STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-577

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

January 9, 1981

Mr. Manuel Pissare
Maple Street Discount
88 Dix Avenue
Glens Falls, NY 12801

Dear Mr. Pissare:

I have received your letter of December 19 as well as the newspaper articles attached to it. You have raised several questions regarding the Open Meetings Law in your letter and in conjunction with the articles.

Your first question concerns the legality of a situation that you described regarding the practice of the Common Council of the City of Glens Falls. Specifically, you wrote that:

> "[W]henever there is a meeting of the Common Council scheduled, the council men all meet in the Mayor's office. Then, after the agenda is discussed and the votes lined up. they then proceed to the 3rd floor and hold their meeting."

In my view, the gathering of the members of the Common Council prior to the regularly scheduled meeting is itself a meeting subject to the Open Meetings Law that should be open to the public.

My opinion is based upon both judicial interpretations of the Open Meetings Law and amendments to the Law that went into effect on October 1, 1979. Specifically, in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the Court of Appeals, the state's highest court, held that the definition of "meeting" in the Open Meetings Law includes any situation in which a quorum of a public body convenes for the purpose of discussing public business,

whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. It is also noted that the decision dealt with gatherings that were denominated as "work sessions", "agenda sessions", and similar gatherings during which there was merely an intent to discuss, but no intent to take action. Further, the definition of "meeting" was altered to be consistent with the determination of the Court of Appeals. In view of the foregoing, the meetings to which you made reference held by the Common Council during which the agenda is discussed and preliminary deliberations are conducted in my opinion fall within the scope of the Open Meetings Law.

In a related area, it is important to point out that §99 of the Law requires that notice be given prior to all meetings. Section 99(1) concerning meetings scheduled at least a week in advance requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 99(2) concerning meetings scheduled less than a week in advance requires that notice be given to the media and to the public by means of posting in the same manner as described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. Consequently, it is clear that notice must be given in advance of all meetings, whether the meetings are regularly scheduled or otherwise.

Your second question concerns executive sessions and minutes. You wrote that minutes are not generally kept in relation to the executive sessions, but that it seems "obvious that at some of these meetings decisions are reached..."

In this regard, I direct your attention to §101 of the Open Meetings Law concerning minutes. Specifically, §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; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

As such, if action is taken during an executive session, minutes must be compiled in accordance with the direction provided by the language quoted above.

It is important to note that §100 describes the procedure that must be followed prior to entry into an executive session and limits the subject matter that may be considered during an executive session. Relative to your inquiry, §100 requires that a motion to enter into an executive session be made during an open meeting and that the motion identify in general terms the subject to be considered. Therefore, in instances in which a public body enters into an executive session and takes no action, while there may be no necessity of creating minutes of the executive session, the minutes of the open meeting [see §101(1)] would be required to make reference to the motion to enter into executive session.

Third, you questioned the legality of meetings of the City Council that were held off of City property. Specifically, you wrote that a "meeting was held in the office of a corporation for the purpose of discussing the proposed Center Authority and the makeup of its members."

Although I am unaware of any provision of law that would require a city council to meet on city property, I believe that all laws should be given a reasonable interpretation. In the case of the Open Meetings Law, the legislative declaration states in part that:

> "[I]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

In view of the statement of legislative intent quoted above, I believe that it would be unreasonable for a public body to hold a meeting in a location in which members of the public might not have the capacity to attend. Conversely, I believe that public bodies should hold their meetings in locations that permit the public to

"observe the performance of public officials and attend and listen to..." their deliberations.

In addition, §98(b) of the Open Meetings Law states that:

> "[P]ublic bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

In terms of the substance of the meeting in question as you described it, it appears that no ground for executive session could appropriately have been cited to close the deliberations. Consequently, I believe that any member of the public had the right to have been present.

Fourth, you raised questions concerning a news article appearing in the Glens Falls Post Star on December 10, 1980. The article made reference to a decision rendered in Pissare v. City of Glens Falls and stated that "although a state Supreme Court decision, while urging advance notice of meetings, found no illegality in the Commission's actual actions." You have questioned the accuracy of that statement. In Pissare it was argued by the City that the Glens Falls Civic Center Commission and its committees and subcommittees fell outside the scope of the Open Meetings Law. Related to that issue was a question of whether notice had to be given under the Open Meetings Law prior to the meetings of the Commission and its committees and subcommittees. From my perspective, those questions were clearly decided in your favor, for the court held that:

> "[T]here is no doubt that the Commission and its component committees were charged with a 'public duty'. At least two members and perhaps three 'ex-officio' members of the full Commission were public officers. All members were formally requested by Mayor Cronin to serve on the Commission, and all members formally agreed to serve on such Commission. While the members jointly and collectively did not have any authority and did not exercise any authority in the sense of taking final and binding action concerning the Civic Center, the members certain-

> ly had 'power' greater than that possessed by the other citizens of Glens Falls to influence the Common Council's decisions and deliberations concerning the Civic Center. The court holds that when persons are formally requested to advise the legislative and executive officers of a municipality and to assist legislative officers in deliberating that such persons are charged with a public duty (see General Construction Law §41). Thus, the Commission and its component committees transacted public business whenever they discharged their public duty. Accordingly, these public bodies formally convened for the purpose of officially transacting public business whenever they gathered to foreseeably effect or actually effect the discharge of their public duty. (see 41 Albany Law Review, pages 331-332, Orange County Publications, supra, slip opinion pages 7 and 8).
>
> "The court specifically holds that meetings of the Commission's committees and sub-committees were held in violation of Public Officers Law §99 and that these entities or sub-groups also constituted 'public bodies' (see Public Officers Law §97-2). The Commission had delegated its responsibility to deliberate and to advise to its members in these various sub-groups..."

In view of the language of the decision, it is clear that the court found that violations of the Open Meetings Law were indeed committed.

Section 102 of the Open Meetings Law, which concerns its enforcement, states that a court may "in its discretion" declare action taken in violation of the Open Meetings Law null and void. The Supreme Court in Pissare v. City of Glens Falls opted not to nullify actions taken in violation of the Open Meetings Law, even though it had discretionary authority to do so. Therefore, in my view, although you may have prevailed with respect to the legal issues involved in the controversy, the potentially drastic steps that could have been taken were not.

Fifth, the article made reference to discussions by the Common Council during the summer regarding elements of a draft bill to create a civic center authority. You indicated that those discussions were not conducted "in open meetings or workshops". In this regard, it is reiterated that all meetings of public bodies are required to be convened as open meetings. Further, as stated previously, a motion to enter into an executive session must be made during an open meeting. Moreover, from my perspective, it is unlikely that a discussion of draft legislation would fall within any grounds for executive session.

Sixth, you wrote that in another edition of the newspaper, it was written that the Common Council determined that four of the nine members of a proposed commission would not be residents of the City of Glens Falls. In conjunction with that article, you wrote that the matter was apparently "settled at one of the unannounced private meetings". Again, if a meeting was held to discuss the issue of membership on a proposed commission, such a meeting should in my opinion have been open to the public. Further, a discussion of the issue that you described would not likely fall within any of the grounds for executive session.

