexation of a particular parcel of real property.

Despite your clarification of the factual circumstances surrounding the controversy, my conclusion does not differ from that offered in an opinion rendered on February 3 at the request of Ms. Frederica Perera.

As you are aware, §100(1)(h) of the Open Meetings Law permits a public body to enter into executive session to discuss:

> "the proposed acquisition, sale or lease of real property, but only when publicity would substantially affect the value of the property."

First, in my opinion, the quoted provision is intended to be applicable to situations in which a financial transaction is involved. An annexation is a legislative act that does not involve an acquisition in the financial sense, but rather pertains to an alteration of boundaries.

Second, you mentioned that the current owner of the property could sell the parcel before any final determination concerning the property is reached. In this regard, I cannot understand the relevance of this factor, for the ability of a property owner to sell his property is constant.

Third, you letter states that:

> "[A]n open discussion of possible zoning to be applied when and if the Village acquires the said property would substantially affect the value of the property in that a more restrictive zoning would lessen the value and a more permissive zoning would increase the value."

Again, I am unaware of the relevance of your contention, since a discussion of "possible zoning" would be required to be discussed during an open meeting. A discussion pertaining to zoning would not involve the acquisition, sale or lease of real property and as such must be discussed publicly.

It is also noted that although a village zoning board may to some extent engage in what may be characterized as quasi-judicial proceedings, the exemption in the Open Meetings Law regarding quasi-judicial proceedings [§103(1)] is of no effect with respect to a village zoning board of appeals. Section 7-712 of the Village Law has long required such boards to conduct their business during open meetings. Since that provision is less restrictive than §103(1) of the Open Meetings Law its effect is preserved. Consequently, both the Committee and the Attorney General have advised that the exemption for quasi-judicial proceedings in the Open Meetings Law is inapplicable with respect to village zoning boards of appeal.

Finally, your letter indicates that the Village Board of Trustees may enter into executive session pursuant to §100(1)(d) of the Open Meetings Law to discuss "proposed, pending or current litigation." I concur with your contention of the substance if the discussion deals with legal strategies connected with such litigation.

In sum, while a discussion of litigation may be an appropriate subject for executive session, I do not believe that the exception concerning the acquisition, sale or lease of real property can properly be asserted to enter into executive session under the circumstances described in your letter.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ph

cc Susan Auslander

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-193

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 13, 1978

Joseph J. Cassata, Esq.
City Attorney
City of Tonawanda
City Hall
200 Niagara Street
Tonawanda, New York 14150

Dear Mr. Cassata:

Thank you for your interest in complying with the Open Meetings Law.

Your letter involves a request for confirmation of our telephone conversation of February 28, during which I advised that a discussion of proposed litigation is a proper subject for entry into executive session. My contention was based upon §100(1)(d) of the Open Meetings Law, which states that a public body may enter into executive session for "discussions regarding proposed, pending or current litigation." As such, an executive session may clearly be held for the purpose of discussing proposed litigation.

It is noted, however, that our conversation of February 28 was one among several conversations that dealt with the issue. During our conversations, I also advised that "possible" litigation is not a proper subject for discussion in executive session, since virtually any matter could be the subject of litigation. Further, in our attempts to discern the meaning of "proposed" litigation, I believe that we agreed that the language is intended to pertain to litigation, which although not yet initiated, is imminent.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-194

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 14, 1978

Ms. Joan Esopa
Secretary
Committee for the Handicapped
Village of Cedarhurst
200 Cedarhurst Avenue
Cedarhurst, New York 11516

Dear Ms. Esopa:

Thank you for your interest in complying with the Open Meetings Law.

As you are aware, §98(b) of the Open Meetings Law requires public bodies to make "reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to the physically handicapped. There are no specific rules on the subject and the availability of barrier-free facilities may vary from one municipality to the next.

Nevertheless, there is a judicial interpretation of §98(b) which I believe will be helpful to you in terms of direction. Enclosed is a copy of the decision.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-195

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 20, 1978

Ms. Barbara M. Beyda
[redacted], [redacted] 1[redacted]

Dear Ms. Beyda:

Thank you for your continued interest in the Freedom of Information Law and Open Meetings Law. As requested, enclosed are copies of the advisory opinions identified by key phrase in your letter.

With respect to rights of access to minutes of open meetings, the Committee has consistently advised that minutes are accessible as soon as they exist, whether or not they have been approved by a school board, for example. In many instances, minutes may not be approved for a month following a meeting. Since a lapse of time of that length precluding rights of access would in my view be unreasonable, it has been suggested that unapproved minutes be marked as "unapproved," "non-final," or draft." By so doing, the public may be apprised that the minutes are subject to change and a public body is given a measure of protection.

I hope that I have been of some assistance. Should any other questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:neb
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-196

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 20, 1978

Mr. Thomas G. Griffen
[redacted]

Dear Mr. Griffen:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry concerns the status of "work sessions" held by the Common Council of the City of Hudson and committees of the Common Council under the Open Meetings Law.

First, although the definition of "meeting" is unclear [see attached Open Meetings Law, §97(2)], recent judicial interpretations of the provision have held that work sessions, agenda sessions and similar gatherings are meetings subject to the Open Meetings Law when certain ingredients are present. The ingredients include reasonable notice to the members of the public body that a meeting will be held at a specific time and place, followed by the convening of a quorum, for the purpose of carrying on the business of the public body. With the regard to the issue, I have enclosed copies of the Committee's second annual report to the Legislature on the Open Meetings Law and a determination by the Second Department, Appellate Division, both of which expand upon the issue.

Second, committees of the Common Council are in my view public bodies subject to the Open Meetings Law and as such must comply with the Law in the same manner as a governing body. Recent judicial decisions regarding the status of committees and advisory bodies have upheld the contention that such bodies are public bodies even though they lack the ability to take final action. Again, the report to the Legislature makes reference to the problem. Also attached are two decisions that concluded that committees and advisory bodies are subject to the Open Meetings Law.

Finally, notice must precede meetings of all public bodies pursuant to §99 of the Law. Specifically, §99(1) of the Law states that notice of meetings scheduled at least a

week in advance must be given to the public and the news media not less than 72 hours prior to the meeting. With respect to meetings scheduled less than a week in advance, §94(2) requires public bodies to give notice to the public and the news media "to the extent practicable" at a reasonable time prior to a meeting. Notice to the public may in my opinion be provided by means of posting in one or more locations, such as an official city bulletin board.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:neb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-197

COMMITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 20, 1978

Board of Education
Saranac Lake, New York 12983

Dear Members of the Board:

Mr. James Dynko, Managing Editor of the Plattsburgh Press-Republican, has asked that I clarify events and advice surrounding the discussion of the proposed ban by the School Board of a novel entitled "The Slaughterhouse Five."

First, Mr. Sperber of the Press-Republican did indeed seek advice from this office on or about February 28, 1978 regarding the proposed ban. In an ensuing conversation with Bela Ward, President of the Board, on March 8, I stated that I did not recall the name of the reporter with whom I spoke, since hundreds of phone inquiries per month may be answered by me. Nevertheless, when Mr. Ward described the issue, I recalled the conversation with Mr. Sperber.

Second, I advised Mr. Sperber that a discussion of the proposed ban of the novel in question was a policy matter that should be discussed during an open meeting and that the subject did not fall within any of the grounds appropriate for executive session listed in §100(1) of the Open Meetings Law.

And third, whether or not I found favor with the quotes attributed to me that Mr. Sperber read during our conversation of March 14, I believe that they are accurate.

I apologize for any misunderstanding that may have arisen regarding these incidents and hope that the foregoing will serve to clarify the situation.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:neb

cc: James D. Dynko
Managing Editor

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-198

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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 21, 1978

Mr. Richard Konrad
[redacted]

Dear Mr. Konrad:

Thank you for your continued interest in the Open Meetings Law. Your inquiry concerns the practice of the Zoning Board of Appeals of the Village of Valley Stream. According to your letter, the Board deliberates and in effect makes decisions behind closed doors which are later announced by reference to case numbers in open session.

As I stated in my letter to you of August 25, 1977, I believe that the practice of the Board of Appeals violates the Open Meetings Law. Although a village zoning board of appeals may act in a quasi-judicial capacity, the exemption concerning quasi-judicial proceedings appearing in §103(1) of the Open Meetings Law is not applicable with respect to village zoning boards of appeals. Section 7-712(1) of the Village Law has long provided that such boards conduct their business in public and the exemption concerning quasi-judicial proceedings in the Open Meetings Law is in my opinion of no effect.

In response to a similar controversy that arose with respect to a town zoning board of appeals, the Attorney General informally advised that such boards could not invoke the exemption for quasi-judicial proceedings. Since the direction in the Village Law is the same as that in §267(1) of the Town Law, an analogous conclusion must be reached.

In discussing the matter, the Attorney General's Office advised that:

> "[S]ince the mandate of the Town Law requires the meetings of a zoning board of appeals to be open to the public, it

> is less restrictive to public access than section 98(1) of Article 7 (Open Meetings Law) of the Public Officers Law, which would exempt the ordinary business of a zoning board of appeals from the provisions of Article 7 of the Public Officers Law. It, therefore, follows that under Public Officers Law, Article 7, §100(2), the Town Law is not superseded by Article 7 of the Public Officers Law, and therefore the Town Law governs the conduct of the ordinary business of a zoning board of appeals.
>
> Town Law, §267, referred to above, does not provide for executive session or informal private meetings by the members of a zoning board of appeals. Under Town Law, §267, all meetings of a zoning board of appeals must be open to the public.
>
> Accordingly, we conclude that the Town Law is not superseded by the provisions of Article 7 of the Public Officers Law with respect to the meetings of a zoning board of appeals. Under Town Law, §267, all meetings of a town's zoning board of appeals must be open to the public."

Again, although the Attorney General's opinion quoted above applied to town zoning boards of appeals, the language concerning the requirement that meetings of town zoning boards of appeals must be open is exactly the same as the language in §7-712(1) of the Village Law. Specifically, both statutes state that "[A]ll meetings of such boards shall be open to the public." Consequently, it is the opinion of the Committee as well as the Attorney General that town and village zoning boards of appeals cannot rely upon the exemption concerning quasi-judicial proceedings and must conduct their business in public.

Finally, it is clear that the purpose of the Open Meetings Law is to permit the public to be informed. In this regard, reference to determinations by the zoning board by case number appears to make cryptic what should be made clear.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

cc: Board of Zoning Appeals
Inc. Village of Valley Stream
Village Hall
123 South Central Avenue
Valley Stream, New York 11580

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-199

COMMITTEE MEMBERS
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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 21, 1978

Ms. Constance Frederickson
[redacted]

Dear Ms. Frederickson:

Your inquiry apparently deals with rights granted by the Open Meetings Law. According to your letter, a controversy has arisen with respect to your ability to inspect maps and sketches of the Town of Evans Planning Board during meetings of the Board.

Please be advised that the Open Meetings Law deals with the extent to which meetings of public bodies must be open to the public, as well as other procedural requirements concerning the substantive aspects of meetings. The Law does not deal with the issue of public participation at meetings, nor does it deal with the ability of the public to view records that may be discussed at a meeting, for instance.

As a general matter, case law has long held that public bodies may adopt reasonable rules to govern their own proceedings. Consequently, despite the provisions of the Open Meetings Law, a public body may, pursuant to reasonable rules, permit public participation at a meeting, but it need not. Similarly, although a public body may establish rules concerning the ability of the public to inspect maps, sketches or other documents discussed at meetings, it need not.

Although a public body may establish reasonable rules concerning the conduct of its meetings, your rights of access to the records discussed at meetings are not effectively diminished. The Freedom of Information Law, a copy of which is attached, grants access to the vast majority of records in possession of municipalities. Further, you have the ability to assert your rights under the Freedom of Information Law pursuant to the procedural rules for the implementation of that statute established by the Town, which must be consistent with the regulations promulgated by the Committee (see attached).

Therefore, although a rule prohibiting inspection of records used by a board during a meeting of the body may be reasonable, you may inspect or copy the same records on other occasions when the records are sought on the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: Richard Stevenson, Chairman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-200

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 23, 1978

Mr. Lance F. Wheeler
WCKL
Box 445
Catskill, New York 12414

Dear Mr. Wheeler:

Thank you for your continued interest in the Open Meetings Law. Your inquiry concerns the propriety of an executive session held by the Board of Education of the Hudson City School District and the minutes or lack thereof relative to the executive session.

It is important to emphasize at the outset that the Open Meetings Law specifies and restricts the subject matter that may be discussed in executive session [see attached, Open Meetings Law, §100(1)(a) through (h)]. According to the minutes of the meeting of the Board of Education appended to your letter, the Board entered into executive session to discuss:

"a. Negotiations - teacher and cafeteria.
b. Personnel.
c. Staff changes.
d. Stottville School.
e. Head Start Program."

In my opinion, portions of the executive session may have been held in violation of the Law.

First, with respect to negotiations, §100(1)(e) of the Open Meetings Law states that a public body may enter into executive session to discuss collective bargaining negotiations. As such, the portion of the executive session during which collective negotiations were discussed was proper. Second, with respect to personnel, I do not believe that citing "personnel" alone as a rationale for entry into executive session is sufficient. Although some personnel matters may properly be discussed in executive session

pursuant to §100(1)(f), not all subject matter concerning personnel may be discussed behind closed doors. For example, a discussion concerning policy matters that may relate to personnel should in my view be discussed in an open meeting. On the other hand, a discussion of the performance of a teacher, for example, which may lead to dismissal of the teacher would be an appropriate subject for an executive session. Third, with respect to "staff changes," once again I believe that citing "staff changes" alone is not sufficient for entry into executive session. If the discussion dealt with policy as opposed to personalities, the discussion should have been held in full view of the public. Fourth, with respect to the Stottville School, there is no indication of the nature of the discussion. If the discussion dealt with the School generally, it should have been held during an open meeting. Fifth, with respect to the Head Start Program, none of the grounds for executive session would appear to be proper for a discussion of this nature without greater specifity of the substance of the discussion. In sum, although some of the subject matter may properly have been discussed in executive session, it is questionable whether the Board complied with the Law in each instance.

Further, although §100(1) of the Law generally permits public bodies to vote during a properly convened executive session, §104(2) of the Law states that

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

One such provision of law is §1708(3) of the Education Law, which states that

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

Although the provision quoted above does not state specifically that school boards must vote publicly, case law has held that

> "...an executive session of a board of education is available only for

> purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hampstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Section 1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law. Therefore, its effect is preserved and in my view, school boards can act only during an open meeting.

Finally, since §101(2) of the Open Meetings Law appears to require a compilation of minutes only when action is taken during executive session, and since school boards may not take action during executive session, a school board should never have minutes of executive sessions compiled under the Open Meetings Law, for all action must be taken publicly.

I hope that I have been of some assistance. If any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman

RJF:nb
Enc.

cc: Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOML-AO-201

MITTEE MEMBERS
ELIE ABEL - Chairman
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 24, 1978

Ms. Julie Gamache
Law Assistant
Town of North Hempstead
Town Hall
Manhasset, New York 11030

Dear Ms. Gamache:

Thank you for your interest in complying with the Open Meetings Law and for transmitting documentation concerning the Home Health Aide Inter-Agency Coordinating Council. The materials were both interesting and useful in determining the status of the Council under the Open Meetings Law.

The central question is whether the Council is a "public body," which is defined as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law" [§97(2)].

Upon review of the documentation, it appears that the Council was created in an effort to pool existing resources that provide home health aide services in Nassau County and construct a framework for cooperation among government, non-profit service organizations and medical facilities. Although several government agencies participate in the Council's business, the Council is independent and is not answerable to any governmental entity. Further, while the Council functions in response to the needs of the

public, I do not believe that it performs a "governmental function" or "transacts public business" in the traditional sense or in the manner envisioned by the definition of "public body" appearing in the Open Meetings Law. In sum, although it may be argued that the Council indeed transacts public business and performs a governmental function, the means by which it was created and its structure indicate that the Council is not in my view a public body subject to the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-202

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 27, 1978

Ms. Elaine Boies
Arts Editor
Staten Island Advance
950 Fingerboard Road
Staten Island, New York 10305

Dear Ms. Boies:

Thank you for your interest in the Open Meetings Law. Your inquiry concerns applicability of the Law to the Snug Harbor Cultural Center.

The question is whether the Cultural Center is a public body subject to the Open Meetings Law. The inquiry is not easily answered due to the unusual status of the Center, which is a not-for-profit corporation that operates pursuant to an agreement with New York City. While the Committee has generally advised that not-for-profit corporations are outside the scope of the Open Meetings Law, the unique relationship between the Center and New York City in my opinion indicate that the Center is indeed a public body subject to the Open Meetings Law. A review of the information contained in your letter as well as the agreement between the Center and the City of New York furnished with the cooperation of Ms. Carlin Gasteyer, Director of the Center, tend to bolster this contention.

For purposes of clarity, reference to the "Center" in the ensuing paragraphs will pertain to its Board of Directors. Reference to the "City" will pertain to New York City.

Section 97(2) of the Open Meetings Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing

> a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

The Center is clearly an entity consisting of more than two numbers for which a quorum is required to transact business (see General Construction Law, §41; Not-For-Profit Corporation Law, §608). However, does it "transact public business" and perform a "governmental function" for a public corporation, in this instance, the City? To respond to these questions, it is necessary to review the history of the Center. According to the agreement into which the City and the Center entered, it would appear that the City had every intention of operating the Center, but that "due to the unusual and critical situation of the City" and the apparent lack of funds available for the maintenance and operation of the Center, a not-for-profit corporation was created to preserve the goals sought to be accomplished by creation of the Center (see Agreement, June 24, 1976, paragraph 7). Moreover, several paragraphs in the Agreement refer to the necessity of review and approval by the City Commissioner of the Department of Parks and Recreation as a condition precedent to action to be taken by the Center. For example, rule making regarding the security, maintenance and operation of the Center, the allocation of space, the entry into contractual agreements, the ability to make structural alterations, and the payment of insurance premiums must be approved by the Commissioner. In view of the foregoing, it is clear that the City of New York maintains direct control over the major activities of the Center. Further, the membership of the Board of Directors, according to Ms. Gasteyer, must be approved by the City administration.

There is one situation with which I am familiar that is somewhat analogous to the circumstances surrounding the Center. Specifically, it was determined that the New York Public Library (hereinafter "the Library") is not a governmental entity in terms of the application of the Taylor Law to the Library [see New York Public Library v. New York Public Employment Relations Board, 45 A.D. 2d 271, 357 NYS 2d 522 (1974)]. Like the Center, the Library engages in a close relationship with the government of the City. Like the Library, the Center has on its Board of Directors City officials as ex officio members. However, there are several factors that may be cited to distinguish the status of the Center from that of the Library. First, the Library retains general control over the direction and management of its

affairs. Second, the Library engages in projects not approved by the City. And third, the City has no ability to interfere in the performance of duties of the Library or its Board of Directors.

The agreement between the City and the Center, however, indicates that there is more of a nexus between the two entities than between the City and the Library, and that the Center is in many instances prohibited from acting without the approval, either direct or by ratification, of a City official. In essence, it appears the Center is acting on behalf of New York City. Consequently, I believe that the Center "transacts public business" and performs a "governmental function" for a public corporation, the City of New York. As such, the Center is in my view subject to the Open Meetings Law in all respects.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

RJF:nb

cc: Ms. Carlin E. Gasteyer

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-203

MITTEE MEMBERS
ELIE ABEL - Chairman
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 27, 1978

Jon H. Hammer, Esq.
Cabell & Hammer
175 Main Street
White Plains, New York 10601

Dear Mr. Hammer:

Thank you for your continued interest in the Open Meetings Law. Your inquiry pertains to the scope of §100(1)(f) of the Open Meetings Law.

Specifically, the cited provision states that a public body may enter into executive session to discuss "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation." According to your letter, the Town Board of the Town of Greenburgh has determined that a discussion concerning the hiring of individuals generally for particular positions, as opposed to the hiring of specific persons, falls within the scope of the quoted provision.

In my opinion, a discussion held to determine whether positions should be filled is a policy matter that should be conducted during an open meeting. I believe that §100(1)(f) was intended largely to protect privacy. Under the circumstances, as you stated, the matter does not deal with personalities, but rather with a policy determination to fill positions.

Enclosed for your consideration is a copy of the Committee's second annual report to the Legislature. A portion of the report deals with abuses that have arisen concerning the interpretation of §100(1)(f). Although the Committee believes that a distinction may currently be made between discussions reflective of policy as opposed to those concerning specific individuals, the report contains a proposal to clarify the Committee's opinion by legislative means.

In sum, since the matter pertains to a discussion of policy rather than named individuals, I believe that it should be aired publicly.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

cc: Town Board
Town of Greenburgh

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-758
OML-AO-204

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

March 30, 1978

Elaine R. Silliman, Ph.D.
People Care of Lakeland
4 Evergreen Road
Peekskill, New York 10566

Dear Dr. Silliman:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. Your inquiry raises questions concerning the interpretation of both statutes in conjunction with the practices of the Lakeland School District.

According to your letter, a request for records containing "statistical data underlying the Superintendent's public report on the educational assessment of the effects of the 42 day Lakeland Teacher's Strike" was denied on the ground that the records constitute "intra-agency material." Although the statistical data used by the Superintendent in the formulation of the report does indeed constitute "intra-agency material," the exception in the Freedom of Information Law pertaining to denial of such materials contains what in effect is a double negative. Specifically, §87(2)(g) states that an agency may deny access to records or portions thereof 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; or
>
> iii. final agency policy or determinations..."

Therefore, to the extent that the materials contain "statistical or factual tabulations or data," they are accessible.

In addition, you mentioned that you were permitted to inspect some of the materials but that your request to make copies was refused. In this regard, case law rendered before the enactment of the Freedom of Information Law held that the right to copy is concomitant with the right to inspect. Consequently, I believe that a refusal by the District to permit you to copy the materials constituted a violation of law.

What effect, if any, is there when a school district fails to adopt rules for the procedural implementation of the Freedom of Information Law? While the Law states that the governing body of a public corporation, such as a school district, must adopt such rules within 60 days after the effective date of the amended Freedom of Information Law, there is no immediate penalty for failure to comply with this aspect of the Law. Nevertheless, if an agency fails to adopt regulations, an Article 78 proceeding in the nature of mandamus could be initiated to compel a school board to perform a duty required to be performed by law.

What responsibility does a school district have to appoint a records access officer who is available during regular business hours? According to your letter, the designated records access officer is a part time employee who is not available to respond to requests in all instances. In my opinion, the records access officer must be a full time employee. The regulations promulgated by the Committee, which have the force and effect of law, specifically describe the duties of a records access officer [see attached regulations, §1401.2(b)]. The major function of the records access officer is to respond to requests. The regulations further provide that agencies must accept requests for public access to records during all hours they are regularly open for business [§1401.4(a)]. Since requests must be accepted during regular business hours, the records access officer must in my view be available to respond to requests during those hours.

Your statement infers that forms must be filed in order to process requests. If this is the case, I believe that the procedure is contrary to the Law. Although an agency may require that a request be made in writing, the failure to complete a form prescribed by an agency cannot be asserted as a valid ground for denial of access. The Committee has consistently advised that any request in writing that reasonably describes the records sought should suffice.

Next, according to the Central Administration, meetings of committees appointed by the School Board need not be open to the public. In this regard, committees are in my view public bodies that fall within the scope of the Open Meetings Law (see attached). The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, does a committee "transact public business?" While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Appellate Division, Second Department (Orange County Publications v. Council of City of Newburgh, NYLJ, January 12, 1978, p. 1; 401 NYS 2d 84).

Third, the committees in question perform a governmental function for a public corporation, the Lakeland School District.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transacript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of NFY Legal Services, Supreme Court, New York County, NYLJ, January 17, 1978; Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Finally, must minutes be taken of executive, special and public work sessions, even though no formal vote may be taken? Section 101 of the Open Meetings Law prescribes the required contents of minutes for both open meetings and executive sessions. With respect to open meetings, §101(1) states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Therefore, a record or summary of motions and proposals must be contained in minutes of open meetings, even if there is no action taken thereon.

With respect to minutes of executive sessions, although public bodies may generally vote during a properly convened executive session, school boards may not vote during executive session except in the case of a tenure proceeding brought pursuant to §3020-a of the Education Law. The Open Meetings Law states that any less restrictive provisions of law remain in effect [§105(2)]. Since §1708(3) of the Education Law has been judicially interpreted to require public voting by school boards, boards of education are generally precluded from voting during executive session [see Kursch et al v. Board of Education, 7 A.D. 2d 922 (1959); United Teachers of Northport v. Northport Union Free School District, 50 A.D. 2d 897 (1975)]. Further, §101(2)

states that minutes of executive sessions need only contain a summary of action taken, and since no action may be taken, presumably minutes of executive session need not be compiled.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc: Lakeland Board of Education
Dr. Leon Bock

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-205

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 11, 1978

Mr. Paul A. Palmgren
[redacted]

Dear Mr. Palmgren:

Thank you for your interest in the Open Meetings Law. Your inquiry concerns the authority of a school board to close its meetings when matters such as salary or personnel are discussed.

The Open Meetings Law provides that all meetings of public bodies, including school boards, shall be open to the public, except when an executive session, which is defined as a portion of an open meeting during which the public may be excluded, can properly be convened. The scope of discussion in executive session is specified and limited to those subjects listed in §100(1)(a) through (h) of the Law (see attached).

Relevant to your inquiry, a public body may enter into executive session to discuss collective bargaining negotiations [§100(1)(e)]. As such, a discussion of salaries in conjunction with the collective bargaining process may be held behind closed doors. Further, a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..." [§100(1)(f)].

Consequently, a school board may go behind closed doors to discuss personnel matters when the discussions appropriately fall within the scope of the quoted provision.

It is emphasized, however, that the Law requires public bodies to follow the procedure set forth in the Law to enter into executive session. Specifically, §100(1) states that an executive session may be held to discuss one or more of the eight areas:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered..."

As such, a public body cannot enter into executive session without a rationale for so doing or without generally identifying the subject or subjects to be discussed.

In addition, §101(1) requires public bodies to compile and make available minutes "which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Therefore, although public bodies may in some instances vote behind closed doors, their actions must be recorded in the form of minutes.

Finally, although public bodies may generally vote during a properly convened executive session, school boards that operate in union free school districts may not vote during executive session except in the case of a tenure proceeding brought pursuant to §3020-a of the Education Law. Since the Open Meetings Law states that any less restrictive provisions of law remain in effect [§105(2)], and since §1708(3) of the Education Law has been judicially interpreted to require public voting by school boards, boards of education are generally precluded from voting during executive session [see Kursch et al v. Board of Education, 7 A.D. 2d 922 (1959); United Teachers of Northport v. Northport Union Free School District, 50 A.D. 2d 897 (1975)]. Further, §101(2) states that minutes of executive sessions need only contain a summary of action taken, and since no action may be taken, presumably minutes of executive session need not be compiled.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

FOIL-AO-774
OML-AO-206

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 14, 1978

Kenneth J. Finger, Esq.
[redacted]

Dear Mr. Finger:

Thank you for your interest in the Open Meetings Law. Your inquiry pertains to the propriety of the nominating procedure adopted by the Scarsdale School Board and the policy of confidentiality that surrounds the procedure.

According to your letter and the documents appended to it, the nominating procedure, which was ratified by resolution, established a committee known as the "Citizens' Committee to Nominate Candidates For the Board of Education Union Free School District No. 1." The resolution further establishes an Administrative Committee which assembles names for election to a Nominating Committee, which runs the School Board elections. The question is whether the three Committees, the Citizens' Committee, the Administrative Committee and the Nominating Committee, are public bodies subject to the Open Meetings Law.

In my opinion, each of the committees is a public body required to comply with the Open Meetings Law in all respects.

Section 97(2) of the Law defines "public body" to include:

> "any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

By separating the definition into its component parts, one can conclude that the committees are clearly public bodies.

First, the committees consist of more than two members and are required to act by means of a quorum. In the case of the Nominating Committee, the rules of procedure adopted on February 27, 1978, require the presence of two-thirds of the membership. In the absence of a specific quorum requirement, §41 of the General Construction Law states that a committee or similar entity designated to act collectively may act only after having convened a majority of its total membership.

Second, the history of the committees and the means by which they were created indicate that they transact public business for a public corporation, in this case a school district. As such, I do not believe that the committees could be considered as entities separate and distinct from the District. On the contrary, the resolutions pertaining to the committees were ratified by voters residing within the District.

Since the committees are public bodies, they are subject to the Open Meetings Law. Therefore, their meetings must be convened in public and preceded by the provision of notice to the public and the news media. In addition, although public bodies may enter into executive session in conjunction with §100(1) of the Law, it does not appear that the nominating process in its entirety could properly be discussed behind closed doors. It might be argued that an executive session could be held under §100(1)(f) to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Nevertheless, the quoted provision could not in my view be appropriately invoked, except in a situation in which employment history is discussed.

Further, the rules of procedure adopted by the Nominating Committee require that deliberations of the committee be confidential. In this regard, insofar as the rules are more restrictive than the provisions of the Open Meetings Law, they are in my opinion null and void. Section 105(1) of the Open Meetings Law states that:

> [A]ny provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Therefore, the rule regarding confidentiality adopted by the committee, which is more restrictive than the Open Meetings Law, is superseded thereby and is of no effect.

Finally, Article III(8) of the resolution, which deals with procedures of the Nominating Committee, states that "[V]oting shall be by secret ballot." Secret ballot voting constitutes a violation of the Freedom of Information Law. Specifically, §87(3)(a) of the statute requires that each agency maintain:

> "a record of the final vote of each member in every agency proceeding in which the member votes..."

Since the Nominating Committee is both a public body under the Open Meetings Law and an "agency" under the Freedom of Information Law [see §86(3)], it must compile minutes (see Open Meetings Law, §101) and a record of votes identifiable to each member in each instance in which the member votes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
cc: Scarsdale School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-207

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 14, 1978

Mr. Mickey Mayes
[redacted]

Dear Mr. Mayes:

Thank you for your interest in the Open Meetings Law. Your question concerns the ability of the public to employ tape recorders at meetings of public bodies. According to your letter, the Warrensburg Town Board recently adopted a resolution barring tape recorders from its meetings except for educational purposes.

It is important to note that the Open Meetings Law is silent with regard to the ability of the public to tape record meetings of public bodies. To date, there has been one judicial decision dealing with the subject. In Davidson v. Common Council of the City of White Plains [244 NYS 2d 385 (1963)], it was held that a public body has the authority to adopt reasonable rules to govern its own proceedings. Under the circumstances of that case, the court found that the presence of a tape recorder would detract from the deliberative processes of the Common Council. As such, the Court held that a rule prohibiting the use of tape recorders at the meeting was reasonable.

Nevertheless, the Davidson case was decided in 1963. As everybody is aware, technology in the area of tape recording devices has advanced markedly. In 1963, tape recorders were cumbersome and their presence was readily evident. However, in 1978, tape recorders are often small machines and their presence might not be detected in some instances. For example, there have been many situations in which I have given speeches and during which members of the audience have used tape recorders. In the majority of those cases, I was not aware that the tape recorders were being employed. The presence of the recorders did not detract from my ability or that of other participants to engage in our presentations. Similarly, if the presence of a tape recorder does not detract from the

deliberative process of the Town Board, I believe that a general rule prohibiting the use of all tape recorders might be found to be unreasonable by a court.

Moreover, your letter indicates that a tape recorder may be used "for educational purposes." In this regard, a question must be raised: if the presence of a tape recorder used for educational purposes is not found to detract from the deliberative process, how can the use of a tape recorder for any purpose be found to detract from the deliberative process? In my opinion, if the board permits the use of a tape recorder in one circumstance, it must permit the use of tape recorders in all circumstances.

The remaining issues in your letter deal with questions concerning harassment and the powers of public bodies generally. Since I have no expertise in those areas, it would be inappropriate to conjecture or otherwise offer a response.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Town Board
Town of Warrensburg

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-208

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 17, 1978

Mrs. Ethel Benvenuto
[redacted]

Dear Mrs. Benvenuto:

Thank you for your interest in the Open Meetings Law. Your question concerns the propriety of executive sessions held by the Deer Park Board of Education.

I agree with your contention that a discussion of "personnel matters" may not be appropriate for executive session in all instances. The Committee believes that §100(1)(f), which pertains to personnel as well as other matters, was largely intended to protect personal privacy. Further, it has come to the Committee's attention that the exception in question has been used in many instances to discuss policy matters under the guise of personal privacy. To clarify the statute, the Committee has recommended remedial legislation in its second annual report to the Legislature (see attached).

Section 100(1)(f) of the Open Meetings Law states that a public body may enter into an executive session, which is defined as a portion of an open meeting during which the public may be excluded, to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

To reiterate, the Committee believes that the quoted provision was intended to protect individual privacy. As a consequence, it would appear that not all of the "personnel matters" to

which the agenda attached to your letter refers would be appropriate for executive session. For example, when discussing personnel matters regarding budget input, is the Board discussing individual employees, or is it discussing policy matters that may relate to employees? If it is the latter, I believe that the discussion should be held during an open meeting, except to the extent that public discussion would impair the progress of the collective bargaining process. Similarly, a request regarding the use of school district telephones may relate to personnel, but appears to be a policy question. As such, the discussion should have been held during an open meeting. The discussions regarding items (b) through (e) on the agenda also would not appear to fall within the scope of §100(1)(f) of the Open Meetings Law, for they do not deal with an employment history per se, nor under the terms of the agenda could they be classified as matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person. Consequently, executive sessions held to discuss those subjects appear to have been held contrary to the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc: Deer Park Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-209

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 17, 1978

Mr. John G. Linehan
Mr. James O. Kaiser
[redacted]

Dear Messrs. Linehan and Kaiser:

Thank you for your interest in the Open Meetings Law. Your inquiry pertains to a policy adopted by the William Floyd Board of Education that prohibits attendance by the news media at meetings of a "School-Community Council," which was created by the Board.

In my opinion, meetings of the School-Community Council are open not only to the news media, but to the public as well.

According to §160.01 of the policy adopted by the Board of Education, the Board has the authority to designate citizens and teachers to a standing committee known as the "School-Community Council." The policy statement further indicates that the members of the Council are appointed by resolution of the Board of Education. Based upon the means by which the Council was created, it is in my view clearly a public body subject to the Open Meetings Law.

"Public body" is defined by the Open Meetings Law as:

> "any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law" [§97(2)].

By breaking the quoted definition into its elements, one can conclude that the Council is indeed a public body subject to the Law. It consists of more than two members, it is required by §41 of the General Construction Law to act only by means of a quorum, and it performs a governmental function for a public corporation, in this instance a school district.

Moreover, recent decisions have held that advisory bodies having no capacity to take final action, but whose membership is designated by an executive or a governing body are public bodies subject to the Open Meetings Law (see e.g., Matter of MFY Legal Services, 402 NYS 2d 510; Pissare v. City of Glens Falls, Supreme Court, Warren County).

Since the Council is a public body subject to the Open Meetings Law, its meetings must be open to the public, notice must be given prior to meetings, and minutes and records of votes [see Freedom of Information Law, §87(3)(a)] must be compiled. It is emphasized that a record of votes must identify each member of the Council and the manner in which the vote was cast in every instance in which the member voted.

Enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, and the Committee's latest report to the Legislature on the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc: William Floyd Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-210

COMMITTEE MEMBERS
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T. ELMER BOGARDUS
MARIO M. CUOMO
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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 17, 1978

Ms. Jeanne Bear
Town Clerk
Town of Greenville
Box 97
Greenville, New York 12083

Dear Ms. Bear:

Your letter addressed to the Department of Audit and Control has been transmitted to the Committee of Public Access to Records, which is responsible for advising with respect to the Open Meetings Law.

Your inquiry pertains to the right of the public to tape record the meetings held by the Town Board of the Town of Greenville.

It is important to note that the Open Meetings Law is silent with regard to the ability of the public to tape record meetings of public bodies. To date, there has been but one judicial decision dealing with the subject. In Davidson v. Common Council of the City of White Plains [244 NYS 2d 385 (1963)], it was held that a public body has the authority to adopt reasonable rules to govern its own proceedings. Under the circumstances of that case, the court found that the presence of a tape recorder would detract from the deliberative processes of the Common Council. As such, the Court held that a rule adopted by the Common Council prohibiting the use of tape recorders at the meeting was reasonable.

Nevertheless, the circumstances described in your letter appear to be somewhat different from those presented in the Davidson case. It appears that the Town Board itself uses a tape recorder at its meetings to record its proceedings. In my opinion, if the presence of its tape recorder does not detract from the deliberative process, the presence of a tape recorder in the possession of a member of the public or the news media could not be found to detract from the deliberative process. I believe that a rule prohibiting the use of tape recorders

must be consistent in its application. Therefore, if, for example, the Town Board precluded its own members from using a tape recorder at a meeting, as was the case in Davidson, such a rule could be applied to members of the public as well. Here, however, the use of tape recording equipment by the Board in my view precludes the Board from prohibiting members of the public from using similar equipment to record the proceedings.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: Mr. Daniel N. Dickens
Director of Municipal Affairs
Examinations
State of New York
Department of Audit and Control

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-211

COMMITTEE MEMBERS
ELIE ABEL - Chairman
T. ELMER BOGARDUS
MARIO M. CUOMO
MARY ANNE KRUPSAK
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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 24, 1978

Professor Helen Clement
State University of New York
Agricultural and Technical College
Morrisville, New York 13408

Dear Professor Clement:

Your letter addressed to the Education Department has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law. Your inquiry concerns "the types of school board meetings that may be closed to the public and if notes are to be taken of the minutes of closed session meetings."

The Open Meetings Law, a copy of which is attached, states that all meetings must be convened as open meetings and that executive sessions may be held to discuss only those subjects specified in the Law [see Open Meetings Law, §100(1)(a) through (h)]. Consequently, a school board may not enter into an executive session to discuss any matter; on the contrary, it may enter into executive session only to discuss those matters set forth in the Law. In addition, a school board must follow the procedure described in §100(1) of the Law, which requires a public body to pass a resolution during an open meeting by a vote of a majority of its total membership that identifies the general area or areas of the subject or subjects to be considered prior to entry into an executive session.

It is noted, however, that §103 of the Law provides three exemptions. The three areas pertain to judicial or quasi-judicial proceedings, political caucuses and matters made confidential by federal or state law. In all likelihood, neither of the first two exemptions would be applicable with respect to the business of school boards. The third exemption, which deals with matters

made confidential by federal or state law, may arise if a board is discussing particular students. Under such circumstances, information identifying the students would be confidential under the federal Family Educational Rights and Privacy Act. Therefore a discussion of particular students would be exempt from the Open Meetings Law.

With regard to minutes or notes of discussion in executive session, although §100(1) of the Law generally permits public bodies to vote during a properly convened executive session, §104 (2) of the Law states that

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

One such provision of law is §1708(3) of the Education Law, which states that

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

Although the provision quoted above does not state specifically that school boards must vote publicly, case law has held that

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Section 1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law. Therefore, its effect is preserved and in my view, school boards can act only during an open meeting.

Finally, since §101(2) of the Open Meetings Law appears to require a compilation of minutes only when action is taken during executive session, and since school boards may not take action during executive session, a school board should never have minutes of executive sessions compiled under the Open Meetings Law, for all action must be taken publicly.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc: Donald O. Meserve

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-212

COMMITTEE MEMBERS
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T. ELMER BOGARDUS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 25, 1978

Ms. Joan Burkhardt
[redacted]

Dear Ms. Burkhardt:

Thank you for your interest in the Open Meetings Law. Your inquiry pertains to the manner in which the business of a town zoning board of appeals is conducted.

According to your letter, a town zoning board of appeals convenes and hears the presentation of arguments in public. However, after arguments are presented, the Board dismisses the public, deliberates, and arrives at its determinations privately. Moreover, your letter indicates that when a determination is made, the Board does not compile a voting record.

With respect to zoning boards of appeals generally, it is likely that portions of their proceedings are quasi-judicial in nature. To the extent that public bodies engage in quasi-judicial proceedings, such proceedings are generally exempt from the provisions of the Open Meetings Law [§103(1)]. Nevertheless, §105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §267(1) of the Town Law has long provided that all gatherings of town zoning boards of appeals "shall be open to the public." As such, although a town zoning board of appeals might in some instances act in a quasi-judicial capacity, §267(1) of the Town Law, which, under the circumstances, is less restrictive than the Open Meetings Law, requires that such meetings be open to the public.

Consequently, it is my view that the exemption for quasi-judicial proceedings is inapplicable with respect to town zoning boards of appeals.

Moreover, an informal opinion rendered by the Attorney General on October 18, 1977, arrived at the same conclusion and advised that the exemption in the Open Meetings Law regarding quasi-judicial proceedings cannot be invoked by a town zoning board of appeals.

Finally, the Freedom of Information Law requires that agencies maintain "a record of the final vote of each member in every agency proceeding in which the member votes" [§87(3)(a)]. Consequently, a town zoning board of appeals must compile and make available a voting record indicating the manner in which each member voted in every instance in which a vote was taken.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-213

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

COMMITTEE MEMBERS
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GILBERT P SMITH
ROBERT W SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 25, 1978

Mr. Lewis Rose
New York Public Interest
Research Group, Inc.
Box 70
Squire 311
SUNY Buffalo
Buffalo, New York 14214

Dear Mr. Rose:

Thank you for your interest in the Open Meetings Law. Your letter pertains to the practices of the College Council of the State University of New York at Buffalo.

Your inquiry raises two questions. First, is the Open Meetings Law applicable to the meetings of the College Council? And second, does the College Council have the ability to hold a closed executive session "without first identifying the general subjects to be discussed and without taking a formal vote of its membership"?

Based upon our telephone conversation as well as the news article appended to your letter, the College Council is clearly a public body subject to the Open Meetings Law. "Public body" is defined in §97(2) of the Open Meetings Law to include:

> "[A]ny entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

The Council consists of more than two members, it is required to act by means of a quorum pursuant to §41 of the General

Construction Law, and it performs a governmental function for the State University.

It is noted that two recent judicial decisions held that advisory bodies having no power to take action but merely the power to recommend were held to be public bodies subject to the Law [see Matter of MFY Legal Services, 402 NYS 2d 510; Pissare v. City of Glens Falls, Supreme Court, Warren County].

Since the Council is required to comply with the Open Meetings Law, it must follow the procedure set forth in §100(1) of the Law prior to entry into executive session. Specifically, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session..."

Moreover, paragraphs (a) through (h) of §100(1) specify and limit the subjects that may be discussed in executive session.

The area of controversy apparently is "disenchantment of the administration" with the current president of SUNY at Buffalo. However, prior to discussion of the issue, your letter indicates that the Chairman of the Council simply informed those in attendance that the public must be excluded on the ground that an executive session was about to be convened. Your letter further indicates that he "would not know what they were going to discuss until the session began." If your account of the situation is accurate, the Council and its Chairman violated the Open Meetings Law. First, the procedure required by §100(1) prior entry into executive session was not followed. Second, the subject matter for discussion would not have been appropriate for executive session, since it was not within the scope of any of the proper subjects for executive session enumerated in the Law.

It is also noted that a discussion of "salaries" without further explanation may not be a valid ground for entry into executive session. If the subject of salaries relative to collective bargaining negotiations [§100(1)(e)] or the areas for discussion appearing in §100(1)(f) of the

Law are present, an executive session would be proper. However, if neither §100(1)(d) nor (1)(f) can be properly invoked, the discussion must be held in public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: Mr. Robert I. Millonzi
Chairman, College Council

FOIL-AO-794
OML-AO-214

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 26, 1978

Robert C. Glennon, Esq.
State of New York
Executive Department
Adirondack Park Agency
P.O. Box 99
Ray Brook, New York 12977

Dear Bob:

Thank you for sending your draft of revisions regarding Agency rules and regulations. I attempted to contact you to discuss the proposals on several occasions without success.

First, although the Agency may promulgate rules regarding the Open Meetings Law, there is no need to do so. The Open Meetings Law is basically procedural in nature and there is in my view no need to reiterate what is already stated in the Law.

Nevertheless, I have two comments with respect to the proposal. The provision pertaining to executive sessions refers only to a vote of "Agency" members. However, the definition of "meeting" in a preceding section refers not only to the Agency, but also to "any committee, or other body consisting of Agency members, designees or members of the general public formally created by the Agency..." Therefore, if you promulgate rules regarding the Open Meetings Law, the reference to "Agency members" in the provision dealing with executive sessions should be altered to make reference to members of all public bodies that "transact business" for or on behalf of the Agency.

The last section, which pertains to exemptions, states that Agency deliberations on "projects or variances" are considered quasi-judicial and therefore outside the scope of the Open Meetings Law. In my opinion the exemption is overly broad. Would all deliberations regarding projects be considered quasi-judicial? Might not some of those discussions be classified as either quasi-legislative or administrative? Furthermore, as we have discussed,

the scope of what constitutes a quasi-judicial proceeding has not to the best of my knowledge been specifically defined. It is possible that deliberations regarding a variance may not be considered quasi-judicial since the granting of a variance is reflective of a privilege; rights per se are not involved. Although I tend to agree that deliberations regarding a variance would in the opinion of a court be considered quasi-judicial, there is no case law that specifically upholds the proposition.

I have but two comments with regard to the proposal concerning the Freedom of Information Law. First, much of the proposal is unnecessary for it merely restates statutory provisions. For example, the proposal defines "record" and specifies the grounds for denial that may be offered. In addition, the proposal seeks to define both "statistical tabulation" and "factual tabulation." When phrases such as those quoted are defined, there is a danger that the definitions will be more restrictive than the terms of the statute. Moreover, §87(2)(g)(i) of the Law makes reference to "statistical or factual tabulations or data"(emphasis mine). In my view, factual data might in the eyes of a court consist of something more than "a collection or orderly presentation" of statistical or factual information. I recommend that the two definitions in question be deleted.

Finally, subdivision (a)(5) of the section dealing with denial of access to records refers to records otherwise "exempt" pursuant to subdivision (2) of §87 of the Freedom of Information Law. I do not mean to be overtechnical. However, the Freedom of Information Law does not provide exemptions, but rather the ability to deny. The only "exemption" in the Law is found in §87(2)(a), which refers to records that are exempt from disclosure by statute. If records are not exempt under §87(2)(a), they may be deniable under the remaining provisions within §87(2).

Thanks again for sending a copy of your proposals. If you would like to discuss the matter, please do not hesitate to call.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-215

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

COMMITTEE MEMBERS
ELIE ABEL Chairman
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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 26, 1978

Mr. Christopher P. Lynch
WWSC
217 Dix Avenue
Glens Falls, New York 12801

Dear Mr. Lynch:

Thank you for your interest in the Open Meetings Law.

Your letter pertains to the decision rendered by Judge Soden in Pissare v. City of Glens Falls, which held that the Glens Falls Civic Center Commission, although advisory in nature, is a public body subject to the Open Meetings Law. Despite the holding, the court did not invalidate any of the proceedings of the Commission, for it found that the Commission's actions were merely advisory and that its recommendations could be rejected or ratified by the City Council of the City of Glens Falls.

The central question raised in your letter is whether an appellate court would modify Judge Soden's decision by invalidating action taken to date regarding the Civic Center project, due to violations of the Open Meetings Law. In all honesty, I cannot begin to conjecture with respect to action that might be taken by appellate courts. To the best of my knowledge, no court has yet asserted its discretionary authority under the Open Meetings Law to render "action taken" in violation of the Law null and void.

The phrase "action taken" is emphasized because it appears in the enforcement section of the Law (§102) and because a key question involves who in reality took action with respect to the project. As Judge Soden stated in his opinion:

> "[M]ost elected officials entrusted to manage local governments do not possess the experience or the expertise necessary and basic to make decisions in connection with a six million dollar Civic Center.

> Obtaining the voluntary services of community persons having some experience in the many faceted areas necessary for the proper erection of such a center is not only a mark of intelligence but also good government."

I agree with Judge Soden's contention. Nevertheless, it raises several questions. Did the City Council have the ability or expertise to intelligently consider the recommendations of the Commission? To what extent were the recommendations deliberated by the City Council? Were the recommendations accepted at face value, or was there dissension of the City Council regarding any or all of the issues presented? What is the connection, if any, between members of the Commission and the financial interests involved regarding the construction of the Civic Center? Did the Commission and the individual members thereof provide City officials with sufficient information to enable the officials to arrive at rational determinations?

If the City Council merely ratified or rubber-stamped the recommendations of the Commission, it might be argued that the Commission effectively acted in lieu of the City. If your allegations are accurate, i.e. that the majority of citizens in Glens Falls oppose the construction of the Center, that the feasibility study upon which City officials relied was "inadequate, misleading and factually inaccurate," and that taxpayers had virtually no input regarding the project, perhaps an appellate court would view the totality of the situation and compel the City to initiate deliberations anew after having invalidated action taken to date. Perhaps a court, viewing the situation in terms of perspective and the totality of circumstances, would rely upon a principle analogous to the doctrine of the "fruit of the poisonous tree." In terms of the Open Meetings Law, it is possible (I am not suggesting that it would be likely) that a court would determine that action validly taken by the City Council that was based upon recommendations conceived in violation of the Open Meetings Law are also invalid. As stated in the Newburgh case, the entire deliberative process is intended to be subject to the Open Meetings Law. Perhaps a court would invalidate action tainted by a violation of the Open Meetings Law that occurred in any step of the deliberative process, particularly in a situation in which public sentiment is opposed to a project for which the public will pay for years.

I like to think that the Open Meetings Law provides the public with the opportunity to become familiar with the governmental process and to determine whether its representatives are indeed representing them. As you have described the

situation, the public voice has not been heard, representatives of the public have taken action based upon inaccurate and incomplete information, and the Open Meetings Law appears to have provided an empty remedy.

I do not want to give you or anyone else false hopes. I have no idea of the manner in which appellate courts would respond to an appeal seeking invalidation of action taken to date regarding the project. The controversy is in my view unusual, for it deals largely with an advisory body rather than a governing body. Nevertheless, if the courts view the situation in terms of its totality and its seriousness to the taxpayers of Glens Falls, perhaps your arguments would not fall upon deaf ears.

If you would like to discuss the matter further, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-216

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 3, 1978

Robert I. Millonzi, Esq.
[redacted]

Dear Mr. Millonzi:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry concerns the propriety of entry into executive session during a meeting recently held by the College Council of the State University at Buffalo.