It is noted that §100(1)(f) of the Open Meetings Law permits a public body to hold an executive session to discuss:

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

Under the provision quoted above, a public body may conduct an executive session to consider matters leading to the appointment of a "particular" individual or individuals; in my opinion, since a discussion concerning the makeup of a proposed commission would not deal with the appointment of any particular individual, such a discussion would have to be open to the public.

Lastly, as requested, copies of this opinion will be sent to the persons that you designated as well as the Common Council of the City of Glens Falls.

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: Carl Davidson
Chris Lynch
Steve Scoville
Common Council

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 578

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

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January 12, 1981

Mr. George Sebouhian
Assoc. Professor of English
Department of English
State University College
Fredonia, NY 14063

Dear Mr. Sebouhian:

I have received your letter of December 14 in which you requested an advisory opinion under the Open Meetings Law.

Specifically, you have asked whether the Faculty-Student Association that serves the campus at the State University College at Fredonia "must abide by the Open Meetings Law for their Board of Directors meetings."

Although you have sought an "authoritative ruling" on the issue, it is emphasized at the outset that the Committee has only the authority to issue advisory opinions, which are not binding upon government. Further, your question has arisen in the past and I regret that my response will be conjectural, due to the fact that there is virtually no case law on the subject. In order to obtain an authoritative ruling, a determination would have to be made judicially.

Nevertheless, I would like to offer the following comments.

First, the crucial question that must be answered is whether the Board of Directors of the Faculty-Student Association constitutes a "public body". The phrase "public body" is defined by §97(2) of the Open Meetings Law to mean:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body."

Based upon a review of the definition in terms of its component parts, several conditions precedent must be established before an entity can be considered a "public body".

In the case of the Faculty-Student Association, first, I believe that it is an entity that must act by means of a quorum. If it is a public body, it can perform its duties only by means of a quorum pursuant to the provisions of §41 of the General Construction Law. If it is a not-for-profit corporation, it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law.

Second, to fall within the definition of "public body", an entity must conduct public business and perform a governmental function for the state. Whether the Faculty-Student Association conducts public business and performs a governmental function for SUNY at Fredonia is in my view questionable.

Nevertheless, if the issue were brought to court, and if the court determined the issue in a manner consistent with the trend in case law, I believe that it would be found that a faculty-student association is a "public body" subject to the Open Meetings Law in all respects.

By means of analogy, under the Freedom of Information Law, the companion statute to the Open Meetings Law concerning access to government records, the state's highest court, the Court of Appeals, found that volunteer fire companies are subject to the Freedom of Information Law [see Westchester-Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. It is noted that a volunteer fire company is a not-for-profit corporation that performs its duties for a municipality by means of a contractual relationship. Even though a volunteer fire company is not itself govern-

ment or a governmental entity, the court found that it performs what traditionally might be considered a governmental function and therefore falls within the scope of the Freedom of Information Law.

I believe that the Faculty-Student Association Board of Directors should be viewed in much the same fashion. Would such an association exist but for its relationship with a particular SUNY college? Further, would State University College at Fredonia perform the duties of the Faculty-Student Association if the Association did not exist? If the Associationexists due to its relationship with the College, and if the College would perform the functions of the Association if the Association had not been created, I believe that it could be concluded that a faculty-student association conducts public business and performs a governmental function for SUNY.

In sum, the application of the Open Meetings Law is unclear with respect to a faculty-student association. However, to the extent that I am familiar with the functions of such an association, I believe that its Board is likely 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
Executive Director

RJF:jm

cc: Faculty-Student Association at Fredonia

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1858
OML-AO-529

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

January 29, 1981

Mr. Joe A. Oliva
[redacted]

Dear Mr. Oliva:

Your letter and the attached materials sent to Attorney General Abrams have been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law and the Open Meetings Law.

You have requested that an investigation be conducted regarding the City of New Rochelle and its Board of Education with respect to their implementation of both statutes. Please be advised that the Committee on Public Access to Records does not have the authority or the resources to "investigate". However, the Committee does have the capacity to advise with respect to the interpretation of both Laws, and, as such, I would like to offer the following comments.

First, with respect to the Freedom of Information Law, it is noted that the Law is based upon a presumption of access. Stated differently, the Law requires that all records be made available, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h) of the Law (see attached).

Second, in terms of the majority of the information in which you are interested, it appears to be clearly available. Section 87(2)(g)(i) of the Law provides that statistical or factual information found within inter-agency and intra-agency materials must be made available. Under the circumstances, the vouchers,

similar records of the expenditure of public money, logs indicating odometer readings of city vehicles and similar documents would constitute "inter-agency" materials. However, I believe that they would be available, for they consist of factual information.

Moreover, §51 of the General Municipal Law has for decades required that "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts..." and related information in possession of a municipality, such as the City of New Rochelle or a school district, must be made available.

Third, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" in writing the records in which he or she is interested. Consequently, when making a request, it is suggested that you provide as much identifying information as possible to assist a designated records access officer in locating the records sought.

Fourth, with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations (see attached) provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Fifth, at this juncture, I direct your attention to the Open Meetings Law, a copy of which is also attached. In brief, the Open Meetings Law requires that all meetings of public bodies be convened as open meetings. The Law states further that an executive session, which is defined as a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §97(3)], may be held only to discuss those subjects listed in the Law that are appropriate for executive session [see §100(1)(a) through (h)].

It is noted that several of the grounds for executive session to which you referred in your letter are apparently appropriate for executive session. For instance, §100(1)(d) of the Law permits a public body to enter into executive session to discuss "proposed, pending or current litigation". With regard to discussions of "personnel", §100(1)(f) of the Law states that a public body may enter into an executive session to discuss:

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

Lastly, I have also enclosed a copy of an explanatory pamphlet regarding both the Freedom of Information Law and Open Meetings Law. The pamphlet may be particularly useful to you, for it contains sample letters of request and appeal.

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

Encs.

cc: Richard Rifkin
New Rochelle City Council
New Rochelle Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1856
OML-AO-580

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

January 28, 1981

Adeline Levine, Ph.D.
[redacted]

Dear Dr. Levine:

As you are aware, I have received your letter of December 26, in which you requested information regarding access to records under the Freedom of Information Law.

Specifically, you wrote that you have attempted without success to obtain minutes of meetings and related information from the Panel to Review Scientific Studies and the Development of Public Policy on Problems Resulting from Hazardous Wastes, which was created pursuant to Executive Order #102 on June 4, 1980. You wrote further that the chairman of the Panel is Dr. Lewis Thomas of the Memorial Sloan-Kettering and that its secretary is Dr. Saul Farber, Dean of the New York University Medical Center School of Medicine.

I have made several inquiries on your behalf regarding your request. Having spoken with the records access officers at both the State Health Department and the State Department of Environmental Conservation, neither has yet located in their respective agencies any of the information in which you are interested. I am hopeful, however, that one or both of the agency officials will soon locate at least some of the information that you are seeking.