According to our discussion this morning, a motion was made to enter into executive session to discuss the possibility of the Council officially recommending the dismissal of Dr. Ketter, President of the University. After the motion was made, you, as Chairman, asked for its approval or rejection by the members of the Council. There being no objection to the motion, the Council thereafter convened an executive session to consider the matter.

As you have described the situation, the Council complied with the Open Meetings Law. First, the subject for discussion could appropriately be held in executive session pursuant to §100(1)(f), which enables public bodies to enter into executive session to discuss "matters leading to the...dismissal or removal of any person..." Second, the procedure required by §100(1) of the Law was followed. In relevant part, the cited provision states that:

> "[U]pon a majority vote of its total membership taken during an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session..."

Since the motion was made in public, identified the general area to be discussed and was carried unanimously by the Council,

the executive session under the circumstances presented appears to have been properly convened.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-217

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 5, 1978

Richard T. Haefeli, Esq.
McNulty, DiPietro, Nesci
& Haefeli
130 Ostrander Avenue
P.O. Box 757
Riverhead, New York 11901

Dear Mr. Haefeli:

Your letter addressed to Mr. James Cooper of the Department of Audit and Control has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law.

According to your letter, the Village of Westhampton Beach has published a schedule of the regular meetings of several public bodies in the Village. Your question is whether notice of regularly scheduled meetings published once in a local newspaper complies with §99 of the Open Meetings Law, or whether a notice must be published on a monthly basis.

In my opinion, in the case of regularly scheduled meetings, one notice to the news media providing the time and place of regularly scheduled meetings is sufficient, so long as there is a procedure whereby the public and the news media can be given notice of meetings other than those regularly scheduled. As such, under the circumstances, I do not believe that a monthly notice must be published.

In addition, since the Legislature distinguished between the public and the news media, it is suggested that a similar notice be posted conspicuously in one or more locations in order that the public may be continually apprised of the meetings of the public bodies identified in the published notice.

It is also noted that §99(3) of the Law specifically states that a notice in the nature of a legal notice need not be given. Consequently, notice to the news media, for example, may be accomplished in a variety of ways other than the publishing of a legal notice.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

cc: James C. Cooper

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-218
FOIL-AO-810

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 8, 1978

Ms. Felice Freyer
Assistant Editor
Harrison Independent
217 Harrison Avenue
Harrison, New York 10528

Dear Ms. Freyer:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. Your letter raises questions regarding both subjects, and I will attempt to deal with each of them.

First, according to your letter, the Harrison School Board two years ago appointed a "Citizens' Budget Committee", which is responsible for advising the Board, but which has no capacity to take final action or determine policy. In my opinion, the Committee is a public body subject to the Open Meetings Law that must comply with the Law in all respects.

Section 97(2) of the Open Meetings Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

The Committee is an entity consisting of more than two members which performs a governmental function for a public corporation, a school district. Although it does not consist of public officials, it is required to act by means of a quorum pursuant to §41 of the General Construction Law, which defines "quorum". Moreover, the leading judicial determination on the Open Meetings Law found that the term "transact" found within the phrase "transact public business" means merely "to discuss"; it does not

necessarily involve either an intent or capacity to take final action (see Ottaway Publications Inc. v. Council of the City of Newburgh, 401 NYS 2d 84). Further, recent determinations held that an advisory committee designated by the Governor and a citizens committee designated by a city council are public bodies subject to the Open Meetings Law, notwithstanding a lack of capacity to take final action (see respectively, Matter of MFY Legal Services 401 NYS 2d 510 and Pissare v. City of Glens Falls, Supreme Court, Warren County). In view of the foregoing, the Citizens' Committee is in my view required to open its meetings to the public and provide the requisite notice pursuant to §99 of the Open Meetings Law.

Second, while collective bargaining negotiations were ongoing, the Citizens' Committee presented to the School Board its recommendations regarding the teachers' contract, which you requested under the Freedom of Information Law. After having been denied access to the report, a contract settlement was reached. Nevertheless, according to your letter, the report of the Citizens' Committee was further denied on appeal on the ground that disclosure of the report would impair the progress of collective bargaining negotiations.

The situation described appears to present an issue of fact. The key question that must be answered is whether under the Freedom of Information Law disclosure of the report would impair collective bargaining negotiations and therefore be deniable on that basis under §87(2)(c) of the Law. If an agreement has essentially been reached and all that remains is the signing of a contract, it would appear that discussion of the Committee's report would have no adverse affects, since the negotiations have terminated. If, on the other hand, the negotiations were continuing and discussion would place the School District at a disadvantage, or if discussion would detract from the ability to negotiate an agreement, the report could justifiably be denied.

With respect to the time limit in response to an appeal, §89(4)(a) of the Freedom of Information Law requires that determinations on appeal be rendered within seven business days of receipt of an appeal. In addition, the Law requires agencies to transmit to this Committee copies of appeals as well as the determinations that ensue.

Third, your letter states that the Board of Education "will meet tonight in executive session" to discuss "personnel matters". However, it is your contention that the discussion will focus on whether or not to eliminate certain positions and that the names of specific employees will not be mentioned.

Since an executive session is a portion of an open meeting [see Open Meetings Law §97(3)], and since a public body cannot enter into executive session unless a motion is made during an open meeting which is passed by a majority vote of its total membership that identifies the general area or areas of proposed discussion, a public body cannot in my view determine in advance that it will conduct an executive session. Moreover, §100(1)(a) through (h) specifies and limits the subjects that may appropriately be considered in executive session. Relevant to your inquiry, §100(1)(f) states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment or removal of any person or corporation."

In this regard, in its second annual report to the Legislature on the Open Meetings Law, the Committee wrote that the quoted provision:

> "...should be asserted to protect privacy, rather than shield discussions regarding policy under the guise of privacy. For example, a distinction should be made between a situation in which a municipal board discusses the dismissal of public employees for budgetary reasons (a policy matter that should be publicly discussed) and a situation in which the board discusses dismissal of a particular employee because that person is not performing his or her duties adequately (a personnel matter that deals with the employment history of a named individual that may properly be discussed in executive session)."

As such, a discussion regarding budget cuts generally, as opposed to a discussion regarding the performance of specific employees, should in the opinion of the Committee be discussed during an open meeting.

With regard to the same meeting, I believe that the Board would be required to give notice of the meeting, notwithstanding its plans to enter into executive session.

You asked further whether actions taken during an unannounced meeting are legal. Only a court can determine this issue. Although §102 of the Open Meetings Law states that a

court may declare action taken in violation of the Law null and void, it need not.

And finally, you asked what a reporter can do, aside from going to court, "when she feels that she has been illegally excluded from a meeting or denied access to public documents". All that I can suggest is that the best way in my view to avoid controversies that arise under the Freedom of Information Law or Open Meetings Law is to become fully educated regarding those statutes. I would like to stress that the educational process should not be restricted to members of the news media; on the contrary, I believe that a lesser number of disputes would arise if government, the public and the news media were to become more familiar with the statutes. In addition to the educational process, persons with questions should do as you did in this instance--call or write to the Committee and seek assistance.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: School Board
Harrison School District

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-219

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 11, 1978

Mr. Robert E. Morris
[redacted]

Dear Mr. Morris:

Your letter addressed to the Education Department has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law.

Your first question pertains to the nature of subjects that may be discussed in executive session by a board of education. Relevant to your inquiry, I have enclosed a copy of the Open Meetings Law, which in §100(1) speoifies both the procedure for entry into executive session and the subjects appropriate for executive session. Unless the subject matter for discussion is consistent with one or more of the eight areas of discussion listed in §100(1)(a) through (h) of the Open Meetings Law, discussion should be held in full view of the public.

The second question deals with whether minutes of an executive session must be compiled and made available to the public. In this regard, §101 of the Open Meetings Law states that minutes must be compiled and made available in the case of action taken during both open meetings and executive sessions. With respect to minutes of open meetings, subdivision 1 of §101 states:

> "[M]inutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

With respect to minutes of an executive session, subdivision

two of §101 states:

> "[M]inutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..."

Nevertheless, it is emphasized that although public bodies may generally vote during properly convened executive sessions under §100, school boards may vote only during an open meeting. Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public"[Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school

boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

In addition, it is noted that §87(3)(a) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-220

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 12, 1978

Mr. John G. Linehan
[redacted]

Dear Mr. Linehan:

Thank you for your letter of May 3 as well as the materials appended to it.

Your first question pertains to the efforts of the William Floyd Board of Education to "impose censorship" upon you and whether investigation of such action falls within the jurisdiction of the Committee. In this regard, the Committee on Public Access to Records has no power to investigate. On the contrary, the staff of the Committee consists of myself and two secretarial assistants. Further, the major function of the Committee involves providing advice concerning the interpretation of the Freedom of Information Law and the Open Meetings Law. Consequently, the Committee has neither the authority nor the resources to initiate an investigation regarding the controversy. It is suggested, however, that you contact the State Education Department to determine whether the action taken by the School Board is justified.

Second, although you are no longer a member of any of the standing committees of the School Board, and, according to your letter, you are "being refused access to all school business", you may in my view assert your rights as a member of the public under the Open Meetings Law and attend the meetings of all standing committees. I believe that a similar rationale may be offered regarding the status of governmental committees and subcommittees as that which was offered in my previous letter regarding a citizens' advisory committee established by the Board. In addition, the transcript of debate in the Assembly that preceded passage of the Open Meetings Law included an exchange in which the question was raised on three occasions as to whether it was the intent that the definition

of "public body" include "committees, subcommittees and other sub-groups". In each instance in which the question was raised, an affirmative response was given. Therefore, in my view, which is based in part upon a clear statement of legislative intent, you have the right to attend meetings of standing committees of the Board of Education.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-816
OML-AO-221

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 16, 1978

Mr. Daniel F. Leary
[redacted]

Dear Mr. Leary:

Thank you for your letter of May 9 and the correspondence appended to it. I have also reviewed your letter of May 1 and the materials attached thereto.

Upon review of the opinion written by Alexander J. Hersha, Town Attorney for the Town of Onondaga, I agree with many of his contentions, but I continue to disagree with several of the statements that he made.

First, I recognize the distinction between minutes approved by a public body and unapproved minutes. Nevertheless, the amendments to the Freedom of Information Law pertain to all records in possession of an agency, whether they are categorized as "official" or otherwise. Section 86(4) of the Freedom of Information Law defines "record" to include:

> "...any information kept, held, filed, produced or 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."

In view of the quoted definition, virtually all information in the form of records in possession of the Town is subject

to rights of access. This is not to say that all records in possession of the Town are accessible, but rather that an agency cannot deny access merely by classifying records as "unofficial", for example.

Second, I am familiar with the opinions of the State Comptroller regarding the legal requirement that a town clerk must maintain custody of complete and accurate proceedings of each meeting of a town board. However, to the best of my knowledge, no opinion rendered by the Comptroller specifically pertains to rights of access to unapproved minutes. Nevertheless, at several gatherings during which I was present, representatives of the Office of Counsel to the Comptroller advised orally that unapproved minutes are accessible. The rationale for the advice was based in part on the provisions of §51 of the General Municipal Law, which has long stated that virtually all records in possession of municipalities are accessible.

Third, I agree with Mr. Hersha's contention that "it is nonsense for drafts or outlines of minutes to be widely disseminated so that the various members of the public who attend meetings can ask to have included in the minutes what they think they heard". In this regard, I believe that it is the duty of a town clerk to present in the form of minutes what he or she heard, independent of suggestions that might be made by members of the public or members of the Board. The clerk's rendition of the activities that transpired at a meeting should in my opinion be reviewed by the Board to determine the accuracy of facts presented. I do not believe that a member of the public or an individual member of a board can appropriately seek changes in draft minutes prepared by a town clerk on an ad hoc basic.

And fourth, although the term "minutes" is undefined, direction concerning the scope and content of minutes is found in §101(1) of the Open Meetings Law, which states:

> "minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

In view of the quoted provision, it is clear that minutes may but need not include reference to each comment made at a meeting by either a member of a board or a member of the public.

And finally, it remains my opinion that unapproved minutes of meetings in possession of a town clerk are accessible under the Freedom of Information Law. Again, it is suggested that by noting on unapproved minutes that they are non-final or draft, the public may be apprised that the minutes are subject to change and members of the board who may disagree with the contents of unapproved minutes are given a measure of protection, for they may seek to amend the draft at an ensuing meeting. In sum, if all interested parties, including the public and members of a board, are aware that unapproved minutes are subject to change, it is difficult from my perspective to envision potential harm as a result of disclosure.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: Alexander J. Hersha

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-222

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 16, 1978

Joseph R. Mulé, Esq.
Town Attorney
Town of Brookhaven
Office of the Town Attorney
475 E. Main Street
Patchogue, New York 11772

Dear Mr. Mulé:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry pertains to the status of the Handicapped Advisory Committee of the Town of Brookhaven under the Open Meetings Law.

According to your letter, the Handicapped Advisory Committee is "composed for the most part of interested residents of the Town who have been requested by the Town Board to serve in an advisory capacity". Your letter further states that the Handicapped Advisory Committee as well as other advisory committees that serve at the request of the Town Board have no authority to create policy or make final determinations.

Based upon the means by which the Committee was created, it is in my view a public body subject to the Open Meetings Law. "Public body" is defined by the Open Meetings Law as:

> "any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction Law" [§97(2)].

By breaking the quoted definition into its elements, one can conclude that the Committee is indeed a public body subject to the Law. It consists of more than two members, it is required by §41 of the General Construction Law to act only by means of a quorum, and it performs a governmental function for a public corporation, in this instance a town.

Moreover, two recent decisions have held that advisory bodies having no capacity to take final action, but whose membership is designated by an executive or a governing body are public bodies subject to the Open Meetings Law (see e.g., Matter of MFY Legal Services, 402 NYS 2d 510; Pissare v. City of Glens Falls, Supreme Court, Warren County).

Since the Committee is a public body subject to the Open Meetings Law, its meetings must be open to the public, notice must be given prior to meetings, and minutes and records of votes must be compiled [see Freedom of Information Law, §87(3)(a)]. It is emphasized that a record of votes must identify each member of the Committee and the manner in which the vote was cast in every instance in which the member voted.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-223

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 16, 1978

Mr. Thomas L. Hoffman
Chairman
The Committee for a Responsive
Park Commission
430 East 65th Street
New York, New York 10021

Dear Mr. Hoffman:

Thank you for your continued interest in the Open Meetings Law. Your letter pertains to the legality of executive sessions held by the Palisades Interstate Park Commission.

It is emphasized at the outset that it is difficult to conjecture as to the propriety of every aspect of the executive sessions, for the nature of discussion during the executive sessions is neither presented nor made clear by the minutes appended to your letter. For example, the minutes of the executive session of April 18, 1977 make reference to the presentation of particular proposals made by three potential concessionaires. It is possible that a discussion of the financial history of the concessionaires was discussed in executive session. If that was the case, an executive session would in my view have been proper [see Open Meetings Law, §100(1)(f)]. Nevertheless, it appears that a determination to expend public monies was made during executive session. If my interpretation of the minutes is accurate, the vote to appropriate public monies should have been accomplished in public. Section 100(1) of the Open Meetings Law states that public bodies may vote during a properly convened executive session, except in situations in which the body votes to appropriate public monies. In such situations, the vote must be held in public.

The second executive session to which your letter refers held on September 19, 1977 raises analogous questions. According to the minutes, the Commission decided to increase the salaries of the General Manager and his assistant and to increase the General Manager's expense allowance. Again, if the discussion dealt with the employment history of the General Manager and made reference to his performance, an executive session could properly be convened under §100(1)(f) of the Open Meetings Law. If, however, a determination to raise salaries was based upon budgetary considerations rather than the employment history of particular individuals, the discussion should in my opinion have been held during an open meeting.

Similarly, a discussion regarding an increase in the expense allowance of the General Manager appears to have been a policy consideration rather than a consideration of personal details concerning a particular employee. If the discussion of an increase in expense money was essentially a budgetary concern rather than a "personnel" matter, it should have been in my view held during an open meeting.

Further, even if the discussion could properly have been held in executive session, a vote to appropriate monies for higher salaries or an increase in an expense account should have been taken in public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

cc: Al Caccese, Counsel

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-224

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

May 19, 1978

Mr. Douglas L. Turner
Executive Editor
Courier Express
785 Main Street
Buffalo, New York 14240

Dear Mr. Turner:

Thank you for your continued interest in the Open Meetings Law. Your inquiry seeks a "ruling" regarding the propriety of holding closed caucuses "of fourteen of the fifteen members of the Buffalo Common Council in Room 1417 of the City Hall on May 10 and May 11 for the expressed purpose of deciding on what executive budget proposals to approve or not to approve." Further, based upon your letter and our conversation of May 17, the purposes of the gatherings are to review budget proposals on a line by line basis and to make what are essentially final determinations that are merely ratified at an ensuing open meeting.

It is noted at the outset that the Committee does not have the statutory authority to issue "rulings," but rather has only the capacity to advise.

The central issues raised by your inquiry involve the interpretations of the terms "meeting" and "public body," both of which are defined in §97 of the Open Meetings Law, as well as the term "quorum" and the scope of a "political caucus."

First, §97(1) of the Law defines meeting as "the formal convening of a public body for the purpose of officially transacting public business." Although the quoted provision is subject to conflicting interpretations due to the phrases "formal convening" and "officially transacting public business," the Committee has advised and the only appellate court determinations rendered to date have held that gatherings characterized as "work sessions," "planning sessions" and the like

during which public business is duscussed but no action is taken are indeed meetings subject to the Open Meetings Law [see e.g., Orange County Publications v. City of Newburgh, 401 NYS 2d 84, 60 AD 2d 409 and Koerner v. Board of Education, 401 NYS 2d 865, _____ AD 2d _____]. Moreover, the Orange County Publications decision expansively discussed the intent of the Open Meetings Law and held that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute...
>
> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance'...
>
> "The Open Meetings Law was obviously designed to assure the public's right to be informed. Accordingly, any private or secret meetings or assemblages of the Council of the City of Newburgh, when a quorum of its members is present and when the topics for discussion and eventual decision are such as would otherwise arise at a regular meeting, are a violation of the New York Open Meetings Law."

Based upon your description of the gatherings, it appears that the discussions are reflective of "the crystallization of secret decisions to a point just short of ceremonial acceptance" and it is clear that the discussion dealt with topics that "would otherwise arise at a regular meeting."

Second, "public body" is defined by §97(2) of the Open Meetings Law to include:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

The Common Council of the City of Buffalo is clearly a public body. However, reference is made in the definition of "public body" to the requirement of a "quorum." In this regard, it is noted that the definition of "quorum" has been in effect for nearly seventy years and requirements imposed by the definition have affected the manner in which public bodies have performed their business long before the enactment of the Open Meetings Law. Its language is in my opinion crucial to the controversy. Section 41 of the General Construction Law defines "quorum" as follows:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole of such persons of officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body

> or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

In view of the definition, one of the conditions precedent that must be met before a gathering can be characterized as a meeting is "reasonable notice" to all of the members. Stated differently, a public body cannot in my view exercise its duties unless reasonable notice of a meeting is provided to each member.

If your contention is accurate, i.e., that a gathering attended by fourteen of the fifteen members of the Common Council is held for the purpose of making what may be considered as binding decisions regarding the budget, it would appear that a failure to provide reasonable notice to the fifteenth member would result in illegality, for a public body cannot convene a quorum or otherwise perform its duties unless reasonable notice is given to all the members. Conversely, if notice if given to all of the members, but the fifteenth member opts not to attend, the gathering would be a meeting that must be open to the public under the Open Meetings Law.

Finally, §103(2) of the Open Meetings Law states that its provisions do not apply to "deliberations of political committees, conferences and caucuses..." Assuming that the fifteenth member of the Common Council is not given "reasonable notice" and does not attend the deliberations of the remaining fourteen members, can the gathering be considered a political caucus and therefore exempt from the Open Meetings Law?

In my opinion, the key word in the exemption is "political," and the key question is whether fourteen of the fifteen members gather for deliberations of a political nature or rather to "transact public business." As presented in your letter, "...what the Common Council has done is to eliminate one member, a republican, move the meetings from the council chambers and into Room 1417, and begin deliberating in secret for days at a time, on a line by line analysis of the people's business, including a raise for themselves." Under the circumstances, are fourteen members meeting as a "political" entity, or are they meeting as fourteen-fifteenths of a public body to discuss matters that cut across political party lines?

These are questions of fact which in my view can be determined only by a court.

To complicate matters, although the Law exempts a "caucus" from its provisions, the sense of the term is unclear. I have studied definitions of "caucus" appearing in several dictionaries, both legal and otherwise. To cite one among many to reach a desired conclusion would be ludicrous, for a second definition could readily be cited to reach a different conclusion. Since there are no judicial interpretations of the caucus exemption in the Open Meetings Law, the status of the gatherings is at this juncture conjectural. Moreover, based upon conversations with George Arthur, Majority Leader of the Common Council, and Patricia Pancoe of the Office of Corporation Counsel, a court order served on May 15 has resulted in opening the budget sessions central to the controversy that you have described.

Nevertheless, as you suggest in your letter, the caucus situation will continue to arise. I agree with your contention that a caucus of fourteen-fifteenths of the Council might often serve to make the open meetings that follow of minimal and only formal significance, for the Open Meetings Law, as stated in Orange County Publications, is intended to apply to every step of the deliberative process. Due to the overwhelming majority of one party, the deliberative process in this instance may effectively be closed by means of the caucus. But where can a line of demarcation be drawn? Should any result that may be reached be altered if the Council was composed of ten members of one party and five of another, or seven of one, seven of another, and one independent?

In conclusion, I would hope that the courts will interpret the Open Meetings Law in terms of the goals that it seeks to accomplish. Perhaps the Open Meetings Law, which may be characterized as "remedial" legislation, will be interpreted as courts have construed remedial statutes in other areas - in a liberal manner in order that the ends of such legislation can be achieved. Despite my inclination to do so, I cannot in good faith and without hesitation advise that a gathering of fourteen members of the Common Council without notice to the fifteenth member constitutes a meeting subject to the Open Meetings Law. Very simply, the issues raised regarding the status of a political caucus must be decided judicially.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
cc: George Arthur
Patricia Pancoe, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS
DEPARTMENT OF STATE 162 WASHINGTON AVENUE, ALBANY NEW YORK 12231
(518) 474 2518 2791

COMMITTEE MEMBERS
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GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 9, 1978

Mr. James Vacca
[redacted]

Dear Mr. Vacca:

Thank you for your letter of June 1. Your inquiry pertains to the ability of a New York City community planning board to elect its officers by means of a secret ballot vote.

The first question that must be answered is whether a community planning board is a public body subject to the Open Meetings Law. Section 97(2) of the Open Meetings Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

A community planning board is an entity that consists of more than two members, is required to act only by means of a quorum (see General Construction Law, §41), and performs a governmental function for a public corporation, in this instance the City of New York. As such, a community planning board is a public body subject to the Open Meetings Law.

Second, is a community planning board an agency subject to the provisions of the Freedom of Information Law? Section 86(3) of the Freedom of Information Law defines "agency" to include:

> "...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."

Since §84 of the New York City Charter provides that community planning boards are created by the City Planning Commission and are comprised of both governmental officials and appointees of a borough president, a community board is a governmental entity that performs a governmental function for New York City. Therefore, a community planning board is an agency subject to the Freedom of Information Law.

Third, §87(3)(a) of the Freedom of Information Law states that each agency shall maintain:

> "a record of the final vote of each member in each proceeding in which the member votes..."

Stated differently, the cited provision of the Freedom of Information Law requires each agency to compile a voting record identifiable to each member in each instance in which a vote is taken. Consequently, the Freedom of Information Law precludes public bodies, including community planning boards, from voting by secret ballot.

In sum, a community planning board is in my opinion subject to both the Freedom of Information Law and the Open Meetings Law, and an election of its officers must be recorded in a manner which identifies each member and his or her vote.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-226

MITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 13, 1978

Mr. Michael W. O'Connor
Town Clerk
Town of Greenburgh
Box 205
Elmsford, New York 10523

Dear Mr. O'Connor:

Thank you for your interest in complying with the Open Meetings Law. Your question pertains to the status of a town clerk with respect to executive sessions held by a town board.

It is important to note at the outset that "executive session" is defined as a portion of an open meeting during which the public may be excluded [see attached Open Meetings Law, §97(3)]. In addition, §100, which pertains to the conduct of executive sessions, specifically provides that "[A]ttendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." As such, although a public body may permit a clerk to attend an executive session, it need not. I recognize that the duties of the town clerk include the compilation of minutes and that the Open Meetings Law requires that minutes of executive sessions be compiled when action is taken during executive session. In this regard, perhaps you and the Town Board may devise an agreement under which the members of the Board could deliberate in executive session and summon you to the executive session when action will be taken in order that you can record the motion and the vote.

Your letter also deals with notice that must be given prior to meetings. Section 99 of the Open Meetings Law requires that notice be given to the public and the news media at least 72 hours prior to meetings that are scheduled at least one week in advance. In the case of a meeting scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. If, for example, the Town Board intends to hold an

unscheduled or special meeting, the notice requirements may in my opinion be accomplished by means of posting a notice for public inspection in one or more conspicuous locations, such as an official town bulletin board, and by informing more than one member of the news media in the vicinity of the Town that a meeting will be held at a specific time and place.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Att.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-227

COMMITTEE MEMBERS
ELIE ABEL - Chairman
T. ELMER BOGARDUS
MARIO M. CUOMO
MARY ANNE KRUPSAK
HOWARD F. MILLER
JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 13, 1978

Ms. Lorraine Metski
[redacted]

Dear Ms. Metski:

Thank you for your interest in the Open Meetings Law. Your inquiry raises several questions regarding compliance with the Open Meetings Law by the Center Moriches Union Free School District No. 33 and its school board, and I will attempt to answer each of them.

It is important at the outset to provide a brief description of the structure of the Open Meetings Law.

The Law is based upon a presumption that all meetings of public bodies are open to the public. Although public bodies may discuss matters behind closed doors, the phrase "executive session" is defined as a portion of an open meeting during which the public may be excluded [see attached, Open Meetings Law, §97(3)]. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. Furthermore, §100(1) specifies and limits the subjects that may appropriately be discussed in executive session, and provides the procedure that must be followed by public bodies before they may enter into executive session. In this regard, the cited provision states that a public body may enter into an executive session "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered..." As a general matter, once a public body has entered into executive session it may vote in executive session, except in situations in which there is a vote to appropriate public monies. It is emphasized, however, that the preceding statement is generally applicable, but that it

does not apply to union free school districts for reasons that will be described later.

At this juncture, I would like to deal with your questions.

First, may the Board continually adjourn a public meeting, enter into executive session "to discuss personnel," and then reopen the meeting as soon as the public leaves? In my opinion, when a meeting has been adjourned, the act of adjournment closes the meeting. Under such circumstances, a public body must reconvene an open meeting in order to enter into executive session. This rationale is based upon the notion that an executive session is a portion of an open meeting. Moreover, an executive session "to discuss personnel" may not be appropriate under all circumstances. It is true that §100(1)(f) of the Open Meetings Law states that a public body may enter into executive session to discuss:

> "the medical, financial, credit, or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation."

Nevertheless, many discussions relative to personnel should in my view be discussed in full view of the public. It is the Committee's contention that the provision quoted above is intended to protect personal privacy. Consequently, although a discussion regarding the firing of a teacher due to his or her inability to perform adequately may be discussed in executive session, a discussion concerning a possible reduction in staff due to budgetary considerations, a policy matter, should be discussed in public. Further, your letter cites specific portions of minutes in which motions were made to enter into executive session. In none of the cases is a reason provided for entry into executive session. As stated previously, §100(1) of the Law requires that the subject matter intended to be discussed in executive session be included within a motion to enter into executive session.

Second, may a closed "special meeting" be held for the purpose of discussing a proposed high school project, and may the Board adopt and revise a budget regarding the project during a closed special meeting? In this regard, although the definition of "meeting" is unclear [see §97(1)],

the Committee has advised and the only appellate court decisions rendered to date have held that any gathering of a public body that is preceded by reasonable notice to each of the members for the purpose of discussing the business of the body is a meeting that must be open to the public. Therefore, the special meeting described in your letter should have been open. Moreover, §99 of the Law requires that notice be given to the public and the news media before all meetings, whether regularly scheduled or otherwise. The status of the votes taken during the special meeting will be discussed in ensuing paragraphs.

Third, may a board authorize changes in a general contract budget in executive session or waive a bidding requirement for repairs over $5,000 due to an "emergency"? With respect to the waiver of bidding requirements, I am not equipped to respond, for the question is outside the area of my expertise. However, the votes in executive session regarding the budget and the waiver should in my view have been taken during an open meeting.

Fourth, may a school board discuss its budget in executive session? Your letter makes reference to a portion of the minutes that describes budget requests made by a head custodian regarding the "general operation of the custodial staff," maintenance schedules and procedures. In my opinion, the discussion to which you referred should have been held during an open meeting, for its subject matter was not consistent with any of the grounds for executive session listed in paragraphs (a) through (h) of §100(1).

Fifth, may a school board discuss "centralization" during an executive session? Again, it appears that the subject of centralization is policy concern which must be discussed publicly since none of the exceptions for executive session could appropriately be envoked.

And sixth, as I interpret your letter, your final question is whether a school board may pay bills during an executive session. I do not believe that actions such as the payment of bills during executive session are proper. The subject matter of such discussions does not appropriately fall within any of the grounds for executive session.

As noted earlier, the Open Meetings Law generally permits public bodies to vote during a properly convened executive session. Nevertheless, school boards of union free school districts are required to vote in public in all instances. Section 105(2) of the Open Meetings Law

states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

In addition, it is noted that §87(3)(a) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: John Vonasek

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-228

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 21, 1978

Mr. Robert A. Kunkel
Councilman
Town of Newburgh
15 Sarvis Lane
Newburgh, New York 12550

Dear Mr. Kunkel:

Thank you for your interest in complying with the Open Meetings Law. Your question deals with the status of closed "work sessions" held by the Town Board of the Town of Newburgh.

Central to the question raised is the interpretation of the definition of "meeting," which appears in §97(1) of the Law. In this regard, the Committee dealt with the issue in its first report to the Legislature as follows:

> "The Law defines 'meeting' as 'the formal convening of a public body for the purpose of officially transacting public business.' Numerous questions have arisen regarding this definition, particularly with respect to the phrases 'formal convening' and 'officially transacting public business.' Many reports indicate that the two phrases have been used by public bodies as a means of circumventing the Law. Several public bodies have adopted practices whereby they meet as a body in closed 'work sessions,' 'agenda sessions,' 'organizational meetings' and the like, during which they discuss public business but take no action. It is during these 'work sessions' that the true deliberative process which is at the heart of the Open Meetings Law occurs. Stated simply, if work sessions and the like are closed to the public, the Open Meetings Law may in many cases be all but meaningless.

> "It is the opinion of the Committee that 'meeting' should currently be construed to include any situation wherein each member of a public body is given reasonable notice that the body will meet at a specific time and place and that, following notification, at least a quorum of the body convenes for the purpose of discussing public business. As such, the Committee believes that 'work sessions' and similar gatherings are meetings within the scope of the Law."

The Committee's second annual report to the Legislature reaffirms the expansive interpretation of "meeting" and is bolstered by the leading judicial opinion on the subject, which held that work sessions held by the Council of the City of Newburgh are in fact meetings that must be open to the public. Enclosed is a copy of that decision, which discusses the definition of "meeting" expansively and directs that any private or secret meeting or assemblage of the Council of the City of Newburgh must be open to the public when a quorum of the Council is present for the purpose of discussing matters that would otherwise arise at a regular meeting.

Your letter also pertains to the action that you may take to force the Town Board to open all meetings including "work sessions" to the public and the news media. In my opinion, the first step to be taken should involve efforts to educate members of the Town Board regarding the provisions of the Open Meetings Law. Upon review of the Law as well as the attached decision, perhaps the remainder of the Town Board will opt to open its work sessions. If attempts to persuade fail, you may seek to enforce the Open Meetings Law and initiate judicial proceedings pursuant to §102 of the Law. Under §102, if, for example, a public body takes action behind closed doors that should be taken during an open meeting, a court has discretionary authority to render determinations made in violation of the Law null and void. In the alternative, you may seek injunctive relief that would prohibit the Board from meeting in closed work sessions.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-229

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 22, 1978

Commissioner Fred H. Morris
Suffolk County
Human Rights Commission
Veterans Highway
Hauppauge, New York 11787

Dear Commissioner Morris:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry pertains to the status of a resolution passed during an executive session by the Suffolk County Human Rights Commission.

Although your letter seeks a "ruling" by the Committee, it is emphasized at the outset that the Committee cannot "rule." An opinion rendered by this office is solely advisory.

According to the materials appended to your letter, the Commission resolved:

> "That no public statements (sic) be made by any commissioners or staff unless approved first by the chairperson."

The legality of the resolution is in my view questionable in terms of content as well as the means by which it was adopted.

Your memorandum of May 24 to the Chairperson of the Commission indicates that the resolution was adopted during an executive session. In this regard, it is noted that the Open Meetings Law provides that all meetings of public bodies, such as the Human Rights Commission, must be open to the public, except in situations in which an executive session may be convened [see attached, Open Meetings Law, §98(a)]. An executive session, which is defined as a

portion of an open meeting during which the public may be excluded [§97(3)], may be held only after having followed the procedure set forth in §100(1) of the statute. In relevant part, §100(1) states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

The ensuing language of §100(1) limits and specifies the areas of discussion appropriate for executive session.

Upon review of the subjects that may be considered in executive session, it is my opinion that none could be appropriately raised for entry into executive session with respect to the resolution in question. The resolution is reflective of a policy concern regarding the conduct of the members of the Commission in the performance of their duties and is in my view outside the scope of discussion permitted in executive session. If my contentions are correct, the resolution was adopted in violation of the Open Meetings Law.

Further, §102 of the Law states that an aggrieved person may challenge a violation of the Open Meetings Law by initiation of judicial proceedings. Under the circumstances, you could argue that the Commission acted in executive session in violation of the Law and request that the court render the resolution null and void.

In terms of the substance of the resolution, the Open Meetings Law has only tangential relevance. Although the restriction contained in the resolution raises questions regarding rights granted by the First Amendment to the United States Constitution, it likely has little relation to the Open Meetings Law, unless the resolution is interpreted and followed in a literal manner. The Open Meetings Law is applicable only to the conduct of meetings of public bodies; it has no application to the activities of members of public bodies outside the confines of a meeting. However, since the Law requires that all meetings be convened as open meetings, and since members of the Commission presumably seek to make public statements during open meetings, an extreme interpretation of the resolution would preclude

members of the Commission from speaking at meetings without prior approval of the Chairperson. It is doubtful that the intent of the resolution is to preclude comment by Commission members at meetings; however, its thrust in my opinion is contrary to the intent of the Open Meetings Law. As stated by the Appellate Division, Second Department:

> "[O]bviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" [Orange Pub. v. Newburgh, 60 AD 2d 409, 415 (1978)].

Moreover, I believe that public bodies have been created in order to enhance discussion, deliberation and debate among individuals whose duty is to decide collectively in the hope that the deliberations leading to decisions will result in better decisions. Stated differently, the creation of entities consisting of several members presupposes disagreement and disparate points of view among the members. If there was no such intent behind the creation of public bodies, there would be no public bodies; individual decision-makers, executives, would be designated in their stead.

In sum, while there may be only an indirect relationship between the Open Meetings Law and the resolution, I believe that the restrictive aspects of the resolution are contrary to the thrust of the Open Meetings Law and the rationale for the creation of public bodies generally.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: Chairperson E. Guanill

Commissioner Rabbi Spar

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-230

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 26, 1978

Mr. Jacob E. Gunther
Board of Police Commissioners
City of Middletown
Middletown Police Department
2 James Street
Middletown, New York 10940

Dear Mr. Gunther:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry pertains to the relationship between the Open Meetings Law and the policy adopted by the Middletown Police Commission, which was created by Chapter 339 of the laws of 1942.

According to your letter, since the creation of the Commission, it has been the policy to hold all meetings "on an executive session basis" to all but members of the Commission or those invited. I have reviewed Chapter 339 of the laws of 1942, but I have not found any direction in the statute that specifically provides that the meetings of the Commission may be closed to the public. Consequently, despite the long-standing policy of the Commission, it is in my opinion subject to the Open Meetings Law in all respects.

I recognize that most of the matters discussed by the Commission could appropriately be discussed during executive session pursuant to §100(1) of the Open Meetings Law. Specifically, §100(1)(f) of the Law states that a public body, such as the Commission, may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion,

> demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Nevertheless, the Law specifically provides that an executive session is a portion of an open meeting during which the public may be excluded. Therefore, although the majority of the Board's discussions may be held during an executive session, the meeting must be convened as an open meeting. Further, the procedure for entry into executive session required by §100(1) must be followed, and the Board must comply with the provisions regarding notice appearing in §99 of the Open Meetings Law.

In sum, it appears that the majority of discussions held by the Board may properly be conducted during an executive session as defined by the Open Meetings Law. However, since an executive session may be held only after having convened an open meeting, the Board must in my opinion initiate its proceedings open to the public and then enter into executive session in conjunction with §100 of the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-231

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 6, 1978

Mr. Donald Brichta
Wayne County Bureau Chief
One Montezuma Street
Lyons, New York 14489

Dear Mr. Brichta:

Thank you for your continued interest in compliance with the Open Meetings Law. Your inquiry deals with the propriety of an executive session held by the Lyons Town Board.

According to your letter and our ensuing telephone conversation, an executive session was convened to discuss the status of some 300 grievances submitted by owners of real property whose assessments had been raised. It was specified that the executive session did not deal with any of the grievances individually, but rather with the means by which the Town Board could deal with the flood of grievances generally. Your letter further indicates that the executive session was based upon the notion that the filing of grievance forms is the "initial step in a legal proceeding to review property assessments" and that, therefore, the discussion dealt with "pending litigation."

Although §100(1)(d) permits a public body to enter into executive session to discuss "proposed, pending or current litigation," the subject matter for discussion was in my view outside the scope of any of the grounds for entry into executive session listed in §100(1)(a) through (h) of the Open Meetings Law. In my opinion, the discussion did not involve "litigation," either proposed or pending. According to both ordinary and legal dictionaries, the term "litigation" involves a judicial contest, an act of carrying on a suit in a court of law. In this instance, while the filing of a grievance may be a condition precedent to the initiation of a judicial challenge to an assessment, that act alone does not

constitute the commencement of litigation, for no judicial contest is involved. Further, I do not believe that filing a grievance may be considered as proposed litigation. I believe "proposed" in the context of the Open Meetings Law is intended to mean "imminent." Under the circumstances, litigation could not be either proposed or imminent until a determination following an appeal is rendered. As such, the filing of a grievance in my view constitutes neither proposed nor pending litigation. Consequently, the ground for entry into executive session was in my opinion inappropriate and outside the scope of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Town Board

Richard W. Youngman, Town Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-861
OML-AO-232

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 6, 1978

Mr. John P. O'Toole
[redacted]

Dear Mr. O'Toole:

Your letter addressed to Attorney General Lefkowitz has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law and Open Meetings Law. Your inquiry pertains to the ability of a New York City community planning board to elect its officers by means of a secret ballot vote.

The first question that must be answered is whether a community planning board is a public body subject to the Open Meetings Law. Section 97(2) of the Open Meetings Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

A community planning board is an entity that consists of more than two members, is required to act only by means of a quorum (see General Construction Law, §41), and performs a governmental function for a public corporation, in this instance the City of New York. As such, a community planning board is a public body subject to the Open Meetings Law.

Second, is a community planning board an agency subject to the provisions of the Freedom of Information

Law? Section 86(3) of the Freedom of Information Law defines "agency" to include:

> "...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."

Since §84 of the New York City Charter provides that community planning boards are created by the City Planning Commission and are comprised of both governmental officials and appointees of a borough president, a community board is a governmental entity that performs a governmental function for New York City. Therefore, a community planning board is an agency subject to the Freedom of Information Law.

Third, §87(3)(a) of the Freedom of Information Law states that each agency shall maintain:

> "a record of the final vote of each member in each proceeding in which the member votes..."

Stated differently, the cited provision of the Freedom of Information Law requires each agency to compile a voting record identifiable to each member in each instance in which a vote is taken. Consequently, the Freedom of Information Law precludes public bodies, including community planning boards, from voting by secret ballot.

In sum, a community planning board is in my opinion subject to both the Freedom of Information Law and the Open Meetings Law, and an election of its officers must be recorded in a manner which identifies each member and his or her vote.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-233

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 12, 1978

Mr. Thomas C. Milone
Student Member
Morrisville College Council
Box 517
Morrisville, New York 13408

Dear Mr. Milone:

Your letter addressed to the Attorney General has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law.

Your letter indicates that you are the Student Member of the College Council of the State University of New York Agricultural and Technical College at Morrisville. According to your letter, a special meeting of the College Council was in your opinion held in violation of §356 of the Education Law and the Open Meetings Law. Your opinion is based upon allegations that you were not given notice of a special meeting and that notice of the meeting was not given to either the public or the news media. Finally, you allege that the meeting was illegal due to its location in Cazenovia, as opposed to the campus at Morrisville.

In my opinion, failure to provide notice to you may have been valid, but failure to give notice to the public and the news media likely constituted a violation of the Open Meetings Law.

Subdivision (3) of §356 of the Education Law states that:

> "[T]he councils of state-operated institutions shall provide for regular meetings, and the chairman, or any five voting members by petition, may at any time call a special meeting of the council

> and fix the time and place therefor. At least ten days notice of every meeting shall be mailed to the usual address of each member, unless such notice be waived by a majority of the council. Five voting members attending shall constitute a quorum for the transaction of business and the act of a majority of the members present at any meeting shall be the act of the council."

In view of the quoted provision, it appears that notice to a member may be waived under the specified circumstances. As such, the factual circumstances surrounding the means by which the special meeting was convened are the factors that determine whether or not you were illegally excluded from a meeting. If notice was waived in accordance with subdivision (3), it appears that there was no illegality with respect to failure to provide notice to you.

Nevertheless, §99 of the Open Meetings Law (see attached) requires that a public body provide notice to the public and the news media prior to any meeting of the body, whether the meeting is special or regularly scheduled. If indeed no notice was given in conjunction with §99, the Open Meetings Law was in my opinion violated.

With respect to the site of the meeting, the question is whether holding a meeting in Cazenovia as opposed to Morrisville was reasonable. Due to the proximity of the two communities, and without knowledge of circumstances surrounding a decision to hold the meeting in Cazenovia, it would be in appropriate to conjecture as to the propriety of the site of the meeting.

Your letter also requests that "an investigation be conducted into this matter and that legal action be taken to declare the Council's actions at the special meeting null and void and to enjoin the Council from similar unlawful conduct in the future." In this regard, it is noted first that the Committee has only the authority to advise; it has neither the statutory authority nor the staff capability to investigate. Second, the Committee cannot initiate a judicial proceeding to compel compliance with the Open Meetings Law. As stated in §102 of the Open Meetings Law, an "aggrieved person" may initiate a judicial proceeding to challenge the legality of a meeting or enjoin a public

body from closing future meetings. And third, §102 of the Open Meetings Law further states that "an unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body." If there was an inadvertent failure to provide notice, such failure alone could not be cited as a ground for nullifying action taken by the Council. Moreover, what is "unintentional" appears to involve a question of fact that must be decided judicially.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: College Council

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-234

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 12, 1978

Mr. Everett Seastrum
[redacted]

Dear Mr. Seastrum:

Your letter addressed to Attorney General Lefkowitz has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law.

Your inquiry involves a situation in which the Board of Education of the Frewsburg Central School District elected its officers after having discussed the matter in executive session. Your letter raises several questions regarding the propriety of the executive session as well as others, all of which I will attempt to answer.

First, the Open Meetings Law requires that all meetings of public bodies be convened as open meetings. The phrase "executive session" is defined in §97(3) of the Open Meetings Law (see attached) as that portion of a meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof.

Second, §100(1) of the Law provides a procedure that must be followed by public bodies prior entry into executive session. Specifically, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Consequently, a public body cannot enter into executive session to discuss the subject matter of its choice, for discussion in executive session is limited to those subjects listed in paragraphs (a) through (h) of §100(1).

Relevant to your inquiry, §100(1)(f) states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

In my opinion, the election of officers by a school board does not fall within the scope of the provision quoted above. Further, it does not in my view fall within the scope of any of the subjects for executive session listed in the Law. Consequently, I believe that the discussion to which you referred should have been held during an open meeting.

You asked whether a school board must maintain a record of the questions discussed in executive session and make such a record available for public inspection. As stated previously, a public body must identify the general areas that will be discussed in executive session in its motion to enter into executive session. Such a motion must be recorded as part of the minutes of an open meeting [see §101(1)]. Nevertheless, although §101(2) requires that minutes of executive sessions be compiled, the minutes must include only a record of action taken by formal vote and the date and vote thereon. Consequently, a record regarding an executive session need not include reference to specific questions discussed during an executive session.

Section 102 of the Law enables any aggrieved person to challenge violations of the Open Meetings Law. For example, if it is contended that action was taken by a public body during an executive session in violation of the Law, that person may request that the court declare such action null and void. Further, if there are repeated violations of the Law, an aggrieved person may seek an injunctive relief to preclude a public body from holding a closed work session, for example. Moreover, a court has the ability to award reasonable attorney fees to the victorious party in any proceeding.

Finally, your letter makes reference to closed "work sessions." In this regard, the Committee has consistently advised that work sessions are meetings that must be open to the public. Furthermore, the only appellate court decisions rendered to date have upheld the notion that work sessions are open meetings that must indeed be open to the public.

Enclosed is a copy of the Committee's second annual report to the Legislature on the Open Meetings Law, which discusses the status of work sessions at some length and cites judicial decisions on the subject. Copies of both the Open Meetings Law and the report to the Legislature are enclosed to you and will be sent to Mr. Marra.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Solicitor General

S. Ralph Marra

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-235

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 14, 1978

Mr. Jacob E. Gunther
Board of Police Commissioners
City of Middletown
Middletown, New York 10940

Dear Mr. Gunther:

Thank you for your letter of July 7. Your inquiry once again pertains to the status of the Middletown Board of Police Commissioners under the Open Meetings Law.

I would like to emphasize at the outset that I am sympathetic to the plight of the Board and cognizant of practices that have long been in effect and the purposes for which the Board was created. Nevertheless, my duty is to provide advice in a manner believed to be correct.

Your letter quotes portions of §129 of the Middletown City Charter, which was enacted by the State Legislature and which in relevant part gives the Board power:

> "[T]o regulate its organization as a board and to establish the times and places for the holding of meetings, and in general to prescribe, amend, modify and repeal rules and regulations concerning such organization, the conduct of its meetings, and the carrying out of the duties and powers vested in it."

Based upon the foregoing, regulations have indeed been adopted to permit closed meetings.

Prior to the enactment of the Open Meetings Law, the Board could undoubtedly adopt rules and regulations for closing its meetings pursuant to the authority conferred by §129. However, I believe that the Open Meetings Law supersedes such rules and regulations.

Central to the issue is §105 of the Open Meetings Law, which deals with construction of the Open Meetings Law with other laws. Specifically, subdivision (2) of the cited section states that:

> "[A]ny provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded to the extent that such provision is more restrictive than this article."

If the Charter itself had specifically provided for closed meetings, its effect would be preserved, for the Charter has the status of a statute due to the circumstances of its enactment. However, since the provisions for closed meetings appear in regulations rather than the Charter itself, such regulations are according to §105(1) in my opinion superseded to the extent that they are more restrictive than the Open Meetings Law.

Once again, although I recognize the difficulty of your situation, a review of the provisions of law relevant to the controversy requires that my initial opinion of June 26 be reiterated.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-236

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 2, 1978

Mr. Richard C. Elliott
Community Coordinator
State of New York
Temporary State Commission
on Tug Hill
N.Y.S. Office Building
317 Washington Street
Watertown, New York 13601

Dear Mr. Elliott:

Thank you for your interest in the Open Meetings Law. Your question concerns the ability of a town board to pass a resolution precluding the public from tape recording its meetings.

It is important to note that the Open Meetings Law is silent with regard to the ability of the public to tape record meetings of public bodies. To date, there has been one judicial decision dealing with the subject. In Davidson v. Common Council of the City of White Plains [244 NYS 2d 385 (1963)], it was held that a public body has the authority to adopt reasonable rules to govern its own proceedings. Under the circumstances of that case, the court found that the presence of a tape recorder would detract from the deliberative processes of the Common Council. As such, the Court held that a rule prohibiting the use of tape recorders at the meeting was reasonable.

Nevertheless, the Davidson case was decided in 1963. As everybody is aware, technology in the area of tape recording devices has advanced markedly. In 1963, tape recorders were cumbersome and their presence was readily evident. However, in 1978, tape recorders are often small machines and their presence might not be detected in some instances. For example, there have been many situations in which I have given speeches and during which members of the audience have used tape recorders. In the majority of those cases, I was not aware

that the tape recorders were being employed. The presence of the recorders did not detract from my ability or that of other participants to engage in our presentations. Similarly, if the presence of a tape recorder does not detract from the deliberative process of the Town Board, I believe that a general rule prohibiting the use of all tape recorders might now be found to be unreasonable by a court.

If, however, such a resolution is indeed found to be valid, I do not believe that it would be required to be renewed annually.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-237

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 3, 1978

Mr. Joseph J. Carrus
Dunkirk School Board
775 Main Street
Dunkirk, New York 14048

Dear Mr. Carrus:

A copy of your letter of July 18 has been transmitted by James C. Cooper, Associate Counsel to the Department of Audit and Control, to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law. I believe the first question raised in your letter was answered by Mr. Cooper. Consequently, I will respond only to the second.

Your question is whether a school board has the right to make a decision to remove a public employee during an executive session.

The Open Meetings Law, a copy of which is attached, provides that all meetings of public bodies must be convened as open meetings. The phrase "esecutive session" is defined as a portion of an open meeting during which the public may be excluded [§97(3)]. As such, it is clear that an executive session is not separate and distinct from a meeting, but rather is a portion thereof. Further, §100(1) specifies the procedure for entry into executive session and limits the areas of discussion that may be held during executive sessions. Relevant to your inquiry, §100(1)(f) states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the circumstances, a discussion regarding the removal of a public employee would be a proper subject for executive session.