Notwistanding the apparent lack of information in possession of the Departments of Health and Environmental Conservation, I believe that the Panel is required to provide access to many of the records that you are seeking.

In this regard, I direct your attention initially to the Open Meetings Law, a copy of which has been attached.

In my view, the Panel in question is a "public body" subject to the Law.

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

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

Based upon a review of the definition in terms of its components, it appears that each of the conditions precedent to a finding that the Panel is a public body is present.

First, the Panel is an entity consisting of at least two members. Second, it may perform its duties only by means of a quorum pursuant to the provisions of §41 of the General Construction Law. Third, in view of the Executive Order, it is clear that the Panel conducts public business. And fourth, also based upon the language of the Executive Order, the Panel performs a governmental function for the State. Consequently, I believe that the Panel is a public body subject to the Open Meetings Law in all respects.

With regard to minutes, §101 of the Open Meetings Law describes minimum requirements concerning minutes of open meetings in subdivision (1) and executive sessions in subdivision (2). Further, §101(3) states that minutes of meetings of public bodies shall be made available in accordance with the provisions of the Freedom of Information Law, that minutes of open meetings must be compiled and made available within two weeks of such meetings, and that minutes reflective of action taken in executive sessions must be compiled and made available within one week of the executive sessions during which the action was taken.

The second question seeks information regarding the identities of those who may have been consulted or interviewed during the meetings and who participated at the meetings and in the intervals between meetings. Again, an agency need not create a record in response to a request. However, if records reflective of the information sought have been prepared, it would appear that they are accessible under the Law.

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

The only ground for denial that I can envision with respect to the identities of persons present at meetings or with whom discussions were held is §87(2)(b), which provides that an agency may withhold records or portions thereof when disclosure would result in an "unwarranted invasion of personal privacy". The cited provision might be applicable if, for instance, persons having medical problems related to hazardous waste may have been contacted. In such a case, identifying details might justifiably be deleted.

In your third area of inquiry, you asked which records, studies or reports were reviewed at each meeting of the Panel and when the Panel received and reviewed the appraisals of the reports reviewed for the purpose of compiling the Panel's final report. If such listings have been compiled, I believe that they would be available. In terms of rights of access to the contents of the reports considered, without greater knowledge of their contents, it would be inappropriate to conjecture as to rights of access. Again, however, the only grounds for denial are those appearing in §87(2) of the Freedom of Information Law.

In this regard and with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or

the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7 (b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of an agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a).

Your fourth question concerns the date on which the Panel "as a whole" reviewed and approved the final report for its distribution to the Governor, the State Legislature and the media. Once again, I direct your attention to the Open Meetings Law. As indicated previously, minutes of meetings are required to be compiled. In addition, §99 of the Law requires that notice be given prior to all meetings of public bodies. Subdivision (1) of §99 concerning meetings scheduled at least a week in advance states that notice must be given to the news media (at least two) and posted in one or more designated, conspicuous public locations not less than seventy-two hours prior to the meeting. Subdivision (2) pertains to meetings scheduled less than a week in advance and states that notice must be given in the same manner as described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. Based upon contentions expressed earlier, minutes would likely indicate when the Panel reviewed and approved a final report, as well as the identities of Panel members who participated in the meetings.

The fifth area of inquiry concerns a copy of the report and the accompanying press releases. From my perspective, if the report and release were transmitted to the news media, they should be made available to you.

Lastly, it is noted that §87(1)(b)(iii) of the Freedom of Information Law permits agencies to assess a fee for photocopying of up to twenty-five cents per photocopy not in excess of nine by fourteen inches, unless another provision of law permits the assessment of a higher fee. In the future, it is suggested that requests for records include an offer to pay the requisite fees for photocopying.

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:ss

Enclosures

cc: Saul J. Farber, M.D.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-581

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

February 3, 1981

Joseph A. McNamara
Commissioner
[redacted]

Dear Mr. McNamara:

As you are aware, I have received your letter of January 9, as well as the news articles appended to it. You have asked for an advisory opinion under the Open Meetings Law.

Specifically, as I understand the situation, the Town Board of the Town of North Salem held an executive session on December 9 during which it resolved to hold another executive session on December 17. As such, if I interpret the situation correctly, the executive session held during the meeting of December 9 was not adjourned, but rather was continued and rescheduled for December 17. You have asked whether such action is permissible under the Open Meetings Law.

In my view, the Town Board should likely have adjourned its meeting of December 9 and scheduled a new meeting with notice given in accordance with §99 of the Open Meetings Law prior to its meeting of December 17. After convening the meeting on December 17, the Board could properly have entered into a new executive session.

The advice given in the preceding paragraph is based upon the following contentions.

First, the phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from an open meeting, but rather is a portion thereof.

Second, the Law requires that a procedure be followed before a public body may enter into an executive session. Specifically, §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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, a public body may enter into an executive session after a member of the body introduces a motion to do so during an open meeting in which the proposed subject matter for executive session is identified in general terms. Further, the Law states that a motion to go into an executive session must be carried by a majority of the total membership.

Consequently, I do not believe that a motion to enter into an executive session can be made during an executive session. Further, I do not believe that an executive session can be scheduled in advance of a meeting, for it cannot be known in advance how many members of a public body will be present or whether a motion to enter into executive session will indeed be carried by a majority of the total membership of a public body.

In sum, while I agree with your contentions that the Open Meetings Law was not followed, based upon statements made in the news articles, I also agree with the statement of the Town Attorney that "if the Board had adjourned the meeting, rather than closing it and scheduling another meeting, procedures would have been run correctly".

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:ss

cc: James Lundy

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1870
OML-AO-582

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

February 3, 1981

Sue Herba, President
Concerned Citizens of Mayfield
P. O. Box 419
Mayfield, NY 12117

Dear Ms. Herba:

I have received your extensive and thoughtful letter in which you raised a series of questions regarding the implementation of the Freedom of Information and Open Meetings Laws by the Town Board and other public bodies of the Town of Mayfield.

While I do not feel that it is appropriate to comment with respect to the attitudes of public officials to which you made reference, I would like to offer the following comments regarding the interpretation of two statutes over which the Committee has advisory responsibility.

The first issue that you raised concerns fees for photocopying. According to your letter, the Town Clerk reported that the actual cost of photocopying records of of eight by eleven inches is eight and one-half cents per photocopy and that the cost of photocopying records of eight by fourteen inches is twenty-five and one-half cents per copy. Despite protests made by the Concerned Citizens of Mayfield, a resolution was passed enabling the Town to charge fifty cents per photocopy for records that are eight by fourteen inches.

In this regard, I direct your attention to §87(1)(b)(iii) of the Freedom of Information Law, which states that the fees for photocopies of records:

> "...shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches,

> or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law."