As a general matter, once a public body has appropriately convened an executive session, it may vote in executive session except in situations in which the vote involves the appropriation of public monies. Nevertheless, school boards may in my view vote only during an open meeting. Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its

effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

In addition, it is noted that §87(3)(a) of the Freedom of Information Law (see attached) requires all public bodies to compile and make available a voting record identifiable to every member of the public body in every instance in which the member votes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: James C. Cooper

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 879
OML-AO-238

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 3, 1978

Mr. Wallace M. Vog
Executive Director
New York State Advisory
Council on Vocational Education
1610, 99 Washington Avenue
Albany, New York 12230

Dear Mr. Vog:

Thank you for your interest in complying with the Freedom of Information Law and the Open Meetings Law. Your inquiry pertains to the means by which notice should be provided, the status of committees which propose activities to be approved by the Advisory Council on Vocational Education, and the procedures adopted by the Council under the Freedom of Information Law.

With regard to notice, §99 of the Law requires that notice be given to the public and the news media prior to all meetings of public bodies. Since the Law distinguishes between the public and the news media, it is suggested that a notice be posted in one or more conspicuous locations in order to inform the public of a meeting. In addition, notice should in my opinion be given to at least two members of the news media who are likely to make contact with those interested in attending the meeting. However, it is noted that a newspaper in receipt of a request to publish a notice is not obligated to print the notice. Furthermore, public bodies are not required to pay to place legal notices in newspapers. Consequently, although a public body may fully comply with the Law by posting notice and by informing more than one member of the news media that a meeting will be held at a specific time and place, there is no guarantee that the members of the news media in receipt of the notice will in fact publicize the meeting.

The committees to which you referred, which have no power to act on behalf of the Council, are in my opinion public bodies that must comply with the Open Meetings Law.

The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, does a committee "transact public business?" While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Appellate Division, Second Department (Orange County Publications v. Council of City of Newburgh, NYLJ, January 12, 1978, p. 1; 401 NYS 2d 84).

Third, the committees in question perform a governmental function for the Education Department.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of NFY Legal Services, Supreme Court, New York County, NYLJ, January 17, 1978; Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Finally, based upon a review of the rules adopted by the Council under the Freedom of Information Law, I believe that they are in substantial compliance with those promulgated by the Committee.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-239

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 4, 1978

Bernard K. Meyer, Esq.
Meyer & Wexler
28 Manor Road
Smithtown, New York 11787

Dear Mr. Meyer:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry pertains to the propriety of an executive session held by the Kings Park School Board "for the purpose of considering two insurance proposals by insurance agents, to insure the school district."

According to your letter, you advised that the executive session was proper based upon the provisions of §100(1)(f) of the Open Meetings Law, which provides that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Since the discussion involved matters leading to the employment of a corporation by the school district, the executive session was in my view appropriately convened.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-883
OML-AO-240

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 8, 1978

Mrs. F. Marino
[redacted]

Dear Mrs. Marino:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. Your question concerns the ability of the public to employ tape recorders at meetings of public bodies.

It is important to note that both the Open Meetings Law and the Freedom of Information Law are silent with regard to the ability of the public to tape record meetings of public bodies. To date, there have been two judicial decisions dealing with the subject. In Davidson v. Common Council of the City of White Plains [244 NYS 2d 385 (1963)], it was held that a public body has the authority to adopt reasonable rules to govern its own proceedings. Under the circumstances of that case, the court found that the presence of a tape recorder would detract from the deliberative processes of the Common Council. As such, the Court held that a rule prohibiting the use of tape recorders at the meeting was reasonable.

Nevertheless, the Davidson case was decided in 1963. As everybody is aware, technology in the area of tape recording devices has advanced markedly. In 1963, tape recorders were cumbersome and their presence was readily evident. However, in 1978, tape recorders are often small machines and their presence might not be detected in some instances. For example, there have been many situations in which I have given speeches and during which members of the audience have used tape recorders. In the majority of those cases, I was not aware that the tape recorders were being employed. The presence of the recorders did not detract from my ability or that of other participants to engage in our presentations. Similarly, if the presence of a tape recorder does not detract from the deliberative process of

a public body, I believe that a general rule prohibiting the use of all tape recorders might be found to be unreasonable by a court.

Despite my contentions, there is a recent decision of the Supreme Court, Suffolk County (see enclosed), which held that a school board has the power to adopt rules to prohibit the use of tape recorders at its meetings. However, it is noted that the decision declined to deal with constitutional issues due to the pendency of litigation on the subject.

With respect to a situation in which no minutes are taken, please be advised that §101 of the Open Meetings Law requires that minutes must be taken. Further, assuming that a public body has tape recorded its proceedings, the tape recording is in my view accessible under the Freedom of Information Law. Although the original Freedom of Information Law failed to define "record," the amendments to the Law, effective January 1, 1978, define "record" to include "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever..." The amended Law is based on a presumption of access and an agency may deny access only under circumstances specified in the Law [see §87(2)]. Since a tape recording of an open meeting does not fall within any of the exceptions to rights of access, it should in my opinion be made available.

Enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law and a pamphlet entitled "The New Freedom of Information Law and How to Use It."

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-241

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 9, 1978

Martin A. Hotvet, Esq.
Southern Tier Legal Services
126 Pine Street
Corning, New York 14830

Dear Mr. Hotvet:

Thank you for your interest in the Open Meetings Law. Your inquiry raises several questions regarding the status of the Social Services Committee of the Steuben County Board of Supervisors.

According to your letter, the Social Services Committee, a standing committee of the County Board of Supervisors, held meetings unannounced and did not take minutes of the meetings. Consequently, your letter seeks advice regarding whether the meetings of the Committee in question were subject to the Open Meetings Law, whether notice was required, and whether minutes were required to be compiled.

The Social Services Committee is in my opinion a public body subject to the Open Meetings Law in all respects. The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory

provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, does a committee "transact public business"? While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Appellate Division, Second Department (Orange County Publications v. Council of City of Newburgh, NYLJ, January 12, 1978, p. 1; 401 NYS 2d 84).

Third, the committees in question perform a governmental function for a public corporation, Steuben County.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510 (1978); Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Next, since the Committee in question is a public body subject to the Law, it is required to comply with the notice requirements appearing in §99. Subdivision (1) of §99 provides that notice of meetings scheduled at least one week in advance must be given to the public and the news media not less than 72 hours prior to the meeting. Subdivision (2) of §99 states that notice of meetings scheduled less than a week in advance must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Consequently, notice must be given by public bodies prior to all meetings, regardless of whether the meetings are characterized as regularly scheduled, special or emergency, for example.

And finally, §101 requires that minutes of meetings be compiled and sets minimum standards regarding their contents. Subdivision (1) states that minutes "shall be taken" at all open meetings "which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Since public bodies may vote during a properly convened executive session, subdivision (2) of §101 requires that "minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon." Further, subdivision (3) requires that minutes of executive sessions be available to the public within one week of the executive session.

It is also noted that §87(3)(a) of the Freedom of Information Law requires that a voting record be compiled which identifies each member of a public body and the manner in which the member votes in each instance in which a vote is taken.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: C. Eugene Davis

Steuben County Board of Supervisors

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-242

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 14, 1978

Ms. Christa Talbot
[redacted]

Dear Ms. Talbot:

Thank you for your continuing interest in the Open Meetings Law. Your inquiry pertains to the interpretation of the notice provisions of the Open Meetings Law.

Section 99 of the Law states in subdivision (1) that meetings scheduled at least a week in advance must be preceded by notice given to the public and news media not less than 72 hours prior to the meeting. If a meeting is scheduled less than a week in advance, subdivision (2) requires that notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting.

It is noted that the Open Meetings Law does not specify the means by which notice must be provided. Nevertheless, it is clear that the Law distinguishes between the public and the news media. Further, it is clear that the phrase "news media" is plural. Consequently, notice must be provided to the public and to at least two members of the news media.

With respect to notice to the public, it has been suggested that a public body post a notice in one or more conspicuous locations that are designated for the purpose of informing the public of a meeting. Notice to the news media may be accomplished in a variety of ways, depending upon the circumstances. If, for example, an emergency meeting is called and there is insufficient time to print the notice in a newspaper, a public body must make reasonable efforts to provide notice to other members of the news media. For instance, in the case of a special meeting, a public body should in my opinion provide notice either by hand

delivery or by phone to at least two radio or TV stations that would likely make contact with the people interested in attending the meeting.

In sum, the Open Meetings Law requires that notice be given to the public and the news media prior to all meetings, whether the meetings are characterized as regular, special or emergency.

It is important to point out that the Open Meetings Law does not require that a public body pay to advertise a meeting. Specifically, §99(3) states that "[T]he public notice provided for by this section shall not be construed to require publication as a legal notice." Therefore, while a public body need not pay to publish a legal notice prior to a meeting, it must make efforts to give notice in the manner outlined in the preceding paragraphs.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: William G. Derenberger

Walter C. Foulke

Clifton Fuller

Gary LaRouech

Wayne D. Marks

Donald H. Myers

Sylvia Powers

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-243

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 14, 1978

Mr. William L. Matthes
Editor and Publisher
The Lookout
Fishkill Road
Hopewell Junction, New York 12533

Dear Mr. Matthes:

I am in receipt of your letter of August 12, 1978.

Your letter indicates that my communication with you of August 9 implies that a reasonable notice need not be given to the public prior to a meeting. In this regard, the Committee has never taken such a stance and the Law clearly requires that notice be given by public bodies prior to all meetings.

Further, the closing paragraph of my letter to you states that:

> "...it is my opinion that so-called 'work sessions' are indeed meetings that must be open to the public, that such meetings must be preceded by compliance with the requisite notice provision of the Law (§99) and that executive sessions are portions of open meetings during which only those matters specified in the Open Meetings Law may be discussed."

Although the mechanics for providing notice of meetings were not discussed, it was stated clearly that work sessions must be preceded by compliance with §99 of the Law, which requires that notice be given prior to all meetings.

When a meeting is scheduled at least a week in advance, §99(1) of the Law requires that notice be given to the public and news media at least 72 hours prior to the meeting. If a meeting is scheduled less than a week in advance, §99(2) requires that notice be given to the public and the news media "to the extent practicable" at a reasonable time prior to all meetings of public bodies, whether they are characterized as regular, special or emergency.

I hope that the foregoing sufficiently clarifies my earlier letter. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-244

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 14, 1978

Mrs. Dolores Chechek
Trustee
Wappingers Board of Education
Miller Hill Road
Hopewell Junction, New York 12533

Dear Mrs. Chechek:

Thank you for your continued interest in the Open Meetings Law. Your inquiry concerns the propriety of executive sessions held by the Wappingers Central School District Board of Education.

According to the agenda appended to your letter, executive sessions were scheduled in advance and held to discuss the role of the Board and its Superintendent, as well as the role of the Board and its individual members.

It is noted at the outset that §100(1) of the Open Meetings Law (see attached) prescribes a specific procedure for entry into executive session by public bodies. Based upon the agenda, it appears that the executive sessions in question were scheduled in advance of the actual convenings of the Board. In this regard, it is noted first that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §97(3)]. Second, §100(1) of the Law states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Consequently, a vote must be taken during an open meeting that is carried by a majority vote of the total membership of a public body in order to enter into executive session. Since a public body may not know in advance whether it will indeed have the capacity or the votes to call an executive session, a public body cannot in my view schedule an executive session in advance.

In terms of substance, the executive sessions in question may or may not have been proper, depending upon the nature of the discussions. Relative to your inquiry, §100(1)(f) provides that a public body may convene an executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

As stated by the Committee in its second annual report to the Legislature, the quoted exception "should be asserted to protect privacy rather than shield discussions regarding policy under the guise of privacy." In the context of the executive sessions to which you referred, discussions regarding the role of the Superintendent vis-a-vis the Board of Education and the role of the School Board vis-a-vis its members appear to be policy concerns that have little to do with the privacy of individuals. However, if, for example, the discussions were held to consider the subject matter permitted to be discussed by §100(1)(f) with respect to a specific individual or individuals, the executive sessions would in my opinion be proper.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: Board of Education

Theodore G. Sturgis

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-245

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 18, 1978

Mr. Paul A. Palmgren
[redacted]

Dear Mr. Palmgren:

Thank you for your continued interest in the Open Meetings Law. Your inquiry once again pertains to the status of work sessions held by the Jamestown School Board.

In this regard, I have enclosed copies of both the leading judicial decision interpreting the Open Meetings Law and the Committee's second annual report to the Legislature on the Open Meetings Law, which is consistent with the judicial decision. In Orange County Publications v. Newburgh, the Appellate Division held that work sessions are indeed meetings that must be open to the public under the Open Meetings Law. The decision discusses the definition of "meeting" in some detail and will serve to answer many of the questions that you might have regarding the scope of the term "meeting."

Your letter indicates that executive sessions and work sessions are held by the Board on the same evening. Since a work session is a meeting, an executive session may be held during the work session if the subject matter for discussion appropriately falls within the framework provided by §100(1) of the Open Meetings Law. Nevertheless, it is noted that an executive session cannot in my view be "scheduled." Section 100(1) of the Open Meetings Law provides that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Since it cannot be ascertained in advance that a majority of the total membership of a public body will vote to enter into executive session, it appears that a public body can never know in advance whether an executive session will indeed be held. Consequently, it is my opinion that executive sessions cannot be scheduled, but rather must be convened pursuant to the procedural requirements contained in the provision quoted earlier.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Ralph Rasmusson

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-246

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 21, 1978

Mr. Craig Robbins
WBPM-FM, WGHQ News
82 John Street
Kingston, New York 12401

Dear Mr. Robbins:

Thank you for your interest in the Open Meetings Law. Your inquiry pertains to executive sessions held by a special committee appointed by the Kingston Common Council to investigate controversies involving Yosman Towers, a senior citizen apartment complex in Kingston.

Your letter specifies that although a criminal investigation was initiated, the grand jury found no criminal wrongdoing. Consequently, at this juncture, it appears unlikely that criminal charges will result from the endeavors of the special committee.

Three questions are raised. First, can a public body adjourn and meet again in executive session "without ever going public"? In this regard, "executive session" is defined as that portion of a meeting during which the public may be excluded [§97(3)]. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. Furthermore, §100(1) of the Open Meetings Law specifies the procedure for entry into executive session and limits the subject matter that may be discussed in executive session. In terms of procedure, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Therefore, when a public body adjourns, it must reconvene an open meeting and adhere to the requirements contained in the provision quoted above in order to enter into a new executive session. It is also noted that the notice required to be given pursuant to §99 of the Law must precede every meeting of a public body.

Second, your letter indicates that votes were taken during a recent executive session. Consequently, you asked whether votes may be taken in executive session. As a general matter, a public body may vote during a properly convened executive session, so long as the vote does not deal with the appropriation of public monies. As such, if the special committee voted during an executive session held to discuss one or more of the matters permitted to be discussed under §100(1)(a) through (h) of the Open Meetings Law, it complied with the Law. It is emphasized, however, that action taken in executive session must be recorded pursuant to §101(2) of the Open Meetings Law, which states:

> "[M]inutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary shall not include any matter which is not required to be made public by the freedom of information law..."

Moreover, subdivision (3) requires that minutes of executive sessions be compiled and made available within one week of the executive session.

I realize that the provision quoted above makes reference to the ability to exclude any matter that is not required to be made available under the Freedom of Information Law. Nevertheless, both the original Freedom of Information Law and the new Freedom of Information Law have provided that agency determinations be made available. Therefore, there are in my view few instances in which minutes of executive sessions would be deniable under the Freedom of Information Law. In some situations, there may be portions of minutes that may be withheld. For example, identifying details might be deleted from minutes in order to protect against disclosures that could result in unwarranted invasions of personal privacy.

And third, since the grand jury found no criminal wrongdoing, you asked how the Committee could apply §100 (1)(c) as the basis for entry into executive session. Section 100(1)(c) provides that a public body may enter into executive session to discuss:

> "information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed..."

Since the possibility of criminal action has all but disappeared, I do not believe that the quoted provision could appropriately be envoked to enter into executive session. Consequently, §100(1)(c) could not in my view be a proper ground for executive session under the circumstances described in your letter.

However, a different ground for executive session might be raised during the course of the study by the Committee. Specifically, §100(1)(f) provides that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Although the quoted provision is somewhat broad, it is the Committee's contention that it is intended to protect personal privacy. Consequently, a discussion regarding individuals generally or procedures to be adopted by the Committee for the purpose of interviewing individuals would not in my opinion fall within the scope of §100(1)(f). However, if the Committee engages in discussion regarding a particular individual or individuals, such as matters leading to the demotion or discipline of a particular public employee, such discussion could in my view be conducted during an executive session.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

RJF:nb
Enc.

Robert J. Freeman
Executive Director

cc: Common Council, City of Kingston

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-247

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 22, 1978

Mr. Richard Palker
[redacted]

Dear Mr. Palker:

Thank you for your interest in the Open Meetings Law. Your letter raises questions regarding the interpretation and practices of the Kings Park School Board relative to the Law.

First, I have reviewed the position statement attached to your letter that was adopted by the Board concerning the Open Meetings Law. Your question concerns that portion of the statement which provides that the Law:

> "...does not preclude informal meetings of board of education members for purposes other than to transact public business. Consequently, the Board of Education shall meet as necessary as a committee of the whole or as sub-committees for any purpose other that the transacting of public business. Such other committee or sub-committee sessions are not within the definitions or the requirements of the Open Meetings Law."

I disagree with the contentions appearing in the quoted statement.

The phrase "transacting public business" within the definition of "meeting" [§97(1)] has resulted in numerous problems of interpretation. Nevertheless, the Committee has consistently advised that the term "transact" does not infer an intent to take action, but rather should be construed

according to its ordinary dictionary definition, i.e. to discuss or to carry on business. This contention is bolstered by the leading appellate court determination rendered under the Open Meetings Law. In Orange Publications v. Newburgh (60 AD 2d 409), the Appellate Division, Second Department (which includes Suffolk County within its jurisdiction) discussed the definition of "meeting" in great detail and stated that:

> "[T]he dictionary meaning of the word 'transact' is to 'carry on business' (Webster's Third New Int Dictionary). The phrase 'officially transacting public business', therefore, when read in conjunction with the Open Meetings Law's legislative declaration, contemplates a broad view extending not only to the taking of an official vote, but also to peripheral discussions surrounding the vote..." (id. at 415).

Further, the controversy with which the Court dealt concerned the status of so-called "work sessions" held by a city council. Although the city council argued that work sessions held solely for the purpose of discussing and without an intent to take action were outside the scope of the Open Meetings Law, the decision unanimously held to the contrary.

The position statement indicates that the Board feels that it can meet as a "committee of the whole" or in sub-committees to discuss school board business in private. In my opinion, the phrase "committee of the whole" is merely a synonym for the Board itself. Moreover, committees and sub-committees are in my view themselves public bodies subject to the Open Meetings Law in all respects. Two recent cases held that advisory bodies with no power to take final action are indeed public bodies that must comply with the Law (see MFY Legal Services v. Toia, 402 NYS 2d 510 and Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978). Further, the transcript of debate in the Assembly that preceded passage of the Open Meetings Law indicates that it was the sponsor's intention to include "committees, sub-committees and other sub-groups" within the scope of the definition of "public body" (Transcript of Assembly Proceedings, May 20, 1976, pp. 6268-6270).

Your second question indicates that the Board recently adjourned a "public meeting for a private meeting" and that neither a motion nor a vote was taken. After approximately one half hour, the Board returned and announced its decision. In this regard, the Open Meetings Law includes a procedure for entry into executive session and limits the subject matter appropriate for discussion in executive session. Specifically, §100(1) provides that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Having reviewed the grounds for executive session permitted by paragraphs (a) through (h) of §100(1), it appears that a discussion of class size could not appropriately be discussed behind closed doors.

Enclosed for your consideration are copies of the Open Meetings Law, the Committee's second annual report to the Legislature on the subject, and the Orange Publications decision to which reference was made earlier. Copies of the same as well as this opinion will be sent to the School Board.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Kings Park School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-248

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 24, 1978

Ms. Chris Anderson
Policy Council Member
Essex County Head Start
P.O. Box 190
Wilmington, New York 12997

Dear Ms. Anderson:

Your letter addressed to Attorney General Lefkowitz has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings Law.

The question you have raised pertains to the status of the Essex County Head Start Policy Council under the Open Meetings Law. According to your letter and our conversation of August 23, the Policy Council is the creation of the Committee for Economic Improvement of Essex County, Inc., which is the Community Action Program (CAP) for Essex County and is a not-for-profit corporation.

Although the Policy Council receives government funding and bears a close relationship to government, it is not in my opinion a governmental entity. As such, the definition of "public body" appearing in §97(2) of the Open Meetings Law (see attached) does not in my view include the Policy Council within its scope. Consequently, the provision of the Policy Manual to which you referred in your letter is unaffected by the Open Meetings Law.

I have discussed your inquiry with representatives of the Division of Economic Opportunity in the Department of State, who concur with my opinion.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: Attorney General Lefkowitz

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-249

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

MITTEE MEMBERS
ELIE ABEL – Chairman
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DOUGLAS L. TURNER
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 28, 1978

Joseph F. Lisa, Esq.
The Temporary State Commission
on Rental Housing
P.O. Box 7020
Alfred E. Smith State Office
Building
Albany, New York 12225

Dear Mr. Lisa:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry concerns the status of the Temporary Commission on Rental Housing created by Chapter 203 of the Laws of 1977 under the Law.

Questions have arisen due to a provision in the enabling legislation which states that the Commission "may sit at any place within the state and hold either public or private hearings" [§4(c), Ch. 203, L. 1977]. The cited provision also states that the Commission "shall generally have, possess and exercise all of the powers of a legislative committee."

During our initial discussions of the matter, I attempted to explain that there may be a distinction between a "hearing" and a "meeting" as defined by §97(1) of the Open Meetings Law. "Meeting" is defined as "the formal convening of a public body for the purpose of officially transacting public business." Despite the vagueness of the definition (i.e. when does a public body "formally" convene or "officially transact" public business?), the Committee and the leading judicial determination have construed the definition broadly, in order that it encompasses any gathering of a quorum of a public body, preceded by reasonable notice to all the members, for the purpose of carrying on its business [see Orange Publications v. Newburgh, 60 AD 2d 409 (1978)]. Moreover, the legislative declaration

in the Open Meetings Law (§95) states that the Law is intended to enable the public to attend and listen to the deliberations and decisions that go into the making of public policy.

A hearing, on the other hand, may be viewed from a different perspective. In Chapter 203 of the Laws of 1977, reference is made in the context of the ability of the Commission to hold public and private hearings to the power to administer oaths, take testimony, subpoena witnesses, and compel the production of records. In such a context, it would appear that hearings are held for reasons other than deliberation, i.e., to elicit testimony or obtain evidence regarding the Commission's area of inquiry. Further, a meeting requires the presence of at least a quorum of a public body; a hearing, according to §§60 and 61 of the Legislative Law, may be held by as few as two members of a legislative committee or sub-committee. Therefore, while a meeting may never be held with less than a quorum present, a hearing, which does not involve the deliberative process of the Commission, may be conducted with only two members present.

In view of the distinction between a meeting and a hearing, it is my opinion that meetings of the Commission held for the purpose of deliberating as a body, and when there is no intent to call witnesses or elicit testimony, are subject to the Open Meetings Law in all respects. Therefore, the provision concerning the ability to hold private hearings could not in my view be envoked regarding a meeting as described in the preceding sentence.

A hearing, however, which is held by the Commission or at least two of its members for the purpose of calling witnesses, or otherwise acting in its investigative capacity, could be held in private, regardless of the number of Commission members present. This is not to say that such hearings must always be conducted in private, for Chapter 203 gives discretion to the Commission to conduct such investigative inquiries either publicly or in private.

Such hearings may be held in private, even if a quorum of its members is present, because §105(1) of the Open Meetings Law, which deals with construction with other laws, states that:

> "[A]ny provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded

> hereby to the extent that such provision is more restrictive than this article."

Stated differently, the Open Meetings Law supersedes all more restrictive provisions of law, except statutes. Since Chapter 203 is a statute, the Open Meetings Law does not supersede its provisions. It is reemphasized, however, that the ability to hold private hearings pertains only to hearings and does not in any way affect the ability of the Commission to close its meetings.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-250

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

August 29, 1978

Mr. Norman Philip Green
Post-Journal
Dunkirk Bureau
72 Orchard Street
Fredonia, New York 14063

Dear Mr. Green:

Thank you for your interest in the Open Meetings Law. Your inquiry concerns the status of the Citizens Advisory Committee created by the Board of Trustees of the Village of Fredonia and the Committee's capacity to enter into executive session.

First, for reasons that will be detailed later, I believe that the Citizens Advisory Committee is a public body subject to the Open Meetings Law in all respects.

Second, the phrase "executive session" has been in existence for years. Nevertheless, it was never defined until the enactment of the Open Meetings Law, which became effective in 1977. "Executive session" is defined by §97(3) of the Law (see attached) as that portion of a meeting during which the public may be excluded. Since all meetings must be convened as open meetings, it is clear that an executive session is not separate and distinct from a meeting, but rather is a portion thereof.

Whether a public body is advisory in nature or is a governing body, it may enter into executive session. However, §100(1) of the Law specifies the procedure for entry into executive session and limits the areas of discussion appropriate for executive session. In relevant part, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting prusuant to a motion identifying the general area or areas of the subject

> or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, it is clear that a public body may enter into executive session only when a motion is made to do so during an open meeting, that the motion must be carried by a majority vote of the total membership of the body, and that the subject matter intended to be discussed must be identified.

In sum, the Citizens Advisory Committee may enter into executive sessions, but the executive sessions must be held in compliance with the Open Meetings Law. Consequently, the so-called "executive sessions" held after a meeting that are closed to the public in my view violate the Open Meetings Law. Similarly, the closed sessions held in private homes of the members represent a violation of the Open Meetings Law, because all meetings must be convened as meetings open to the general public. Further, §98(b) provides that public bodies must make reasonable efforts to hold meetings in facilities that permit barrier-free access to the physically handicapped.

Next, the Citizens Advisory Committee of Fredonia is in my opinion a public body subject to the Open Meetings Law in all respects. The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable

> notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, does a committee "transact public business"? While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Appellate Division, Second Department (Orange County Publications v. Council of City of Newburgh, NYLJ, January 12, 1978, p. 1; 401 NYS 2d 84).

Third, the Committee in question performs a governmental function for a public corporation, the Village of Fredonia.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510 (1978); Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978). The Pissare decision cited in the previous sentence dealt with a citizens advisory committee that appears to be similar to the committee described in your letter. A copy of the decision is attached.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Board of Trustees, Village of Fredonia

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO- 251

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 6, 1978

Mr. Richard M. Kessel
[redacted]

Dear Mr. Kessel:

Thank you for your continued interest in the Open Meetings Law. Your inquiry pertains to the status of a discussion held by the Nassau County Board of Supervisors relative to the passage of the Nassau Community College budget.

According to your letter, approximately one half hour after convening a scheduled meeting of the Board of Supervisors, the Presiding Chairman of the Board declared a fifteen minute recess for "discussion relating to passage of the budget." Your letter indicates that Mr. D'Amato, the Presiding Chairman, described the gathering as a "work session" and thereafter he and the remaining members of the Board retired to another room. You wrote further that Mr. D'Amato explained that the work session was being held to discuss "questions and clarifications" concerning the proposed budget. Upon your request for permission to join the Board for the discussion, you and a Newsday reporter were refused entry.

In conjunction with the factual situation presented in your letter, the following questions have been raised: first, was the Board's procedure proper; second, should minutes have been kept; third, were you entitled to attend the so-called "work session" or recess; and fourth, did the Board of Supervisors violate the Open Meetings Law?

First, as described in your letter, the Board of Supervisors in my opinion failed to comply with the procedural requirements of the Open Meetings Law. Section 98(a) of the Law provides that all meetings of public bodies must be convened as open meetings, except that executive

sessions may be called in accordance with the requirements set forth in §100 of the statute. Section 100(1) specifies the procedure for entry into executive session and limits the subject matter appropriate for discussion behind closed doors. In relevant part, §100(1) provides that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

In view of the foregoing, a public body must vote during an open meeting to enter into executive session, the vote must be carried by a majority vote of its total membership, and the motion must identify the general area of intended discussion, which must be consistent with one or more of the areas of discussion that may be held in executive session listed in paragraphs (a) through (h) of §100(1). Moreover, upon review of the categories of discussion appropriate for executive session, it appears that none could properly have been cited by the Board. The discussion of the budget apparently was a policy matter inconsistent with any of the grounds for executive session listed in the Law.

Further, although the definition of "meeting" in the Law [§97(1)] is somewhat unclear, the Second Department, Appellate Division, which includes Nassau County within its purview, has held that "work sessions" are indeed meetings subject to the Open Meetings Law in all respects [see Orange Publications v. Newburgh 60 AD 409]. The decision specified that any convening of a quorum of a public body preceded by reasonable notice to each of the members for the purpose of discussing its business is subject to the Law, whether or not there is an intent to take action. In discussing the status of "work sessions" and similar gatherings, the Court stated:

> "[W]e believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware

> of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (id. at 415).

The Court also stated that:

> "[C]learly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance'" (id. at 416).

To further bolster the contention that the discussion that you described, regardless of how denominated or characterized, is subject to the Law, the Court stated:

> "[I]f the legislative intent was to permit public bodies to convene at gatherings that they themselves interpreted to be informal, during which they would discuss the business of the public body, then the New York State Legislature would not have provided for executive sessions. The very mechanism for an executive session, in and of itself, suggests that the Legislature wanted to provide for the possibility of a private working session in the absence of the public eye, but only under the express conditions and enumerated purposes contained therein" (id. at 417).

Based upon the holding in the Newburgh decision, your third question regarding your right to attend the work session must be answered affirmatively. In addition, your fourth question, which deals with whether the gathering by the Supervisors violated the Law, must in my opinion also be answered affirmatively.

With respect to your second question, concerning the compilation of minutes, §101(2) of the Law states that:

> "[M]inutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..."

As I read the Law, if no action is taken during executive session, minutes need not be compiled. Conversely, if action is taken during executive session, minutes must be compiled in accordance with the provision quoted above. Implicit in the quoted provision is the notion that an executive session has been properly convened. The events that you described, however, indicate that the session in question was improperly convened. As such, §101(2) appears to be of minimal relevance.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: Board of Supervisors,
Nassau County

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML - AO - 252

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 8, 1978

Ms. Nancy Connell
Albany Times Union
645 Albany-Shaker Road
Albany, New York 12201

Dear Ms. Connell:

Thank you for your interest in compliance with the Open Meetings Law. Your inquiry pertains to the ability of the Board of Managers of Glenridge Hospital to enter into executive session to discuss its operational budget.

According to your letter and our conversation, you are concerned that the Board may attempt to discuss the budget during an executive session on the ground that the discussion deals with "personnel". In my opinion, a discussion of personnel generally, as opposed to a discussion of specific individuals, must be held during an open meeting in full view of the public.

It is noted initially that §98(a) of the Open Meetings Law requires that all meetings be convened as open meetings. Second, "executive session" is defined by §97(3) of the law to mean that portion of an open meeting during which the public may be excluded. Third, §100(1)(a) through (h) specifies and limits the areas of discussion appropriate for executive session. And fourth, a public body must follow the procedure set forth in §100(1) of the Law in order to enter into executive session.

Specifically, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a public body may enter into executive session only by means of a motion carried by a majority of its total membership that identifies the general areas of intended discussion.

Of the subjects listed in the law appropriate for executive session, relevant to your inquiry is §100 (1)(f), which states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal or any person or corporation..."

It is noted that the word "personnel" does not appear in the quoted provision. Moreover, the Committee has consistently advised that the language in question is intended to protect privacy, rather than shield discussions regarding policy under the guise of privacy. For example, a discussion concerning the possible dismissal of a public employee due to incompetence would involve his or her employment history and would be a matter that might lead to the employee's suspension or dismissal. In that circumstance, the discussion could be held in executive session, for the privacy of a named employee could be invaded. Contrarily, a discussion regarding personnel generally in which specific individuals are not cited should in my view be discussed publicly, for the privacy of individuals would not be a consideration.

In the situation that you described, it appears that the Board of Managers would be discussing its budget in general terms. While it is possible that the discussion may involve personnel in a tangential and indirect manner, such as the dismissal of staff for budgetary reasons, it would not identify particular individuals or infringe upon personal privacy. In sum, if the Board intends to discuss the budget in relation to personnel generally, rather than specifically, it cannot in my opinion appropriately convene an executive session.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

CC: William Hall
Francis J. Juracko

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-253

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 8, 1978

Ms. Annette LaBelle
[redacted]

Dear Ms. LaBelle:

I am in receipt of your letter and the correspondence attached thereto.

It is noted at the outset that I have been dealing with Mr. Byer of the Westchester County Attorney's Office for approximately four years. Based upon my experience, I believe that Mr. Byer is serious about his job and performs his duties well. Consequently, I doubt that he is "stalling" for time in conjunction with your request for an opinion.

With respect to your ability to attend committee meetings, as you are aware, this Committee has advised that committees are public bodies subject to the Open Meetings Law in all respects. This contention is bolstered by two judicial decisions with which you are familiar, as well as a statement made by the sponsor of the Law during the debate on the floor of the Assembly prior to its passage. Assemblyman Joseph Lisa stated unequivocally that he intended the definition of "public body" to include "committees, subcommittees and other sub-groups" (see transcript of Assembly debate, May 20, 1976, pp 6868-6870). In view of the clear intent of the Legislature, I do not believe that you need "permission" or a determination by the County Attorney to attend committee meetings of the County Legislature. I suggest that you simply attend if that is possible.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-254

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 11, 1978

Arthur J. Selkin
Town Attorney
Town of Yorktown
Town Hall
363 Underhill Avenue
Yorktown Heights, New York 10598

Dear Mr. Selkin:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry concerns the ability of a public body to take action regarding proposed litigation during an executive session.

As a general matter, I believe that a public body may vote during a properly convened executive session, unless the vote pertains to the appropriation of public moneys. Specifically, §98(a) of the Law requires that meetings be convened as open meetings. Section 97(3) defines "executive session" as that portion of an open meeting during which the public may be excluded. Further, §100(1) specifies the procedure required for entry into executive session and limits the topics that may be considered in executive session.

In terms of procedure, §100(1) in relevant part states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Although not specifically stated, I believe that the provision quoted above implicitly provides that a public body may take action during executive session, except when the action concerns the appropriation of public funds. Section 101(2) of the Law pertaining to minutes tends to bolster this contention, for it makes specific reference to the compilation of minutes reflective of action taken by formal vote during executive session. It is noted that minutes of executive sessions must be made available within one week of an executive session.

Viewing the ability to vote behind closed doors from an historical perspective, §100(1) of the Open Meetings Law represents a departure from past practices. Prior to the enactment of the Open Meetings Law, both the Attorney General and the Comptroller advised that public bodies at the municipal level must vote in public [see e.g., 1966 Atty. Gen. (Inf.) 97; 1970 Op. Atty. Gen. March 18; Op. St. Compt. 363, 1962; 19 Op. St. Compt. 40, 1963; 25 Op. St. Compt. 88, 1969].

In sum, I believe that the Open Meetings Law permits a public body to vote during a properly convened executive session, except as otherwise noted.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-254

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 11, 1978

Arthur J. Selkin
Town Attorney
Town of Yorktown
Town Hall
363 Underhill Avenue
Yorktown Heights, New York 10598

Dear Mr. Selkin:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry concerns the ability of a public body to take action regarding proposed litigation during an executive session.

As a general matter, I believe that a public body may vote during a properly convened executive session, unless the vote pertains to the appropriation of public moneys. Specifically, §98(a) of the Law requires that meetings be convened as open meetings. Section 97(3) defines "executive session" as that portion of an open meeting during which the public may be excluded. Further, §100(1) specifies the procedure required for entry into executive session and limits the topics that may be considered in executive session.

In terms of procedure, §100(1) in relevant part states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Although not specifically stated, I believe that the provision quoted above implicitly provides that a public body may take action during executive session, except when the action concerns the appropriation of public funds. Section 101(2) of the Law pertaining to minutes tends to bolster this contention, for it makes specific reference to the compilation of minutes reflective of action taken by formal vote during executive session. It is noted that minutes of executive sessions must be made available within one week of an executive session.

Viewing the ability to vote behind closed doors from an historical perspective, §100(1) of the Open Meetings Law represents a departure from past practices. Prior to the enactment of the Open Meetings Law, both the Attorney General and the Comptroller advised that public bodies at the municipal level must vote in public [see e.g., 1966 Atty. Gen. (Inf.) 97; 1970 Op. Atty. Gen. March 18; Op. St. Compt. 363, 1962; 19 Op. St. Compt. 40, 1963; 25 Op. St. Compt. 88, 1969].

In sum, I believe that the Open Meetings Law permits a public body to vote during a properly convened executive session, except as otherwise noted.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-255

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 12, 1978

Ms. Susan Gottesman
Lindskoog Road
Coeymans Hollow, New York 12046

Dear Ms. Gottesman:

Thank you for your interest in compliance with the Open Meetings Law. In conjunction with our conversation of September 6 and your correspondence, your inquiry pertains to the propriety of an executive session held by the Ravena, Coeymans, Selkirk School Board.

First, although your letter to the President of the Board of Education cites "the New Freedom of Information Law", it is important to distinguish between the Freedom of Information Law, which was recently amended, and the Open Meetings Law. The former pertains to access to records in possession of government; the latter pertains to access to meetings of public bodies. Enclosed are copies of both statutes.

Second, the Open Meetings Law requires that all meetings be convened as open meetings [see Open Meetings Law, §98(a)]. Section 97(3) of the Law defines "executive session" as that portion of an open meeting during which the public may be excluded. Further, §100(1) sets forth the procedure that public bodies must follow in order to enter into executive session. Paragraphs (a) through (h) of §100(1) specify and limit the areas of discussion appropriate for executive session. The provision that you cited in your letter to Mr. Archibald was one among the eight areas of discussion that may be held in executive session.

Third, in relevant part, §100(1) of the Law states that:

> [U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

In view of the foregoing, prior to entry into executive session, a motion must be carried by a majority vote of the total membership of a public body that identifies the general area or areas of intended discussion, and the areas identified must be consistent with those enumerated in the Law.

Under the circumstances described in your letter, a discussion of a letter addressed to the School Board from the Town Supervisor without further explanation would not in my view be reflective of a proper rationale for entry into executive session.

I hope that I have been of some assistane. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

CC: Prescott D. Archibald, President

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML - AO-256

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 15, 1978

Ms. Annette La Belle
[redacted]

Dear Ms. La Belle:

I am in receipt of your letter of September 6. Once again, your inquiry concerns the status of committees under the Open Meetings Law. Your letter indicates that Westchester County is inclined to decide on a case by case basis whether committee meetings should be open to the public.

In my opinion, committees are public bodies subject to the Open Meetings Law in all respects. The Open Meetings Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law,

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, does a committee "transact public business"? While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Appellate Division, Second Department (Orange County Publications v. Council of City of Newburgh, NYLJ, January 12, 1978, p. 1; 401 NYS 2d 84).

Third, committees perform a governmental function for a public corporation, in this instance, Westchester County.

Fourth the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS Court, Warren County, March 7, 1978).

Next, since committees are public bodies subject to the Law, they are required to comply with the notice requirements appearing in §99. Subdivision (1) of §99 provides that notice of meetings scheduled at least one week in advance must be given to the public and the news media not less than 72 hours prior to the meeting. Subdivision (2) of §99 states that notice of meetings scheduled less than a week in advance must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Consequently, notice must be given by public bodies prior to all meetings, regardless of whether the meetings are characterized as regularly scheduled, special or emergency, for example.

And finally, §101 requires that minutes of meetings be compiled and sets minimum standards regarding their contents. Subdivision (1) states that minutes "shall be taken" at all open meetings "which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Since public bodies may vote during a properly convened executive session, subdivision (2) of §101 requires that "minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon." Further, subdivision (3) requires that minutes of executive sessions be available to the public within one week of the executive session.

It is also noted that §87(3)(a) of the Freedom of Information Law requires that a voting record be compiled which identifies each member of a public body and the manner in which the member votes in each instance in which a vote is taken.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alfred B. DelBello, County Executive
Gordon Burrows, Assemblyman
Samuel Yasgur, County Attorney
Milton Byer, Assistant County Attorney
Dr. E. Franklin Hall

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-257

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 19, 1978

Joseph A. Longo
Councilman
Town of Geddes
1000 Woods Road
Solvay, New York 13209

Dear Mr. Longo:

I am in receipt of your letter of September 14 as well as the letter sent to the Solicitor General on the same subject. The Department of Law as a matter of course transmits to the Committee questions pertaining to the Freedom of Information Law and the Open Meetings Law. Consequently, the following will be responsive to both inquiries.

According to your letter, the Town Attorney of the Town of Geddes is about to resign, and the Town Board intends to conduct interviews for the purpose of filling the vacancy. Your letter indicates, however, that the Supervisor and the other members of the Board may seek to conduct interviews with prospective candidates in a "political caucus" during which you, a member of the Board, would be excluded. The question is whether your exclusion would violate the Open Meetings Law.

First, although the Open Meetings Law specifically exempts from its provisions political caucuses [see attached, Open Meetings Law, §103(2)], it appears that the nature of the discussion in question would not be reflective of political party business. All town officers, including a prospective town attorney, perform their duties for all residents of the town, regardless of their party designation. As such, interviewing candidates for the position of town attorney would in my opinion constitute Town business as opposed to political party business. Therefore, in my opinion, if Town business is in fact being conducted, your exclusion would be improper.

Second, the Open Meetings Law provides that all meetings of public bodies must be convened as open meetings. The phrase "executive session" is defined to mean those portions of a meeting during which the public may be excluded [§97(3)]. Moreover, the Law specifies the procedure for entry into executive session and limits the areas of discussion appropriate for executive session [§100(1)]. Among the subjects for executive session that would be proper is a discussion of matters leading to the appointment of persons to fill vacant positions [§100(1)(f)]. As such, the Town Board could legally interview candidates for the position of Town Attorney during an executive session.

Nevertheless, §100(2) of the Law specifically states that:

> "[A]ttendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body."

In view of the provision quoted above, it is clear that members of public bodies have the right to be present at executive sessions. Therefore, you cannot in my opinion be properly excluded from either interviews or discussions concerning the hiring of a Town Attorney.

Third, the definition of "quorum" appearing in §41 of the General Construction Law tends to bolster my earlier contentions. In relevant part, the cited provision states:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty..."

Based upon the definition of quorum, a public body, such as the Town Board, is precluded from conducting Town business, i.e. interviewing candidates for a Town office, unless reasonable notice is given to each of its members. Under the circumstances, the Town Board cannot in my view conduct Town business unless you are given reasonable notice of its gathering.

In sum, interviewing candidates for the position of Town Attorney constitutes Town business which cannot be conducted in a political caucus, and although interviewing may be conducted during a closed executive session, a member of the Town Board may not be excluded from that gathering.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: Ruth Toch, Solicitor General

Town Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-258

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 26, 1978

Mr. Ellis Simon
Associate Editor
Business Insurance
708 Third Avenue
New York, New York 10017

Dear Mr. Simon:

I am in receipt of your letter of September 19. Your inquiry pertains to the status of the Committee appointed to draft the constitution and by-laws of the New York Insurance Exchange under the Open Meetings Law and the legality of your exclusion from a meeting of the Committee on September 18.

With respect to the composition of the Committee, your letter indicates that a bill signed by Governor Carey in July of this year provides that the committee:

> "shall consist of thirteen members, six to be appointed by the governor, and two each by the speaker of the assembly and the temporary president of the senate and one each to be appointed by the minority leader of the assembly and the minority leaders of the senate, and one to be the superintendent of insurance."

Based upon the manner in which the Committee was created, it is my opinion a public body that is subject to the Open Meetings Law in all respects. Although advisory committees and similar bodies may not have the authority to take final action, as in the case of governing bodies, I believe that they are nonetheless subject to the Open Meetings Law.

The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board of similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only be means of a statutory quorum.

Second, does a committee "transact public business"? While it has been argued that committees do not take final action and therefore do not "transact" public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This stance has been ratified in a decision of the Appellate Division, Second Department (Orange County Publications v. Council of City of Newburgh, NYLJ, January 12, 1978, p. 1; 401 NYS 2d 84; 60 AD 2d 409).

Third, the Committee in question performs a governmental function for the State and perhaps the Insurance Department as well.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of the definition of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510 (1978); Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Further, §98(a) of the Open Meetings Law provides that "every meeting of a public body shall be open to the general public..." As such, your status as a representative of the news media has no bearing upon your right to attend the meeting. Therefore, based upon the facts presented in your letter, it appears that your exclusion from the meeting of the Committee in question on September 18 represents a violation of the Open Meetings Law.

The portion of your letter pertaining to minutes of the Committee is governed by §101 of the Open Meetings Law. Rights of access to other records of the Committee are governed by the Freedom of Information Law, a copy of which is attached.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Albert B. Lewis, Superintendent

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-914
OML-AO-259

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 27, 1978

Ms. Dorothy Getman
[redacted]

Dear Ms. Getman:

I am in receipt of your letter of September 21. Your inquiry raises a series of questions regarding both the Freedom of Information Law and the Open Meetings Law and seeks a "ruling" with respect to each.

It is noted at the outset that the Committee does not have the authority to issue "rulings". Rather, the Committee has the capacity only to give advice.

The ensuing paragraphs will seek to respond to your questions in the order in which they appear in your correspondence.

1. According to your letter, the Gloversville School Board gathers privately as a "committee of the whole" or holds closed "work sessions" prior to scheduled public meetings. At those private gatherings, the Board discusses its business, but does not take action. In this regard, I have enclosed copies of both the leading judicial decision interpreting the Open Meetings Law and the Committee's second annual report to the Legislature on the Open Meetings Law, which is consistent with the judicial decision. In Orange County Publications v. Newburgh, the Appellate Division held that work sessions and similar gatherings, regardless of their characterization, are indeed meetings that must be open to the public under the Open Meetings Law (60 AD 2d 409). The decision discusses the definition of "meeting" in some detail and will serve to answer many of the questions that you might have regarding the scope of the term and the Open Meetings Law itself. In brief, the Committee has advised and the decision cited above has held that the definition of "meeting" [see attached Open Meetings Law, §97(1)] includes any situation in which a quorum of public body convenes, following reasonable notice given to each of its members, for the purpose of discussing its business. There need not be an intent to take action, but rather only an intent to discuss public business.

By designating itself as a "committee as a whole" the Board does not in any way alter its status or its duties under the Open Meetings Law. In my opinion, the phrase "committee of the whole" is synonymous with the Board itself. As such, it is required to comply with the Open Meetings Law and any other provisions of law, irrespective of the manner in which it characterizes itself or its meetings.

With respect to minutes of the so-called "work sessions", §101 of the Open Meetings Law sets forth the minimum requirements concerning the extent to which minutes must be compiled by public bodies. As I read the law, if there are no motions, proposals, resolutions or votes taken, minutes need not be compiled. Furthermore, although public bodies may generally vote during a properly convened executive session, school boards are precluded from so doing and in my view may vote only during an open meeting. Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this instance, §1708(3) of the Education Law, which pertains to meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the school boards may hold executive sessions, at which sessions only members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" then the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

2. Next, the committees that that you described are in my opinion public bodies subject to the Open Meetings Law in all respects. The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, does a committee "transact public business"? While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by the Orange Publications decision cited earlier.

Third, the committee in question perform a governmental function for a public corporation, the Gloversville School District.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510; Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

3. Your letter indicates that during the course of open meetings, the school board adjourns and enters into executive session without offering a motion to do so or a vote. In this regard, §100(1) of the Law specifies the procedure for entry into executive session and limits the areas of discussion appropriate for executive session. In relevant part, the cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof, that a public body may enter into executive session only when a motion is made to do so during an open meeting, that the motion must be carried by a majority vote of the total membership of the body, and that the subject matter intended to be discussed must be identified. The "closed sessions of the board" that precede the regular meetings should also be open to the public, for those gatherings fall within the definition of "meeting", which was discussed previously.

4. Your fourth question states that there are no minutes regarding executive sessions or meeting of the "committee of the whole". For the reasons discussed earlier, a school board may not vote during executive sessions.

5. Your fifth question also deals with the ability to enter into executive session and the status of the work session. Both areas were discussed in preceding paragraphs.

6. With respect to public participation at meetings, the Open Meetings Law is silent. As such, I believe that a public body may adopt reasonable rules to permit public participation. Nevertheless, it need not permit public participation.

7. Your seventh question concerns a discussion among board members by telephone. In my opinion no law precludes such a conversation.

8. Although the Open Meetings Law does not specifically require that a record of votes be compiled, the Freedom of Information Law does indeed require that a record of votes be compiled that identifies the manner in which individual members cast their votes in any situation in which a vote is taken [see attached, Freedom of Information Law, §87(3)(a)].

9. The policy adopted by the Board that requires Board members to refer the public to the Superintendent appears to be permissible. Nevertheless, while I agree that a School District is a "corporate body" whose board of directors is a school board, members of the Board of Education may seek information under the Freedom of Information Law. When board members are acting individually

and not on behalf of that Board, they have the same rights as any member of the public and should use the same vehicles to gain access to records. Specifically, each agency must have one or more records access officers to deal with requests. Also enclosed for your consideration is a copy of the Committee's regulations which govern the procedural aspects of the Freedom of Information Law and with which each agency in the state must comply.

Your tenth and eleventh questions deal with matters unrelated to the Freedom of Information Law or the Open Meetings Law. Therefore, I believe that it would be inappropriate to comment with respect to those matters.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enclosure

cc: A. Glen Everhart, Superintendent

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-260

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 28, 1978

Mr. Vincent A. Cooke
[redacted]

Dear Mr. Cooke:

I am in receipt of your letter of September 21. Your inquiry concerns the status of an executive session held by the Kings Park School Board.

According to your letter, the School Board voted to enter into executive session to review a report from an insurance consultant. The insurance consultant had been engaged by the Board to study the School District's insurance program and the bids submitted by three insurance agents. Your letter further indicates that the Board stated that the insurance consultant is an "employee" of the District and, therefore, the discussion with him fell within the "personnel" section of the Open Meetings Law.

In my opinion, entry into executive session by the School Board for the reason described in your letter was unfounded and inappropriate. It is noted that the word "personnel" appears nowhere in the Open Meetings Law. In some instances, discussions regarding personnel may be held in executive session. Nevertheless, the fact that an individual has been employed by the District does not automatically permit an executive session for the purpose of carrying on a discussion with "personnel".