In view of the foregoing, I believe that the Town is restricted to a charge of twenty-five cents per photocopy for records up to nine by fourteen inches. Consequently, in my view the fee of fifty cents per photocopy of records of eight and one-half by fourteen inches exceeds the limit permitted by the Freedom of Information Law. In addition, based upon your letter, it is clear that if the Town charges twenty-five cents per photocopy for duplicating records of eight by eleven inches, it is operating at a profit with respect to records of that size. Further, while the cited provision states that a fee higher than twenty-five cents per photocopy may be assessed when another provision of law so provides, a resolution passed by the Town Board permitting a fee of fifty cents per photocopy is not in my opinion a "law". Stated differently, I do not believe that a resolution could be considered a law that permits the assessment of a fee higher than twenty-five cents per photocopy. As such, at the present time, I believe that the Town is restricted to charge a fee of no more than twenty-five cents per photocopy of records not in excess of nine by fourteen inches.

The second issue that you raised concerns a vacancy on the Town Board and an apparent deadlock within the Board with respect to a possible replacement. You wrote that the Board has met privately to interview candidates and that the meetings during which such interviews were held were not preceded by notice.

Here I direct your attention to the Open Meetings Law. Relevant under the circumstances is the definition of "meeting" appearing in §97(1) of the Law. The definition is broad and has been interpreted expansively by the courts. Specifically, in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the Court of Appeals, the state's highest court, held that any convening of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Therefore, based upon the facts presented in your letter, the gatherings in which candidates for the Town Board are interviewed are in my opinion meetings subject to the Open Meetings Law in all respects.

It is also noted that all meetings must be preceded by notice given in accordance with §99 of the Open Meetings Law. With respect to meetings scheduled at least a week in advance, §99(1) states that notice must be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. With regard to meetings scheduled less than a week in advance, §99(2) prescribes that notice be given in the same manner as described in §99(1) "to the extent practicable" at a reasonable time before such meetings. As such, notice must be given prior to all meetings of a public body.

It is important to point out, however, that the subject of the meetings in question, i.e. interviews of candidates for the Town Board, could in my view be conducted during executive sessions. The Law lists eight areas of discussion that are appropriate for executive session, one of which is §100(1)(f). The cited provision states that a public body may enter into an executive session to discuss:

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

From my perspective, since the interviews dealt with a matter leading to the appointment of a particular person to the Town Board, I believe that the discussion would fall within the scope of §100(1)(f).

Your next area of inquiry concerns a request by one of the Board members for a monthly financial statement from the Supervisor. You indicated further that specific information regarding the expenditure of Town funds has not been forthcoming. In this regard, I would like to direct your attention to several provisions of law.

First, §87(2)(g)(i) of the Freedom of Information Law states that statistical or factual information found within inter-agency and intra-agency materials is available. With respect to the information in question, although it may be characterized as "intra-agency", I believe that it consists solely of factual information that is available.

Second, §29(4) of the Town Law entitled "Powers and duties of supervisor" states that the supervisor of a town:

> "[S]hall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

Third, §51 of the General Municipal Law, which has been in effect for decades grants access to:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

In view of the three provisions of law cited in the preceding paragraphs, it is clear that the financial information in which you are interested must be kept and made available to the public.

In all honesty, I do not know whether a monthly financial report must be prepared. To obtain additional information regarding the responsibilities of the Town, it is suggested that you contact the Division of Municipal Affairs at the Department of Audit and Control. In a related vein, you asked questions regarding the manner in which you can be certain "of what is paid to whom" and the length of time in which a town board must act upon a motion that was carried. In this regard, it is again suggested that you contact the Department of Audit and Control, for I do not have the expertise to respond to those questions.

Your next area of inquiry concerns your capacity to employ tape recorders at meetings of the Board. In my view, a public body cannot restrict the use of portable, batter-operated, inconspicuous tape recorders.

In terms of background, until mid-1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee on Public Access to Records had consistently advised that the use of tape recorders should not be prohibited in situations in which the devices used are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was essentially confirmed in a decision rendered in June of 1979. That decision arose when two individuals sought to bring their tape recorders to a meeting of a school board. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct

> their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent the possibility of star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

Based upon the advances in technology and the enactment of the Open Meetings Law, the court in Ystueta found that a public body cannot adopt a general rule that prohibits the use of tape recorders.

In the Committee's view, the principle enunciated in Davidson remains valid, i.e., that a public body may prohibit the use of mechanical devices, such as tape recorders or cameras, when the use of such devices would in fact detract from the deliberative process. However, since a hand held, battery operated cassette tape recorder would not detract from the deliberative process, the Committee does not believe that a rule prohibiting the use of such devices would be reasonable or valid.

It is important to point out that a recent opinion of the Attorney General is consistent with the direction provided by the Committee. In response to the question of whether a town board may preclude the use of tape recorders at its meetings, the Attorney General reversed earlier opinions on the subject and advised that:

> "[B]ased upon the sound reasoning expressed in the Ystueta decision, which we believe would be equally applicable to town board meetings, we conclude that a town board may not preclude the use of tape recorders at public meetings of such board. Our adoption of the Ystueta decision requires that the instant opinion supersede the prior opinions of this office, which are cited above, and which were rendered before Ystueta was decided".

In view of the foregoing, I do not believe that a public body can prohibit the use of tape recorders at open meetings.

You wrote that the Town spent $15,000 for a front-end loader that was purchased from Fulton County. Several individuals stated their belief that the purchase should have been put out to bid. While I am not an expert with respect to that type of question, it appears that the purchase was proper, for §103(6) of the General Municipal Law states that:

> "[S]urplus and second-hand supplies, material or equipment may be purchased without competitive bidding from the federal government, the state of New York or from any other political subdivision, district or public benefit corporation."

Lastly, you wrote that you and others are fearful of "retaliation" when a person or group "rocks the boat". Although I cannot offer a good response, I believe that, as a general rule, the laws are intended to protect the public. Further, I believe that in many instances risks must be taken in order to achieve a desired goal.

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: William Blaha
Arthur Montanye
Debra Perham
Ivan VanNostrand
Edward Vosburg

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-583

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

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EXECUTIVE DIRECTOR
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February 5, 1981

Vivian Weisman
Community Worker
United Community Centers
833 Van Siclen Avenue
Brooklyn, NY 11207

Dear Ms. Weisman:

As you are aware, I have received your letter of January 19 in which you raised questions regarding the Open Meetings Law and §414 of the Education Law.

According to your letter, the District 19 Community School Board often gathers at closed meetings with the Presidents' Council, which is comprised of the officers of the PTA's in the District. Further, you wrote that the Board "has used 'personnel meetings' and consultative meetings with Presidents' Council to discuss budget and policy. Agendas have included the numbers of personnel to be laid off, and the criteria for selecting superintendents and principals". You also indicated that the Community School Board "is usually invited to meetings" of the Presidents' Council "in order to inform and consult".

The first point that I would like to make concerns the scope of the Open Meetings Law. In this regard, it is emphasized that the definition of "meeting" appearing in §97(1) of the Law has been interpreted expansively by the Courts. Specifically, in Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the state's highest court, the Court of Appeals, held that the definition of "meeting" encompasses any gathering of a quorum of a public body for the purpose of discussing or conducting public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. As such, I believe that any convening of a

quorum of the Community School Board for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law that must be convened upon to the public and preceded by notice given in accordance with §99 of the Open Meetings Law. Moreover, from my perspective, if a quorum of the School Board meets with the Presidents' Council in the performance of its official duties as a body, such a meeting falls within the scope of the Law.

Second, you made reference in your letter to a so-called "personnel meeting" and attached an agenda of one such meeting indicating that specified subjects would be discussed. The subjects included:

1. "Setting the dates for selection of Principal for P. 213

   discuss major selection criteria, especially residence and Assistant Principal experience

2. Request to continue process for selection of Elementary School Principal at

3. District Office Relocation update

4. Potential problems for tenure of Principal at

5. Absenteeism problems for teachers at

   -- steps being taken

6. Possible personnel consequences of rezoning proposals".

Based upon the agenda, it appears that only one item could properly have been discussed during an executive session.

I would like to direct your attention to §100 of the Open Meetings Law. The cited provision prescribes a procedure that must be followed by a public body before it may enter into an executive session. 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, it is clear that in order to enter into an executive session, a motion must be made during an open meeting that identifies in general terms the subject matter intended for executive session, and such a motion must be carried by a majority vote of the total membership of a public body. In addition, in a technical sense, the provision quoted above indicates that a public body cannot schedule an executive session in advance of a meeting. Since a motion to enter into executive session must be made during an open meeting and carried by a majority vote of the total membership, it cannot be known in advance whether such a motion will indeed be carried.

Paragraphs (a) through (h) of §100(1) specify and limit the areas of discussion that are appropriate for executive session. In my view, there is but one ground for executive session that could be cited with respect to the subjects under consideration, and that ground for executive session could in my opinion be cited only with respect to one of the agenda items.

Section 100(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

It is emphasized that the language quoted above represents a change from the language of the analagous ground for executive session that appeared in the Open Meetings Law as originally enacted. Under the original Law, a public body could 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..."

The problem that often arose centered upon discussions of policy that indirectly or tangentially had a bearing upon "personnel". For example, if a board engaged in a discussion of lay-offs due to financial restraints or a possible school closing, such matters would clearly deal with policy, rather than the manner in which particular employees performed their duties. However, public bodies often cited §100(1)(f) as a basis for entry into executive session, because "personnel" might be affected. Since the Law went into effect in 1977, the Committee contended that the quoted exception for executive session was intended to protect privacy, not to shield matters of policy under the guise of privacy.

Due to the insertion of the word "particular", it is now clear that a public body may not enter into an executive session to discuss matters concerning personnel generally, but only those matters concerning a "particular person".

Based upon a review of the agenda, with respect to item 1, it would appear that the topics concern the procedures by which a principal might be selected. It does not appear that the discussion would involve a matter leading to the employment of any particular individual to the position of principal. If my interpretation of the nature of the discussion is accurate, I believe that the discussion would be required to be held during an open meeting.

The second item concerns a request to continue the process for selection of an elementary school principal. Again, unless the discussion concerned a matter leading to the appointment or employment of a particular individual, the discussion would have had to be conducted during an open meeting.

The third item, entitled "District Office Relocation Update" simply does not fall within any of the grounds for executive session.

The fourth item is in my view the only agenda item which could properly have been discussed during an executive session, for it apparently deals with problems relative to the tenure of a particular individual. As such, the discussion would fall within the scope of §100(1)(f), for it would apparently deal with a "particular person".

The last two items regarding absentee problems regarding teachers and possible personnel consequences of rezoning apparently deal with policy related to personnel in general rather than particular individuals. As such, I believe that such discussions should have been open to the public if they were not.

Lastly, you have raised questions concerning your capacity to attend meetings of the Presidents' Council. In this regard, you attached a memorandum addressed to Community School Board members from Frank C. Arricale, II, Community Superintendent. Mr. Arricale wrote that he had contacted Robert Stone, Counsel to the State Education Department, who replied that "inasmuch as the P.T.A. is not a public body, their meetings, along with their Executive Board meetings and the meetings of their joint body are not subject to the 'Sunshine Law', consequently; they are not obliged to admit the public to such meetings. They may restrict their meetings to their members and invited guests". Mr. Arricale also reported that in situations in which Presidents' Council meetings or similar meetings are held in public places such as school district offices, Mr. Stone stated that "there was no obligation under any law of which he was familiar to require the public to be admitted to meetings of a non-public body simply because that group was meeting in a public place".

With all due respect to Mr. Stone and Mr. Arricale, I disagree.

Certainly I agree that neither the PTA nor its Presidents' Council would constitute a "public body" as defined by §97(2) of the Open Meetings Law. Consequently, I concur that the PTA and the Presidents' Council would not be required to comply with the Open Meetings Law.

Nevertheless, §414 of the Education Law, concerning the use of school property, requires a response contrary to that offered in Mr. Arricale's memorandum. Specifically, §414(1)(c) states that a Board of Education may permit school property to be used for specific purposes, one of which is:

> "[F]or holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public".

Based upon the provision quoted above, if a meeting held for a "civic" purpose or for a purpose pertaining to the welfare of the community is conducted on school property, such a meeting, in the words of §414, "shall be non-exclusive and shall be open to the general public".

Therefore, if the PTA or the Presidents' Council holds meetings on School District property, I believe that such meetings are required to be open to the general public and that you or other representatives of your organization cannot be excluded.

Further, although the language of the quoted provision within §414 of the Education Law may be subject to various interpretations, it is my opinion that a meeting of the PTA is held for what may be characterized as a "civic" purpose and that such a meeting pertains to the welfare of the Community.

As requested, copies of this opinion will be sent to the individuals that you identified 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

Robert J. Freeman
Executive Director

RJF:ss

cc: Robert Stone
Iva Marks
Frances Abbraciamento
Frank Arricale
Gordon Ambach
Frank Macchiarola
Albert Oliver

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-584

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

February 6, 1981

Ms. Rosellen McFarland
Statewide Youth Advocacy, Inc.
Southern Tier Representative
4117 David Lane
Painted Post, NY 14870

Dear Ms. McFarland:

I have received your letter of January 15 as well as the news articles appended to it.

Although I have been assured by the Superintendent of Schools that the Open Meetings Law will be followed by the School Board, I would like to make the following comments.

First, according to the article appearing in the January 2 edition of the Corning Leader, it appears that the School Board might not yet be acting in compliance with the Open Meetings Law. Specifically, the article stated that:

> "[T]he public board meeting will be preceded by a 7 p.m. executive session to discuss recommendations of the committee on the handicapped and will be immediately followed by a closed-door meeting to discuss a personnel matter."

In this regard and assuming that the quotation above is an accurate representation of events, it is reiterated that the phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Further, the procedure required to be followed for entry into executive session states that a motion to enter into executive session must be made during an open meeting in which the subject matter to be discussed is identified in general terms and

which is carried by a majority vote of the total membership of a public body. 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, an executive session is one of two mechanisms by which a public body may close a meeting. The other instance in which a public body may deliberate behind closed doors would involve a situation in which an exemption from the Open Meetings Law is applicable. Here I direct your attention to §103 of the Law, which states that the Open Meetings Law does not apply to three designated areas of discussion. Stated differently, if an exemption applies, the Open Meetings Law does not.

Relevant to meetings of a committee on the handicapped is §103(3) of the Law, which exempts from its provisions "matters made confidential by federal or state law."

As you are likely aware, the federal Family Educational Rights and Privacy Act (20 USC §1232g) generally requires confidentiality of education records identifiable to particular students. In a situation in which education records are discussed, the discussion would concern matters made confidential by federal law and therefore would be outside the scope of the Open Meetings Law. As such, if, for example, a school board or its committee on the handicapped discusses the substance of education records that would be confidential under the FERPA, such a discussion would in my view be required to be closed, unless a parent waives his or her right to confidentiality. Consequently, in such cases, the general provisions of the Open Meetings Law, such as those concerning notice and the procedure for entry into an executive session, would not apply.

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

FOIL-AO-1879
OML-AO-585

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

February 6, 1981

Michael Maione
WPUT Radio
Brewster, NY 10509

Dear Mr. Maione:

I have received your mailgram in which you asked for an opinion under the Freedom of Information Law.

Your inquiry concerns rights of access to a budget document transmitted by the Putnam County Executive to the Clerk of the Putnam County Legislature. The document in question contains recommendations for salaries regarding various managerial positions in County government.

In terms of background, as you may be aware, I have discussed the issue with Vincent Libell, Putnam County Attorney, and Michael Sansolo, a reporter for the White Plains Reporter-Dispatch. As I understand the situation, the document in question and the procedure that has been followed regarding its review represent an aberration from the normal budget process followed by a county. Based upon various conversations, some months ago, the County began its normal budget review process. During that process, questions arose regarding the salaries for particular positions. In order to review those salaries and attempt to develop standards for the future, a consulting firm was hired by the County to make recommendations regarding salary levels for specific positions. The report of the consultant has been completed and made available, and the County Executive has recently submitted his recommendations to the County Legislature after having reviewed the consultant's report.

As I have contended in discussions with you and the individuals identified earlier, it appears that the document in question is part and parcel of the budget review

process, even though its implementation might result in the adoption of policy that could be in effect for a period of years. It also appears that a review of the document in question is necessary now, for decisions regarding salaries for the current fiscal year will likely be made pursuant to a review of the document sought. Stated differently, the recommendations found within the document in which you are interested would, if the usual budget procedure had been followed, have been included within a tentative budget. It appears further that the only reason for the absence of the recommendations in question from the tentative budget is the unusual process that has transpired due to the additional review of salaries for particular positions. As such, it is my view that the document souqht should be considered an extension of the tentative budget of the County.

In this regard, if my contention that the document in question is a necessary incident to the budget review process and represents an addendum to the tentative budget, I believe that it is available. Article 7 of the County Law describes the procedure by which County government prepares, reviews, and adopts a budget. The intent of Article 7 is in my opinion to make available for public inspection the budget documents that lead to the adoption of a final budget. For instance, §357(2) of the County Law states that:

> "[U]pon the filing of the tentative budget with the clerk of the board of supervisors the clerk shall transmit forthwith a copy thereof to the chairman of the committee designated or created to review the tentative budget. The committee, upon receipt of such copy, shall proceed to review the tentative budget. Within fifteen days after the receipt of such copy of the tentative budget the committee may file a report with the clerk of the board of supervisors setting forth any proposed changes, alterations or revisions in the tentative budget. A copy of the report of the committee shall remain on file in the office of the clerk of the board of supervisors and shall be open to public inspection during business hours".

Further, §359 of the County Law requires that the clerk of a county board of supervisors prepare at least a hundred copies of a tentative budget for public distribution prior to a public hearing preceding the adoption of a budget. In addition, §208(4) of the County Law states that:

> "[E]xcept as otherwise provided by law and subject to reasonable rules and regulations of the officer having custody thereof, all records, books, maps or other papers recorded or filed in any county office, shall be open to public inspection, and upon request, copies shall be prepared and certified; and, except where another fee is prescribed by law, such officer upon the payment of a fee of twenty cents for each folio, shall furnish such certified copy. Upon request and after diligent search, if no record be found, such officer shall be entitled to receive a fee of one dollar for certification thereof".

Based upon the provisions quoted above, I believe that it is the intent of the County Law to require that the County make available and that the public have the capacity to know of the proposals that may become the budget. Again, based upon the facts as I understand them, the document in question would, if the usual procedure had been followed, be included within the tentative budget, which would clearly be accessible. Therefore, I believe that the document in which you are interested is also available.

With respect to the Freedom of Information Law, I direct your attention to the case of Dunlea v. Goldmark [380 NYS 2d 496, affirmed 54 AD 2d 446, affirmed with no opinion, 43 NY 2d 754, (1977)]. In Dunlea, the state's highest court, the Court of Appeals, upheld lower court decisions which found that statistical, numerical figures were available, even though they were advisory in nature and could be accepted, rejected or modified by the Executive. It appears that the information in question is similar to that at issue in Dunlea.

Lastly, during our conversation, you also raised questions concerning the possible discussion of the recommendations made in the document by the County Legislature. Here I direct your attention to the Open Meetings Law. In brief, the Open Meetings Law requires that all meetings of a public body, such as a County Legislature, be convened open to the public and preceded by notice given in accordance with §99 of the Law. Section 100(1) prescribes the procedure for entry into executive session, and paragraphs (a) through (h) of the cited provision specify and limit the areas of discussion that may appropriately be considered in executive session.

Possibly relevant to the situation is §100(1)(f) of the Open Meetings Law, which states that a public body may enter into an executive session to discuss:

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

It is emphasized that the language quoted above represents a change from the analagous provision in the Open Meetings Law as originally enacted. Under the former provision, a public body had the capacity to 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..."

With the addition of the word "particular" in the current §100(1)(f) of the Open Meetings Law, it is clear that a public body may enter into executive session when it discusses a "particular person". It is also clear that a discussion of personnel in general or a discussion of policy that does not relate to any particular individual must now be discussed during an open meeting.

If, for instance, the salary designated for a particular position or item is under discussion, I believe that such a discussion must be held open to the public, unless and until the discussion relates a particular individual. Stated differently, if a discussion relates to the position of county administrator and to any person who might hold that position, I believe that the discussion would be required to be open. If, however, the discussion dealt with an individual holding the position of county administrator and whether or not that person, based upon his or her employment history, merits an increase in pay, an executive session would 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
Executive Director

RJF:ss

cc: Robert Bondi
Vincent Libell
Michael Sansolo

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO 1878
OML-AO-586

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

February 6, 1981

Jody Adams
[redacted] NY [redacted]

Dear Ms. Adams:

I have received your letter of January 14 and appreciate your continued interest in the Freedom of Information and Open Meetings Laws.

Your most recent inquiry concerns your capacity to attend meetings of what are characterized as supervisors' associations in Suffolk County. You wrote that two groups of town supervisors met informally and that the attendees do not consider their meetings to be public. You have indicated your belief that the meetings are important because the public, if it had the capacity to attend, could gain basic information that leads to decision making. In addition, you attached a news article concerning gatherings of a "top county financial officer" with leaders from East End towns and villages.

From my perspective, the question raised with respect to both areas of inquiry is whether those in attendance constitute a "public body" as defined by §97(2) of the Open Meetings Law.

As you are aware, "public body" is defined to mean:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

With respect to the gathering of supervisors, it does not appear that the supervisors' associations constitute a "public body". There are often associations of various public officials in which persons holding similar positions discuss common problems. For instance, there are groups known as the Association of Towns, the Conference of Mayors and Village Officials, the County Officers Association, and similar organizations which, although comprised of public officials, do not in my view act within their associations as public bodies. More than anything else, when acting as members of the associations, the members generally exchange points of view, discuss trends, and discuss issues of common interest. If the supervisors' associations engage in the same types of activities as those discussed above, I do not believe that they could be characterized as public bodies.

In the case of the situation described in the news article, it appears that the gathering was attended by representatives of various units of government, and that no particular public body was represented by a quorum of its members. If that was indeed the case, there was no entity present that could be characterized as a "public body". If, however, the group in question is the same as that which you characterized as a "liaison committee", it would in my view be an entity that would constitute a public body subject to the Open Meetings Law.

I would like to suggest another avenue for gaining information relative to the groups that you identified. Even if the groups of public officials could not be characterized as public bodies subject to the Open Meetings Law, presumably records in their possession would be subject to the Freedom of Information Law.

Section 86(4) of the Freedom of Information Law defines records 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 foregoing, if a town supervisor, for example, receives communications from an association that relates to the performance of his or her official duties, such communications would constitute "records" subject to rights of access granted by the Law.

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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-587

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

February 9, 1981

Margaret Gardinier
[redacted]

Dear Ms. Gardinier:

I have recently received your letter of January 15 in which you requested literature regarding the Open Meetings Law. You have also raised questions concerning the application of the Law to the Amsterdam Golf Commission.

Attached are copies of the Open Meetings Law, which is attached to a memorandum explaining amendments to the Law that went into effect on October 1, 1979, a pamphlet on the subject that may be useful to you, and an article that I prepared for local government officials which seeks to provide a "common sense" perspective on both the Freedom of Information and Open Meetings Laws. In addition, enclosed are twenty copies of the Open Meetings Law for distribution.

You wrote that questions have arisen with respect to the means by which the Amsterdam Golf Commission should conduct its meetings and how many members are required to be present to constitute a quorum.

The Open Meetings Law does not specifically prescribe the manner in which a public body should conduct a meeting, but it does set forth the procedures that must be followed with respect to providing notice, entry into executive session, and it also specifies minimum requirements regarding the contents of minutes.

With regard to quorum requirements, I direct your attention to two provisions of law. First, §97(2) of the Open Meetings Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

As explained in the memorandum sent to you, the definition represents a change from the analagous provision in the Open Meetings Law as originally enacted. Under the original Law, it was unclear whether the definition included within its scope committees, subcommittees and similar bodies which may have had no authority to take final action, but only the capacity to provide advice. Under the new definition, however, it is clear that even advisory bodies are subject to the Open Meetings Law in all respects.

Second and perhaps more important is the definition of "quorum" appearing in §41 of the General Construction Law. That provision states that:

> "[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. 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 of officers disqualified from acting".

Based upon the language quoted above, a quorum of the Golf Commission would be a majority of its total membership, notwithstanding vacancies, for instance. Therefore, if, for example, the Golf Commission was designated to consist of five members, a gathering of three would constitute a quorum, even if only three among the five positions are currently filled. Further, the Committee may exercise its duties only by means of action taken by a quorum, a majority of its total membership.

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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-588

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

February 10, 1981

Ms. Patricia C. Fry
General Counsel
Financial Control Board
270 Broadway
New York, NY 10007

Dear Ms. Fry:

I have received your letter of January 28 and appreciate your interest in complying with the Open Meetings Law.

Your question is whether, under the Open Meetings Law,

> "...a member of members of the Financial Control Board may be deemed present at an open meeting of the board for quorum purposes where such member attends such meeting by telephone conference equipment or other mechanical devices and such member can be heard clearly by all persons attending such meeting and can participate fully in all of the proceedings of the meeting."

It is noted at the outset that the issue that you have raised has not to my knowledge been considered judicially. Nevertheless, I believe that the language of the Open Meetings Law would preclude the Board from conducting its business as a body unless a quorum of its members has physically convened. Consequently, in my view, the participation of a member by means of "conference equipment or other mechanical devices" would not constitute the presence of that member for the purpose of convening a quorum.

I direct your attention to the legislative declaration of the Open Meetings Law, §95, which states in part that:

> "[I]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

From my perspective, even though the use of a conference call would permit participation on the part of an absent member or members, members of the public in attendance at a meeting would not have the capacity to "observe the performance of public officials" who are not physically present.

Moreover, §97(2) of the Open Meetings Law defines "meeting" to mean "the official convening of a public body for the purpose of conducting public business." In my opinion, the term "convening" means a physical coming together. Further, based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assembly syn see "SUMMON" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

Based upon the ordinary definition of "convene", I believe that a "convening" requires the assembly of a group in order to constitute a quorum of a public body.

In view of the foregoing, and if my contentions are accurate, I do not believe that a public body could employ a conference call or similar mechanical means to convene a quorum.

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-589

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 11, 1981

Mr. Julius A. Sanna
[redacted]

Dear Mr. Sanna:

I have received your letter of January 17 in which you raised questions regarding a series of events concerning your daughter, a teacher who is or had been employed by the Lindenhurst School District.

As you are aware, I am familiar with the chronology of events relative to the lawsuit in which your daughter was involved. In brief, in Sanna v. Lindenhurst Board of Education, the Supreme Court, Suffolk County, held that action taken by the Board of Education after having met in executive session to terminate your daughter should be nullified, for the Board failed to follow the procedural steps necessary for entry into executive session pursuant to the Open Meetings Law, §100(1). The Board has since taken additional steps relative to the controversy and you have asked for my opinion regarding the more recent actions of the Board of Education regarding your daughter's employment.

First, you asked whether your daughter is entitled to the minutes "of the executive portion" of a meeting held on January 14, 1981. In this regard, based upon the records that you forwarded, it is unclear whether action was taken during an executive session. Section 101(2) of the Open Meetings Law concerning minutes of executive sessions requires that minutes be compiled only when action is taken during an executive session by formal vote. Consequently, if a public body merely discusses an issue during an executive session but takes no action, minutes of the executive session need not be compiled.

If, on the other hand, action was taken during an executive session, minutes reflective of that action must generally be compiled and made available within one week of the executive session. However, as we may have discussed some months ago, it is questionable whether a school board has the capacity to take action during an executive session, unless the action concerns a tenure proceeding. In brief, §1708(3) of the Education Law has been judicially interpreted to require school boards of union free school districts to vote only during open meetings, except in the case of votes regarding tenure.

In sum, without additional facts, I cannot provide specific direction with respect to your first question.

Second, you asked whether the School Board may legalize by "reaffirmation" a vote that had been nullified by the Supreme Court. In all honesty, again, I am unclear as to the action that was indeed taken by the Board. However, if the Supreme Court nullified a vote taken in June, and that nullification essentially resulted in the absence of action, I am not sure that there is any action to be "reaffirmed".

Third, you asked whether a majority vote or a unanimous vote would be required to affirm. Leaving the issue of "reaffirmation" aside, I believe that, as a general rule, a unanimous vote is not necessary and that a majority vote of the total membership of a public body is all that is required for that body to act or otherwise carry out its duties (see definition of "quorum", §41 General Construction Law).

Fourth, you have asked my opinion, in view of the determination rendered by Judge Orgera in Sanna, as to whether the vote taken on January 14 should be interpreted to mean that your daughter is entitled to reinstatement. Unless I am mistaken, the determination by Judge Orgera means that your daughter was never terminated. If my interpretation of the determination is accurate, reinstatement would not be necessary, for the action to terminate was invalid, and your daughter never lost her job.

Fifth, you have asked whether the Committee would mediate in the controversy. From my perspective, the issuance of advisory opinions months ago and currently are reflective of mediation. If you and School District officials believe that the Committee could offer additional services, I would be happy to discuss the matter.

Lastly, I would like to comment on some of the documentation that you forwarded to this office. Specifically, your Exhibit 3, which apparently is a cover page for the Board's agenda of a meeting held on January 7, indicates that an executive session was scheduled for 7:30 p.m. to be followed by a regular session commencing at 8:30 p.m. In this regard, I direct your attention to both the Open Meetings Law and to Judge Orgera's decision.

It is emphasized that the phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded. Further, it is clear that an executive session is not separate and distinct from an open meeting but rather is a portion thereof. Section 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the language quoted above, it is clear that an executive session may be held only after having convened an open meeting. Further, to enter into an executive session, a motion to do so must be made during an open meeting in which the subject matter intended for discussion in executive session is identified in general terms, and the motion must be carried by a majority vote of the total membership. Based upon your Exhibit 3, it appears that executive sessions are convened prior to open meetings. As stated by Judge Orgera, certain conditions precedent to conducting executive sessions must be met. If the conclusions that I have reached on the basis of the Board agenda are accurate, it appears that the conditions precedent to entry into executive session are not met, and that executive sessions may be convened prior to open meetings in violation of the Open Meetings Law.

If my assumptions are inaccurate, I would appreciate hearing from you or representatives of the School District.

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:ss

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-590

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 2, 1981

Norma H. Fatone, President
Troy Citizens' Forum
75 Fourth Street
Troy, New York 12180

Dear Ms. Fatone:

I have received your letter of January 7 in which you requested an opinion under the Open Meetings Law.

Specifically, you wrote that the Troy Citizens' Forum, upon which you serve as president, believes that the Mayor's Community Development Task Force may have violated the Open Meetings Law by failing to give notice to the public and the news media. You wrote that the Task Force was appointed by the Mayor to:

> "...review the current process (citizen imput into the community development program) as established by the City Council legislation; to establish by review or inquiry whether the guidelines established by legislative act are being followed; and, to review the Community Development Program presented to the City Council through the citizen imput process and to make recommendations for Council action".

Assuming that the situation that you presented is accurate, I believe that the Task Force in question is required to comply with the Open Meetings Law and to give notice of its meetings.

In order to arrive at such a conclusion, it must be determined initially whether the Task Force is a "public body" as defined by §97(2) of the Open Meetings Law.

"Public body" is now defined to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body."

By breaking the definition into its components, one may in my view conclude that the task force in question is subject to the Open Meetings Law.

First, the task force is an entity consisting of more than two members.

Second, the task force is in my opinion permitted to conduct public business only by means of a quorum. While there may be no specific quorum requirement in the resolution or other enabling act that created the task force, all entities consisting of three or more members that operate for or on behalf of government can conduct business only be means of a quorum. The term "quorum" has been defined by §41 of the General Construction Law for decades. In relevant part, "quorum" is defined as follows:

> "[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. 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 language quoted above, whenever 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", such group must act by means of a quorum, a majority of its total membership.

Third, based upon your description of the duties of the task force, it is clear that it performs a governmental function for a public corporation, the City of Troy.

Since each of the conditions precedent necessary to a finding that an entity is a "public body" have been met in this instance, the task force is in my view a "public body" subject to the Open Meetings Law.

It is also noted that in a similar situation, it was found that a citizens advisory commission was subject to the Open Meetings Law. In Pissare v. City of Glens Falls, the Supreme Court, Warren County, which dealt with a citizens commission designated by a mayor to advise with respect to the construction of a civic center, it was held that:

> "[T]here is no doubt that the Commission and its component committees were charged with a 'public duty'. At least two members and perhaps three 'ex-officio' members of the full commission were public officers. All members were formally requested by Mayor Cronin to serve on the Commission, and all members formally agreed to serve on such Commission. While the members jointly and collectively did not have any authority and did not exercise any authority in the sense of taking final and binding action concerning the Civic Center, the members certainly had 'power' greater than that possessed by the other citizens of Glens Falls to influence the Common Council's decisions and deliberations concerning the Civic Center. The court holds that when persons are formally requested to advise the legislative and executive officers of a municipality and to assist legislative officers in deliberating that such persons are charged with a public duty (see General Construction Law, §41)."

Finally, if it can be found that the task force is a public body, it is required to comply with the notice provisions appearing in §99 of the Open Meetings Law. Specifically, §99(1) concerning meetings scheduled at least a week in advance requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. In the case of meetings scheduled less than a week in advance, §99(2) prescribes that notice be given in the same manner as in subdivision (1) "to the extent practicable" at a reasonable time prior to such 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
Executive Director

RJF:jm

cc: Mayor of the City of Troy
Corporation Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-591

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

February 17, 1981

Jody Adams
[redacted]

Dear Ms. Adams:

I have received your letter of January 16. As requested, enclosed are copies of both the Freedom of Information and Open Meetings Laws.

Unless I am mistaken, the substance of your most recent letter deals with the same subject matter as that presented in your earlier letter of January 14 to which I responded on February 6.

Again, if you could provide additional facts, I would be happy to respond in a more specific fashion.

However, you did mention a situation concerning the use of tape recorders at meetings of public bodies. In order to avoid the necessity of rendering a separate opinion regarding the use of tape recorders at a future date, I would like to offer the following comments.

In terms of background, until mid-1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt reasonable rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee on Public Access to Records had consistently advised that the use of tape recorders should not be prohibited in situations in which the devices used are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule

prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process (see attached, Special Report: Electronic Reproduction of Public Proceedings).

This contention was essentially confirmed in a decision rendered in June of 1979. That decision arose when two individuals sought to bring their tape recorders to a meeting of a school