Specifically, the Open Meetings Law provides that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, sus-

> pension, dismissal or removal of any person or corporation" [see attached, Open Meetings Law, §100 (1)(f)].

The Committee long contended that the provision quoted above is intended to protect privacy, rather than shield discussions regarding policy under the guise of policy. Under the circumstances, the privacy of an individual did not in any way relate to the substance of the discussion. On the contrary, the discussion apparently dealt with a policy concern that should have been discussed in full view of the public.

A copy of this response, the Open Meetings Law and the Committee's Report to the Legislature on the subject will be transmitted to you as well as the Kings Park School Board.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enclosure

cc: Kings Park School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-261

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

September 29, 1978

Ms. Annette La Belle
[redacted]

Dear Ms. La Belle:

I have reviewed your letter to Alfred Del Bello, County Executive of Westchester County. I have but one comment to make.

According to your letter, Mr. Byer, the Assistant County Attorney, stated that public body is not precluded from meeting in "...restaurants or men's rooms..." I disagree with that contention. Section 98(a) of the Open Meetings Law provides that all meetings shall be open to the general public. Since the services offered by a restaurant are generally based upon the ability to pay, I believe that holding a meeting in a restaurant would be unreasonable, for there may be some who could not pay or would be required to pay beyond their means. A meeting held in a men's room, needless to say, would discourage females from attending.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Del Bello, County Executive
Mr. Byer, Assistant County Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-262

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 18, 1978

Ms. Annette La Belle
[redacted]

Dear Ms. La Belle:

Thank you for your continued interest in compliance with the Open Meetings Law. Your letter raises several questions, some of which have relevance to the Open Meetings Law, and others of which do not. My response will concern only those matters that are related to the Open Meetings Law.

Your initial inquiry concerns a situation in which action apparently was taken by a committee by means of a series of telephone conversations. In this regard, there is nothing in the Open Meetings Law that precludes members of public bodies from conversing and discussing issues relevant to their performance of their duties by telephone. However, if, as your letter indicated, a "consensus" of a committee was indeed reached by means of a telephone communication, and in fact the committee transacted public business and acted as a body through its telephone conversations, it would appear that the Open Meetings Law was violated, for the Law permits the the transaction of business only at gatherings convened as open meetings.

Your second question states that a public body consisting of thirteen members that has two vacancies "has been using six members for a quorum." The Open Meetings Law requires that a quorum be present in order to transact public business. Although it does not define "quorum", §41 of the General Construction Law defines "quorum" as follows:

> "[W]henever three or more public officers are given any power or authority, or three of more persons are charged with any public duty to be performed or exercised

> by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words "whole number" shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

I would like to direct your attention to the last sentence within the definition, which states that the words "whole number" mean the total number that a public body would have "were there no vacancies and were none of the persons or officers disqualified from acting." In view of the foregoing, a quorum of a thirteen member board is always seven, even though there may be vacancies. Consequently, in my opinion if only six members of a thirteen member body are present, they cannot act on behalf of the body.

Your question concerning the speed with which a vacancy should be filled and whether a supervisor who resigned should be replaced by another supervisor are outside the scope of the Open Meetings Law. Therefore, it would be inappropriate to deal with those questions.

The fourth question is whether "unpaid, voluntary, appointed officials" are required to follow the laws. Both the Open Meetings Law and the definition of "quorum" quoted earlier pertain to persons as well as officers designated to perform duties collectively. Consequently, an unpaid, voluntary, or appointed official has the same responsibility with respect to compliance with the Open Meetings Law as others. Moreover, as you are aware, there are judicial decisions that have held that advisory bodies composed of members of the public are subject to the Open Meetings Law.

Your last question pertains to the degree of formality with which meetings must be conducted. I can only respond that public bodies may vary in terms of the formality of their proceedings. However, meetings must be held in a manner consistent with the requirements of the Open Meetings Law. For example, entry into executive session must be preceded by compliance with the procedure set forth in §100 of the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Milton Byer
Assemblyman Burrows

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-932
OML-AO-263

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 20, 1978

Ms. Doris Wenger
[redacted]

Dear Ms. Wenger:

Thank you for your letter of October 10. Once again, your inquiry deals with the manner in which the Islip School District has responded to the requirements of the Freedom of Information Law.

Your letter indicates that the school district requires you to wait five days after its receipt of your written request for any sort of response. In this regard, §89(3) of the Law provides time limitations for a response to a request. Specifically, the cited provision states that an agency shall make records available or deny access to records in writing within five days of receipt of a written request. To reiterate a statement made in my initial letter to you, the "five day" provision is not intended to be used to stall responses to requests; on the contrary, it is intended to be an outer limit for responding.

Second, according to your letter, School Board minutes are not made available until they are approved, which is approximately 30 days after a meeting. Here I direct your attention to §101 of the Open Meetings Law, a copy of which is attached. The Open Meetings Law generally permits public bodies to vote during a properly convened executive session, and minutes reflective of action taken during an executive session must be made available to the public within one week of the executive session. However, while the Open Meetings Law generally permits public bodies to vote during executive session, school boards cannot take action during executive session, except in the case of a tenure proceeding (see Education Law, §3020-a).

This distinction between the obligations of the public bodies generally and school boards is based upon the following rationale. Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of the school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can only act during an open meeting.

There is no time limit in the Open Meetings Law concerning the compilation and availability of minutes of open meetings. Nevertheless, this Committee has consistently advised that minutes are accessible as soon as they exist, whether or not they have been approved. It has also been suggested that the clerk or other person in possession of unapproved minutes may write or stamp "unapproved, "draft", or "non-final" on unapproved minutes when making them available. By so doing, the public is apprised that the minutes are subject to change, and the public body is given a measure of protection.

Your third area of inquiry concerns your inability to know how members of the School Board voted. In this regard, §87(3)(a) of the Freedom of Information Law requires that each agency maintain:

> "...a record of the final vote of each member in every agency proceeding in which the member votes..."

In view of the foregoing, agencies, such as the School Board, are precluded from taking action by means of secret ballot and are required to compile a record of votes that identifies each member and the manner in which he or she voted in each instance in which a vote is taken.

Fourth, your letter makes mention of the efforts of an attorney who has made two requests of the Board, to which the Board has neither replied nor offered an acknowlegment of their receipt. Again, I would like to direct your attention to §89(3) of the Freedom of Information Law and §1401.7 of the Committee's regulations, a copy of which is attached. The regulations, which have the force and effect of law and with which each agency in the state must comply, state that a failure to respond to a request or acknowlege its receipt within five business days of its receipt constitutes a constructive denial of access that may be appealed to a governing body or head of an agency. Consequently, the attorney who made the request may within thirty days appeal these constructive denials of access.

And finally, I am cognizant of the efforts of the Suffolk County Legislature to enact a search fee under the Freedom of Information Law. As reported in Newsday, I believe that the enactment of such fees would subvert the clear intent of the Freedom of Information Law and may constitute a violation of the law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enclosures

cc: School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-264

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 24, 1978

Mr. Tom Wise
Councilman
Town of West Monroe
Grannis Road
West Monroe, New York 13167

Dear Mr. Wise:

Thank you for your interest in complying with the Open Meetings Law. Your question is whether the public should be notified of a work session scheduled to discuss the preliminary budget.

Notice must be given prior to all meetings of public bodies in accordance with §99 of the Open Meetings Law (see attached). Therefore, in order to determine whether notice must be given, it first must be determined that a "work session" is a meeting within the framework of the Law.

In this regard, although the definition of "meeting" appearing in §97(1) of the Law is somewhat vague, the leading judicial determination rendered to date held that "work sessions" and similar gatherings are meetings subject to the Open Meetings Law (see attached, Orange County Publications v. City of Newburgh). Since the work session to which you made reference is, according to judicial interpretation, a meeting, notice should be given prior to the work session in the same manner as it is generally given prior to other meetings of the Town Board.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-265

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 24, 1978

Mr. Bruce I. Raynor
Board of Cooperative
Educational Services
201 Sunrise Highway
Patchogue, New York 11772

Dear Mr. Raynor:

Thank you for your interest in complying with the Open Meetings Law. Your inquiry raises several questions regarding the implementation of the Law by the Occupational Advisory Council, which was created under §4601 of the Education Law.

Your first question is whether meetings of the Occupational Advisory Council must be open to the public, and if so, whether the public must be given an opportunity to participate at the meetings. The Open Meetings Law is applicable to public bodies, and the phrase "public body" is defined in §97(2) of the Law to include:

> "any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

Based upon the definition quoted above, I believe that the Council is a public body subject to the Open Meetings Law in all respects. The Education Law, §4601, requires that the Council consist of "at least ten members." Further, it performs a governmental function for several public corporations, i.e. school districts, as well as other entities of government. In addition, although neither the Education Law nor by-laws of the Council may specifically require the presence of quorum for the transaction of business, §41 of the General Construction Law requires that bodies such as the Council act only by means of a quorum, which is defined as a majority of the total membership. It is noted that

many have argued that the term "transact" implies the capacity to take final action and an intent to take action. Nevertheless, the leading judicial decision rendered to date viewed the term "transact" according to its ordinary dictionary definition, i.e., to carry on business or to discuss (see attached Orange Publications v. City of Newburgh, 60 AD 2d 409 (1978)]. Further, two judicial determinations have held that bodies other than governing bodies, such as advisory bodies, are public bodies that must comply with the Open Meetings Law [see attached MFY Legal Services v. Toia, 402 NYS 2d 510 (1978); Pissare v. City of Glens Falls, Supreme Court, Warren County, (1978)].

The Open Meetings Law is silent with respect to public participation. Although the public has the right to attend and listen to deliberations of a public body, it has no right to participate. Therefore, while a public body may permit public participation, it need not.

Second, must meetings of subcommittees of the Council be open to the public, and, if so, must the public be given an opportunity to participate? Again, although public participation is permitted, a public body may preclude such participation. In my opinion, committees and subcommittees are themselves public bodies subject to the Open Meetings Law. Referring back to the definition of "public body", by separating the definition into its elements, one can conclude that a committee or subcommittee is a public body subject to the Law. For reasons expressed previously, a committee or a subcommittee is required to act by means of a quorum pursuant to provisions of §41 of the General Construction Law. A committee "transacts" public business on behalf of the governmental entitities cited earlier. Further, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268-70). Finally, the same rationale used by the courts in determining that advisory bodies are subject to the Law may be used with respect to committees and subcommittees. In fact, the Pissare decision cited earlier dealt with an advisory committee composed of citizens that was created by a mayor.

Third, are gatherings held among representatives of the various councils in the area subject to the Open Meetings Law? Under the circumstances described, the gatherings would be attended by representatives of public bodies, but there would be no presence of a public body itself. Therefore, I

do not believe that a gathering of representatives of advisory councils would constitute either a meeting or a public body subject to the Open Meetings Law.

Enclosed for your consideration are copies of several judicial decisions which may be helpful to you.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-266

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 25, 1978

Mr. William L. Matthes
Editor and Publisher
The Lookout
Fishkill Road
Hopewell Junction, New York 12533

Dear Mr. Matthes:

I am in receipt of your letters of October 7 and October 10. The response to the question raised in your letter of October 10 will be incorporated into that which will be given in conjunction with the earlier letter.

Your first question concerns the status of gatherings of the East Fishkill Planning Board. Specifically, you have asked whether there is any distinction in terms of the Open Meetings Law between regularly scheduled work sessions and other meetings of the Board. In my opinion, the Open Meetings Law is grounded upon the definition of "meeting" [§97(1)], and compliance with the remainder of the Law must be based upon the definition.

"Meeting" is defined as "the formal convening of a public body for the purpose of officially transacting public business." Due to the vagueness of the definition, there have been several judicial determinations regarding its interpretation. As you are aware, the leading decision is Orange Publications v. City of Newburgh (60 AD 2d 409). In short, the decision held that the term "meeting" includes any situation in which a quorum of a public body convenes, preceded by reasonable notice to each of its members, for the purpose of discussing its business. The decision made clear that "agenda sessions," "work sessions" or "informal" gatherings are "meetings" when the ingredients described in the preceding sentence are present. The court also made clear that there need not be an intent to take action for the Open Meetings Law to be applicable; on the contrary, there must only be an intent to discuss collectively, as a

body. Consequently, the Open Meetings Law makes no distinction between a regularly scheduled meeting or a work session, for example. Therefore, if the public body gathers at 7:30 p.m. as a matter of course but opens its doors one half hour later, I believe that the definition of "meeting" and therefore the Open Meetings Law itself become applicable at 7:30. The point is that the characterization of a gathering is irrelevant; it is the act of convening a quorum on notice for the purpose of discussing public business that is the focal point of the Law.

Section 99 of the Law requires that reasonable notice be given to the public and the news media prior to all meetings, regularly scheduled or otherwise. Again, the fact that a meeting may be characterized as a work session or an agenda session, for instance, is irrelevant. Consequently, the notice requirements of §99 must be fulfilled to the same extent in all situations in which a meeting is to be held, regardless of the manner in which the meeting is denominated.

In my opinion, the fact that a calendar in the lobby of the Town Hall is marked "P.B.W.S. 7:30" in the box allocated for a particular date does not alone constitute notice. Without more, it would appear that a notice of this nature would not be "reasonable." Second, there is no indication that at least two representatives of the news media were given notice of such a gathering. If the notation on the calendar was the only notice given with respect to the work session, the Board in my view failed to carry out the requirements set forth in §99 of the Law.

Your next question concerns the propriety of an executive session held to discuss "litigation." As you have described the situation, the litigation has ended, an appeal can no longer be taken, and the executive session was held to discuss the means by which a judicial direction might be carried out.

As you are aware, the Open Meetings Law permits a public body to hold an executive session to discuss "proposed, pending or current litigation" [see §100(1)(d)]. If it is true that the litigation has ended and the Board was discussing matters that arose as a result of litigation, the executive session in question would not in my view have been proper. I believe that §100(1)(d) is intended to give public bodies the opportunity to protect against disclosure of litigation strategy which if publicly discussed might place government at a disadvantage vis-a-vis a potential or

actual adversary in a judicial proceeding. According to the facts that you have presented, neither litigation strategy nor "proposed, pending or current litigation" was discussed.

The final question concerns a recent "special meeting" held "to discuss Board Members' and Town employees' salaries and increasing the tax rate..." You have asserted you were not notified of the meeting and have asked whether it was legal. As stated previously, §99 of the Law requires that notice be given to the public and news media prior to all meetings. Although you may not have been notified of the meeting, it is possible that the public and other members of the news media were given notice. If that was the case, there was likely no violation of law. However, if neither the public nor other members of the news media were given notice, the Board would have failed to carry out the requirements of §99. It is also noted that §102 of the Law provides that an "inadvertent failure" to comply with the notice provisions "shall not alone" be grounds for the invalidation of action. Since the foregoing raises questions of fact, it would be inappropriate to conjecture as to the legality of the meeting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: East Fishkill Planning Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-267

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

October 26, 1978

Mr. Kevin E. Whelan
Westvale Professional Building
2105 West Genesee Street
Syracuse, New York 13219

Dear Mr. Whelan:

I am in receipt of your letter of October 13 and the materials appended thereto. Please be advised that your communication was not received by this office until October 25.

Your inquiry seeks an advisory opinion with respect to action taken by the Town Board of the Town of Camillus at a meeting held on August 1. Specifically, your client has challenged the propriety of action taken by the Board with respect to a landfill resolution. Having reviewed the minutes of the meeting in question, the Board entered into an executive session after the discussion of Resolution No. 426 and prior to the adoption of Resolution No. 427. According to the minutes, after discussing and acting upon Resolution No. 426 the "[B]oard then moved into executive session." Without greater specificity regarding the manner in which the executive session was convened or the subject matter intended to be discussed, the Town Board in my opinion failed to comply with the requirements of the Open Meetings Law.

The Law provides that all meetings of a public body shall be open to the general public, except that an executive session may be held in accordance with the provisions of §100(1) of the Law. Section 100(1) provides that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct and executive session for the below enumerated purposes..."

Based upon the foregoing, it is clear that a public body must vote to enter into executive session during an open meeting, that the motion must be carried by a majority of its total membership, and that the "general area or areas of the subject or subjects to be considered" must be identified. Further, the areas of discussion appropriate for executive session are enumerated and limited by the ensuing provisions of §100(1); only those subjects listed in subparagraphs (a) through (h) of the cited provision may be discussed in executive session. The minutes do not indicate that any of the procedural steps required for entry into executive session were taken by the Board. Consequently, it would appear that the Board failed to comply with the requirements set forth in §100(1) of the Law.

Moreover, the subject matter that was discussed in executive session was not identified in the minutes. Thus, it is unclear at this juncture whether Resolution No. 427, which dealt with the landfill, was discussed during an open meeting or during the executive session to which reference was made earlier in the minutes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-268

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 1, 1978

James V. Feuss, P.E.
Director of Public Health
Cortland County Health
Department
Court House
Cortland, New York 13045

Dear Mr. Feuss:

Thank you for your letter of October 25. Your inquiry concerns the propriety of a meeting held at a restaurant by the Cortland County Board of Health.

In terms of background, when I was asked questions concerning the legality of meetings held in restaurants, I responded that meetings must be open to the general public and that the ability to attend should not be based upon an ability to pay. Your letter indicates that admission to the restaurant is not based upon an ability to pay, that parking space is readily available, and that notice was given to the news media prior to the meeting. In relation to the foregoing, you have asked whether "holding a special meeting of the Board of Health at a readily accessible restaurant where admission is not based upon ability to pay, and the space is reasonable for the number of guests based upon past experience, constitutes a violation of the law?"

First, although your letter states that notice was given to the news media prior to the meeting, there is no indication that the public was informed of the meeting. In this regard, §99 of the Open Meetings Law provides that notice must be given to the public and the news media prior to all meetings. If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than seventy-two hours before the meeting. If a meeting is scheduled less than a week in advance, as in the case of a special or emergency meeting, notice must be given to the public and news media "to the extent practicable" at a reasonable time prior to the meeting. Consequently, it is clear that notice must be given to both the news media and the public.

Second, your letter mentions past experience relative to the number of visitors that have attended meetings. Here I merely want to suggest that although the Open Meetings Law does not require the public to attend meetings, it offers any person the right to do so.

Third, §98(b) of the Open Meetings Law requires public bodies to make reasonable efforts to hold meetings in facilities that permit barrier-free access to the physically handicapped as defined in §50 of the Public Buildings Law. I have no knowledge of whether the restaurant in which the meeting was held permits barrier-free access to the physically handicapped. However, the phrase "physically handicapped" is defined to include infirmities concerning both sight and hearing, as well as those generally associated with the phrase. Consequently, the Law requires that efforts be made to accomodate individuals with handicaps of various natures.

Lastly, §98(a) of the Law provides that all meetings shall be open to the general public. Your letter states that an ability to pay had no bearing upon the ability of the public to attend the meeting. I have taken the liberty to question a reporter for the Cortland Standard with respect to the nature of the meeting and the restaurant in which the meeting was held. First, I was informed that the restaurant is one of quality. Second, as indicated in the article appended to your letter, the meeting was held at midday and the restaurant was somewhat crowded.

In my opinion, the site of a meeting optimally should not present either physical or psychological barriers to access by members of the public. Although you have stated that attendance was not based upon the ability to pay, it is possible that people who may have attended the meeting if held in another location could have been dissuaded from attending the meeting in question because of its site, a restaurant. Very simply, I believe that when a person enters a restaurant, he or she is expected to partake in the services offered. Stated differently, a person may feel compelled to spend money. Therefore, it is my contention that holding a meeting at a restaurant at midday would be unreasonable, for it would in my opinion present potential barriers to access by the public for the reasons described above.

The end of your letter alludes to the possibility of obtaining advice on the same subject from the Department of Law. As a general matter, the Attorney General transmits all inquiries concerning the Freedom of Information Law and

Open Meetings Law to the Committee, for only this office is given specific statutory authority to advise with respect to those statutes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Dr. T. Jacobus

Dr. R. Corey

Mr. Kevin Howe

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-944
OML-AO-269

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 3, 1978

Mr. Eugene J. Corsale
Room 5 City Hall
Assessment Office
Saratoga Springs, New York 12866

Dear Mr. Corsale:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns rights of access to minutes taken at your Assessor's Association meeting.

In my opinion, the minutes are deniable. Section 86(3) of the Freedom of Information Law defines "agency" to include governmental entities performing a governmental function. Section 97(2) of the Open Meetings Law defines "public body" in an analogous manner. In view of those provisions, a private association of assessors would constitute neither an agency subject to the Freedom of Information Law nor a public body subject to the Open Meetings Law. Consequently, I do not believe that the minutes in question are accessible as of right.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-270

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 9, 1978

John P. Mazzeo
Vice President
Nesconset Taxpayers Association
Post Office Box 181
Nesconset, New York 11767

Dear Mr. Mazzeo:

The carbon copy of your letter sent to Secretary Cuomo that was addressed to Commissioner Ambach has been transmitted to me. As the Executive Director of the Committee on Public Access to Records, of which the Secretary of State is a member, I generally respond to inquiries concerning both the Freedom of Information Law and the Open Meetings Law.

The questions raised concern the status of "work sessions," "workshop sessions," and executive sessions, and your letter indicates that the Smithtown Board of Education has refused to admit the public to some of the sessions in question. In addition, attached to your letter is a copy of minutes reflective of Board policy which states that the Board, based upon the advice of its attorney, believes that it can open or close meetings as it sees fit.

It is noted at the outset that the Court of Appeals on November 2 affirmed the holding of the Appellate Division, Second Department, in Orange County Publications v. City of Newburgh (60 AD 2d 409). As you are aware, the Appellate Division, Second Department, which includes Suffolk County within its jurisdiction, held that "work sessions" and similar gatherings are "meetings" that must be open to the public. In sum, the Court held that the definition of "meeting" appearing in §97(1) of the Open Meetings Law is applicable to any situation in which a quorum of a public body convenes, on notice, for the purpose of discussing its business. There need not be an intent to take action, but merely an intent to discuss to fall within the framework of

the Open Meetings Law. The decision rendered by the Court of Appeals affirms the notion that "work sessions" and other "informal" gatherings are meetings subject to the Law, regardless of the manner in which they are characterized.

Consequently, the School Board no longer has any discretion with respect to the opening or closing of meetings, for all of its meetings, including work sessions and similar gatherings, must be convened as open meetings.

The phrase "executive session" is defined by §97(3) of the Open Meetings Law as a portion of an open meeting during which the public may be excluded. Section 100(1) of the Law sets forth the procedure that must be followed prior to entry into executive session and limits the subject matter appropriate for discussion in executive session. In relevant part, §100(1) provides that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

In view of the foregoing, it is clear that a public body cannot enter into executive session without following the procedure quoted above.

With respect to the areas of discussion held in executive session marked in the attachment to your letter, it is possible that both subjects could have been appropriately discussed in executive session. Section 100(1)(e) provides that a public body may enter into executive session to discuss collective bargaining negotiations. If item 1 in the minutes of September 12 indeed dealt with collective bargaining negotiations, the discussion may properly have been discussed behind closed doors.

Item 10 dealt with a discussion of a retirement bonus for a particular teacher. In this regard, §100(1)(f) of the Law enables a public body to enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to

> the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

If the discussion dealt with the employment history of the teacher named in the minutes, it appears that the executive session would have been proper. If, however, the employment history of the teacher was not discussed, the executive session would in my view have been improper.

Enclosed for your perusal are copies of the Open Meetings Law and the decisions to which reference was made that were rendered by the Appellate Division and the Court of Appeals.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Mr. Gordon M. Ambach
Secretary Cuomo
Mr. V. Michael Pick
Mr. J. Richard Starkey

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-271

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 16, 1978

Mr. David W. Hollis
Editor
Oneida Daily Dispatch
130 Broad Street
P.O. Box 120
Oneida, New York 13421

Dear Mr. Hollis:

I am in receipt of your letter of November 14 and the materials appended thereto. Your inquiry pertains to the status of the Acute Care Study Committee of the Central New York Health Systems Agency under the Open Meetings Law.

In my opinion, both the Health Systems Agency and the Acute Care Study Committee are public bodies subject to the Open Meetings Law in all respects. The ensuing discussion will deal initially with health systems agencies, and secondarily with the Committee which, according to the articles attached to your letter, closed its meetings.

The Open Meetings Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law" [§97(2)].

First, a health systems agency is an entity for which a quorum is required. It is noted that such an entity must act by means of a quorum whether it is a creation of government, such as a public benefit corporation, or a not-for-profit corporation. With regard to the former, §41 of the General Construction Law provides that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such a board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Therefore, whenever three or more persons are charged with any public duty to be performed or exercised by them jointly, a majority of the whole number of such persons at any meeting held upon reasonable notice to all of them constitutes a quorum, and not less than a majority of the whole number may perform and exercise such duty. Similarly, §608 of the Not-for-Profit Corporation Law states that:

> "[M]embers entitled to cast a majority of the total number of votes entitled to be ast thereat shall constitute a quorum at a meeting of members for the transaction of any business..."

Moreover, Public Law 93-641 reiterates these requirements and states that a health systems agency shall:

> "conduct its business meetings in public, give adequate notice to the public of such meetings, and make its records and data available, upon request, to the public" [P.L. 93-641, Sec. 1512(b)(3)(B)(viii)].

The statute also states that a quorum for a governing body and an executive committee shall not be less than one half of its members (id.). As such, it is clear that health systems agencies can act only by means of a quorum and that the intent of the statute is to require open meetings.

Second, numerous provisions of the federal law indicate that health systems agencies transact public business.

Third, it is also clear that the governing bodies of such entities must consist of more than two members. Public Law 93-641, §1512(b)(3)(C)(viii) provides specific guidelines relative to the composition of the governing bodies and the executive committee, if any, of health systems agencies.

And fourth, health systems agencies in my view perform governmental functions for the state and entities within state government. As stated in a letter from Mr. Robert M. Kaufman, Esq., to Mr. George B. Allen, President of the Hospital Association of New York State, Public Law 93-641 "...provides that the state health planning and development agency designated under the federal act must be 'an agency ...of the government of the state.' Additional evidence that HSAs are performing a state function is the fact that, under state law, each HSA must be approved by the Governor according to standards which he promulgates (Public Health Law §29-4[c])."

In view of the foregoing, health systems agencies are in my opinion within the scope of the definition of "public body" under the New York State Open Meetings Law.

Based upon a similar rationale as expressed in the preceding paragraphs, the Acute Care Study Committee is in my opinion also a public body. First, the Committee consists of more than two members. Second, the Committee is required to act by means of a quorum under §41 of the General Construction Law, whether or not there is a provision of law or a by-law concerning the requirement that the Committee act by means of a quorum. Third, the Committee performs a governmental function for the Health Systems Agency, and therefore performs a governmental function for the state. And fourth, in the debate on the Open Meetings Law prior to its passage, the Assembly sponsor of the bill indicated that it was his intent that "committees, sub-committees and other sub-groups" should fall within the definition of "public body" (see Transcript of Assembly Proceedings, May 20, 1976, pp. 6268-6270). In addition,

two judicial determinations have held that advisory bodies with no power to take final action are public bodies that must comply with the Open Meetings Law (see MFY Legal Services v. Toia, 402 NYS 2d 510 and Pissare v. City of Glens Falls, Supreme Court, Warrent County, March 7, 1978).

In general, the Open Meetings Law requires meetings of public bodies to be convened as open meetings. An executive session is defined as a portion of an open meeting [§97(3)] during which specified subjects set forth in §100(1) of the Law may be discussed. In addition, §100(1) enables a public body to vote during a properly convened executive session.

With regard to construction with other laws, §105(2) of the Law states that:

> "[A]ny provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby."

The question that arises regarding §105(2) is whether the requirements quoted previously in §1512(b)(3)(B)(viii) are less restrictive provisions of law than the Open Meetings Law. If the cited provision of federal law is construed literally, without exception and is indeed less restrictive than §100 of the Open Meetings Law, the provisions permitting executive sessions would be inapplicable and all business of health systems agencies would have to be discussed during open meetings, even if some business appropriately falls within one of the subjects for executive session listed in §100(1)(a) through (h) of the Open Meetings Law.

Similarly, the access language of the cited provision appears to be broader in scope than the access provisions of either the New York Freedom of Information Law [Public Officers Law, §87(2)] or the federal Freedom of Information Act (5 USC §552). It is noted that §89(5) of the New York Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records."

Nevertheless, since the terms of the federal statute relating to open meetings and accessible records are general, it would be inappropriate to advise with certainity that executive sessions are forbidden and that rights of access extend to all records in possession of a health systems agency. In my opinion, conjecture surrounding these issues can be removed only by gleaning the intent of Congress by means of review of the legislative history.

Lastly, the news article indicates that the Committee in question voted by means of secret ballot to close its meetings. In this regard, the Freedom of Information Law, §87(3)(a), requires that a record of votes be compiled which identifies each member in every proceeding in which the member votes. Therefore, a cited provision precludes secret ballot voting by agencies such as the Committee.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis Blaise
Betty Bradley
Robert B. Burtch, M.D.
Richard D. Chapman
Richard Cohen, M.D.
James T. Gustafson
Alfred M. Helbach
Leo Jivoff, M.D.
Gary Johnson
Harold Lilhot
John C. Macauly, M.D.
James Maher
John Mitchell
Robert Paul
C. Arthur Pearson, M.D.
Rodney Sellen
Marianne Simberg
Edward Vantine
Lee Woltmen
Frederick F. Yanni

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-272

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 17, 1978

Ms. Helen S. Rattray
The Star
153 Main Street
P.O. Box E
East Hampton, New York 11937

Dear Ms. Rattray:

I am in receipt of your letter of November 10 and the newspaper articles appended thereto. The articles as well as your letter raise questions concerning the implementation of the Open Meetings Law by two school boards in your area.

First, several public bodies have raised questions concerning the interpretation of the definition of "meeting" appearing in §97(1) of the Open Meetings Law. "Meeting" is defined as "the formal convening of a public body for the purpose of officially transacting public business". Despite the vagueness of the definition, it has recently become clear that virtually all gatherings of public bodies, regardless of the manner in which they are characterized, are subject to the Open Meetings Law. Specifically, on November 2 the Court of Appeals unanimously affirmed a decision rendered by the Appellate Division, Second Department, which interpreted the definition of "meeting" expansively (see Orange County Publications v. City of Newburgh, 60 AD 2d 409, affirmed, ___ NY 2d ___). In sum, the decision held that any situation in which a quorum of a public body convenes, on notice, for the purpose of carrying on or discussing its business constitutes a meeting subject to the Open Meetings Law. The decision made clear that there need not be an intent to take action, but rather merely an intent to discuss public business. The Court further stated that so-called "work sessions", "agenda sessions", or "informal" gatherings must be open to the public when the ingredients described above are present.

Your second question pertains to the status of a meeting held jointly by the members of two boards of education. Based upon the same rationale as offered in the preceding paragraph, a gathering of a quorum of one board for the purpose of discussing public business would alone constitute a meeting that must be open to the public. A meeting which includes a quorum of two or more boards also would constitute a meeting subject to the Law.

Finally, your letter indicates that one of the boards in question has given notice that executive sessions will regularly be held prior to open meetings. In addition, the notice appearing in one of the articles states that the practice of holding executive sessions prior to open meetings is intended to apply for the entire school year. In my opinion, the notice represents a violation of the Open Meetings Law. Section 97(3) of the Law defines "executive session" as a portion of an open meeting during which the public may be excluded. Therefore, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. Moreover, the notice in the newspaper does not indicate the nature of subject matter intended to be discussed in executive session. In this regard, §100(1) of the Law specifies the procedure for entry into executive session and limits the subject matter that may appropriately be discussed in executive session. The cited provision states that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

In view of the foregoing, a public body can neither schedule an executive session in advance nor engage in unlimited discussion in executive session. Therefore, continuation of the policy that you have described would in my view constitute a violation of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis J. Yakaboski
John J. Hart
Sag Harbor School Board
East Hampton School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-273

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 21, 1978

Ms. Mary D. Stearns
[redacted]

Dear Ms. Stearns:

Thank you for your interest in the Open Meetings Law. Your question concerns the ability of the public to employ tape recorders at meetings of public bodies.

It is important to note that the Open Meetings Law is silent with regard to the ability of the public to tape record meetings of public bodies. To date, there have been two judicial decisions dealing with the subject. In Davidson v. Common Council of the City of White Plains [24 NYS 2d 385 (1963)], it was held that a public body has the authority to adopt reasonable rules to govern its own proceedings. Under the circumstances of that case, the court found that the presence of a tape recorder would detract from the deliberative processes of the Common Council. As such, the Court held that a rule prohibiting the use of tape recorders at the meeting was reasonable.

Nevertheless, the Davidson case was decided in 1963. As everybody is aware, technology in the area of tape recording devices has advanced markedly. In 1963, tape recorders were cumbersome and their presence was readily evident. However, in 1978, tape recorders are often small machines and their presence might not be detected in some instances. For example, there have been many situations in which I have given speeches and during which members of the audience have used tape recorders. In the majority of those cases, I was not aware that the tape recorders were being employed. The presence of the recorders did not detract from my ability or that of other participants to engage in our presentations. Similarly, if the presence of a tape recorder does not detract from the deliberative process of a public body, I believe that a general rule prohibiting the use of all tape recorders might be found to be unreasonable by a court.

Despite my contentions, there is a recent decision of the Supreme Court, Suffolk County (see enclosed), which held that a school board has the power to adopt rules to prohibit the use of tape recorders at its meetings. However, it is noted that the decision declined to deal with constitutional issues due to the pendency of litigation on the subject.

In sum, although I believe a public body cannot adopt a blanket rule prohibiting the use of tape recorders, there is no clear or sure response to your question. At this juncture, it appears that judicial or legislative clarification is needed.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-274

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

November 29, 1978

Mark Litwak, Esq.
Regional Director
New York Public Interest
Research Group, Inc.
1 Columbia Place
Albany, New York 12207

Dear Mr. Litwak:

Thank you for your interest in the Open Meetings Law. Your inquiry concerns the ability of the Citizen Advisory Council of the Department of Human Resources of the City of Albany to close its meetings. It is indicated that the Council has excluded the public from its meetings and has informed the public of its intention to close future meetings.

The Citizen Advisory Council is in my opinion a public body subject to the Open Meetings Law in all respects. The Law defines "public body" as:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a council is a public body subject to the Law.

First, a council is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although a council may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all such entities act only by means of a statutory quorum.

Second, does a council "transact public business"? While it has been argued that councils and similar advisory bodies do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Court of Appeals (Orange County Publications v. Council of City of Newburgh, 60 AD 2d 409; aff'd _____ NY 2d _____, Nov. 2, 1978).

Third, the Council in question performs a governmental function for a public corporation, the City of Albany.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270). Thus, it was clearly the intent to include bodies other than governing bodies within the ambit of the Law.

And fifth, two judicial decisions cited this Committee's contention that advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510 (1978); Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Finally, your letter indicates that the Council in question was created pursuant to the Comprehensive Employment and Training Act (CETA) and that it is required under CETA regulations to "assure the participation in program planning of community-based organizations and the population to be served." In view of the quoted language, it would appear that the regulations seek to enhance rather than inhibit communication between government and the people it serves. As such, the legal requirements imposed upon the Council by the New York Open Meetings Law are consistent with and would tend to ensure that the direction given by the regulations is carried out.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: Commissioner McEneny

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-275

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 5, 1978

James McIntyre, President
Board of Education
East Hampton Union Free School
District
76 Newtown Lane
East Hampton, New York 11937

Dear Mr. McIntyre:

Thank you for your letter of November 28, which deals with a letter sent by Ms. Helen Rattray of the East Hampton Star and raises questions regarding the interpretation of the Open Meetings Law.

As you requested, enclosed are copies of the letter seeking advice sent by Ms. Rattray, the attachments to the letter, and portions of the Star cited by Ms. Rattray.

While I believe that the convening of two school boards for the purpose of discussing public business falls within the scope of the Open Meetings Law for the reasons discussed in my letter of November 17, the associations to which you made reference are not in my opinion public bodies subject to the Law. Although the New York School Boards Association, for example, assists and provides services to school boards, it is a corporate entity separate and distinct from government. Further, it is clear that school boards indeed transact public business on behalf of the residents of school districts. An interest group, such as a school boards association, however, transacts business which in my view may be distinguished from "public" business, on behalf of its members.

If you would like to discuss these matters further, I am at your service.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Helen Rattray

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-276

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 6, 1978

Ms. Rose Tripoli
[redacted]

Dear Ms. Tripoli:

Thank you for your interest in the Open Meetings Law. Your question concerns the ability of the public to employ tape recorders or photographic equipment at meetings of public bodies.

It is important to note that the Open Meetings Law is silent with regard to the ability of the public to tape record meetings of public bodies. To date, there have been two judicial decisions dealing with the subject. In Davidson v. Common Council of the City of White Plains [244 NYS 2d 385 (1963), it was held that a public body has the authority to adopt reasonable rules to govern its own proceedings. Under the circumstances of that case, the court found that the presence of a tape recorder would detract from the deliberative processes of the Common Council. As such, the Court held that a rule prohibiting the use of tape recorders at the meeting was reasonable.

Nevertheless, the Davidson case was decided in 1963. As everybody is aware, technology in the area of tape recording devices has advanced markedly. In 1963, tape recorders were cumbersome and their presence was readily evident. However, in 1978, tape recorders are often small machines and their presence might not be detected in some instances. For example, there have been many situations in which I have given speeches and during which members of the audience have used tape recorders. In the majority of those cases, I was not aware that the tape recorders were being employed. The presence of the recorders did not detract from my ability or that of other participants to engage in our presentations. Similarly, if the presence of a tape recorder does not detract from the deliberative process of a public body,

I believe that a general rule prohibiting the use of all tape recorders might be found to be unreasonable by a court.

Despite my contentions, there is a recent decision of the Supreme Court, Suffolk County (see enclosed), which held that a school board has the power to adopt rules to prohibit the use of tape recorders at its meetings. However, it is noted that the decision declined to deal with constitutional issues due to the pendency of litigation on the subject.

There are no decisions of which I am aware that deal with ability to use photographic equipment at meetings of public bodies. I believe, however, that the question would again involve whether the presence of photographic equipment would detract from the deliberative process.

Enclosed for your consideration are copies of the Open Meetings Law and the Committee's most recent report on the subject. If you have any questions concerning the interpretation of the Open Meetings Law and particularly the provisions regarding executive sessions (§100), please feel free to contact me.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

RJF:jm

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-277

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 12, 1978

Mr. Richard G. Timbs
Co-President
Bloomfield Professional
Education Association
Bloomfield Central School
East Bloomfield, New York 14443

Dear Mr. Timbs:

I have received your letter of December 8 and the attached minutes. Your inquiry concerns the propriety of an executive session held by the Bloomfield Central School Board.

According to your letter and the minutes, a motion was made to enter into executive session to discuss "personnel matters and administrative positions". After reconvening, a series of motions was made and acted upon without significant discussion. Further, you have alleged that:

> "[I]t is obvious, therefore that school administrative organization, the abolition of positions, the creation of new positions and procedures for screening candidates for administrative positions were discussed in executive session. These should occur in the regular session, open to the public."

I am in basic agreement with your contentions. The Open Meetings Law provides that a public body may enter into executive session to engage in one or more among eight areas of discussion enumerated in §100(1)(a) through (h) of the Law. Relevant to your inquiry is §100(1)(f), which states that an executive session may be held to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

In conjunction with the quoted provision, the Committee has consistently advised that its intent is to protect personal privacy, and that the provision is not intended to shield discussions regarding policy under the guise of privacy. Therefore, it has been the Committee's contention that matters of policy that may tangentially relate to personnel should be discussed during an open meeting. Contrarily, matters which relate to specific individuals may justifiably be discussed in executive session.

By means of example, the minutes attached to your letter describe situations which in my view involve both proper and improper subjects for executive session. For instance, the portion of the minutes regarding the appointment of a specific individual to a position could in my opinion justifiably be held in executive session, for that discussion dealt with "matters leading to the appointment...of a person...". However, discussions involving the abolition or establishment of positions, or contacting a professional consulting service are reflective of matters of policy and therefore should have been discussed publicly.

In sum, it appears that several matters discussed by the Board in executive session should have been discussed during an open meeting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-278

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 12, 1978

Ms. A.A. Rossiter
[redacted]

Dear Ms. Rossiter:

I am in receipt of your letter of December 6. In all honesty, without additional information regarding your allegations, it is difficult to provide advice.

It appears that you have questioned the legality of an executive session held by the Town Board of the Town of Salina during a meeting held on November 2. According to the minutes that you marked, an executive session was held for the purpose of discussing "personnel matters".

In this regard, the Open Meetings Law states that an executive session may be held to discuss one or more among eight subjects enumerated in the Law [see attached, Open Meetings Law, §100(1)(a) through (h)]. Relevant to the section of the minutes marked, §100(1)(f) states that a public body may enter into executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Although the quoted provision enables a public body to discuss some personnel matters behind closed doors, the Committee has advised that it is intended to protect personal privacy, and is not intended to shield discussions regarding policy under the guise of privacy.

For example, a discussion of the employment history of a particular individual could properly be held in executive session. Contrarily, a discussion of policy involving personnel generally or indirectly should be discussed during an open meeting, for there would be no privacy considerations.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 12, 1978

Albert M. Martocchia
Supervisor
Office of Supervisor
Town of Southold
Southold, New York 11971

Dear Supervisor Martocchia:

Thank you for transmitting the determination of the Board in response to an appeal made under the Freedom of Information Law.

While I concur with the substance of the determination, there is a point to which I would like to direct your attention. First, as inferred in the determination, there is no requirement that an agency create a record in response to a request [see Freedom of Information Law, §89(3)]. Second, it is true that minutes of executive session need only make reference to action taken.

However, your determination states that the gathering related to the second request "was not in fact a Formal Town Board Meeting, nor was the same a meeting of the Town Board at which action was taken by formal vote..." In this regard, enclosed are copies of decisions rendered by the Appellate Division and the Court of Appeals in Orange County Publications v. Council of the City of Newburgh. In brief, the Court of Appeals affirmed the lower court's finding that any gathering of a quorum of a public body, on notice to the members, for the purpose of discussing public business falls within the definition of "meeting" in the Open Meetings Law [see §97(2)]. Further, it is clear that there need not be an intent to take action nor a characterization of a gathering as "formal" to fall within the scope of the Law.

Consequently, the session described in your letter appears to have been a "meeting." If so, it should have been convened as an open meeting and preceded by notice.

After convening an open meeting, a public body may enter into executive session in accordance with §100 of the Law (see attached).

I hope that I have been of some assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-280

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 13, 1978

Mr. Bob Manas
President
Student Association
Queens College of the City
University of New York
Student Union Building - Room 319
Flushing, New York 11367

Dear Mr. Manas:

As promised on December 12, the following consists of an advisory opinion in response to your letter sent to Secretary of State Cuomo.

The question raised in your letter concerns the status of "informal" gatherings held by the Board of Higher Education of the City University of New York prior to its scheduled meetings. Your contention is that the Board deliberates and irons out disagreements among the members at the "informal meetings" and later takes action at open meetings without significant deliberation. However, your exclusion from the gatherings in question apparently is based upon Chairman Jacobs' contention that "the informal sessions merely give those Board members who happen to be present early an opportunity for extremely informal discussion." Chairman Jacobs added that no votes are taken during the informal sessions.

In my opinion, the applicability of the Open Meetings Law is contingent upon the circumstances under which the Board meets.

The Law defines "meeting" as "the formal convening of a public body for the purpose of officially transacting public business" [see attached, Open Meetings Law, §97 (1)]. Despite its vagueness, the Court of Appeals recently affirmed an Appellate Division decision that expansively interpreted the definition [see attached, Orange Publications v. Council of the City of Newburgh, 60 AD 2d 409; ___ NY 2d ___ (1978)]. In brief, the Appellate Division stated that

"meeting" encompasses any situation in which a quorum of a public body convenes, on notice to the members, for the purpose of discussing or carrying on its business. The decision made clear that there need not be an intent to vote or take action, but merely an intent to discuss as a body to fall within the scope of the Law. The Court also stated that gatherings characterized as "informal," or as "work sessions," "agenda sessions" and the like are meetings that must be open to the public when the ingredients described above are present.

One of the focal points of both decisions is the Law's statement of intent, which states that the public must have the ability to "attend and listen to the deliberations and decisions that go into the making of public policy." Thus, it is the entire deliberative process, and not only the act of voting or the ratification of decisions effectively made behind closed doors, that is subject to the Law.

It is emphasized that one of the criteria for the convening of a public body is based upon the definition of "quorum," which is defined by §41 of the General Construction Law. In order to convene a quorum, reasonable notice must be given to all members that the body will meet at a particular time and place. Therefore, if, as Chairman Jacobs suggested, members of the Board do not by design convene to discuss business as a board prior to a scheduled meeting, the informal gatherings would not in my opinion be considered meetings under the Open Meetings Law. For example, if a meeting is scheduled for 11 a.m. and members of the Board arrive at various times between 10:30 and 11:00, the discussions held prior to 11:00 would not constitute a meeting under the Law. Contrarily, if it is established in advance that the members will meet prior to the "official" meeting scheduled for 11 a.m., the gathering would be considered a meeting subject to the Open Meetings Law. In such a case, the meeting would have to be preceded by compliance with the notice provisions appearing in §99 of the Law and would have to be convened open to the public.

In sum, the informal gatherings that you described are subject to the Open Meetings Law if a quorum of the Board convenes, on notice, for the purpose of discussing its business, whether or not there is an intent to take action.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enclosures

cc: Chairman Jacobs

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-281

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 18, 1978

Robert C. Glennon
Counsel
Executive Department
Adirondack Park Agency
P.O Box 99
Ray Brook, New York 12977

Dear Bob:

I have received your note regarding the status of advisory bodies, committees, and subcommittees under the Open Meetings Law.

My advice on the subject continues to be that advisory bodies and other sub-groups are public bodies subject to the Open Meetings Law in all respects. For example, if a governing body consisting of nine members has three committees each consisting of three of its members, a quorum of any of the committees would consist of two. Consequently, the convening of a quorum of a committee, or two, would be a meeting subject to the Open Meetings Law.

The point that may not have come out with great clarity in the newspaper article involves the requirements contained in the definition of "quorum" in §41 of the General Construction Law. Under the definition, only a majority of the total membership of a body, whether it is governing or advisory, can act on behalf of the body. If a school board has nine members, and five leave the room, the remaining four do not constitute a public body, nor can they take action or otherwise act for the body. In the situation described in the news clipping, it appears that a quorum of the school board was present and therefore was required to open its doors. To evade the Law, two board members left. Since only four, less than a quorum, remained, the discussion was outside the scope of the Open Meetings Law, for there was no public body present.

Relative to your question, if a committee of five had been designated, and four of the five were present, certainly the gathering would have been a meeting subject to the Law. However, that was not the case as I understood it.

If you want to discuss the matter, call anytime.

Happy Holidays!

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-978
OML-AO-282

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 19, 1978

Ms. Barbara C. Singer
[redacted]

Dear Ms. Singer:

I have received your letter of December 13 concerning the notice requirements of the Open Meetings Law and rights of access to an agenda under the Freedom of Information Law.

With respect to meetings scheduled at least a week in advance, §99(1) of the Open Meetings Law provides that notice must be given to the public and the news media not less than seventy-two hours prior to the meetings. Section 99(2) states that if a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting.

In my opinion, the provisions cited in the preceding paragraph distinguish between the public and the news media. In essence, separate notices must in my view be provided. With regard to the news media, since "media" is plural, it has consistently been advised that notice must be given to at least two members of the news media who would likely make contact with those interested in attending. Notice to the public can be accomplished by posting a notice conspicuously in one or more designated locations prior to all meetings.

Your letter indicates your belief that notice must be provided in writing to the news media. It is noted that §99 does not specify the means by which notice should be provided. Consequently, notice to the news media might be accomplished by means of a telephone call, as in the case of a meeting called on short notice, for instance.

The second question concerns rights of access to agendas. The Freedom of Information Law is based upon a presumption of access. In brief, the Law defines "record"

to include any information "in any physical form whatsoever" in possession of an agency [see §86(4)], and that all records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information listed in §87(2) of the Law. In my opinion, none of the grounds for denial appearing in the Law could appropriately be asserted with respect to agendas. Further, the Committee has long advised that agendas are available as soon as they exist. The fact that matters that may be discussed at a meeting might differ from the items for discussion appearing on an agenda is irrelevant, for any new items would presumably be raised at an open meeting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Mr. John Fabozzi
Mrs. Anthony London
Mr. Kenneth Luft
Mr. Joseph Orapello
Mr. John V'Doviak
Mr. Fredrick Woller

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-283

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

December 29, 1978

Mr. Richard Kessel
[redacted]

Dear Mr. Kessel:

I have received your letter of December 19 in which an advisory opinion is sought regarding the propriety of discussions held in private by the Nassau County Board of Supervisors. Specifically, your letter indicates that:

> "[A]t various times during the period between budget submission and adoption (November 13th and December 18th) the Supervisors met, in private, to discuss various proposals, ideas, cutbacks, revenue projections, etc...the Supervisors even met to discuss the document on the morning of its adoption - in private session."

Although the definition of "meeting," the focal point of the Open Meetings Law [§97(1)], is somewhat vague, the Court of Appeals on November 2 affirmed an expansive interpretation of the definition rendered by the Appellate Division, Second Department (Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd ____ NY 2d ____). In sum, the decision upheld the notion that "meeting" includes any situation in which a quorum of a public body convenes, on notice to the members, for the purpose of discussing public business. The decision clearly stated that there need not be an intent to discuss or deliberate to fall within the framework of the Law. As such, when the ingredients described above are present, a gathering must be convened as an open meeting, regardless of the manner in which it is characterized.

In view of the foregoing, the private gatherings of the Board of Supervisors were in my view meetings that should have been open to the public and preceded by notice given to

the public and news media as required by §99 of the Open Meetings Law.

Finally, it is noted that although public bodies may in some cases deliberate behind closed doors, an "executive session" is defined by §97(3) of the Law as that portion of an open meeting during which the public may be excluded. Clearly an executive session is not separate and distinct from a meeting, but rather is a portion of a meeting. Further, §100(1)(a) through (h) of the Law specifies and limits the subject matter that may be discussed in executive session. As you have described the situation, even if the Board had convened the gatherings in question as open meetings, none of the grounds for executive session enumerated in the Law could have appropriately been cited by the Board to exclude the public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb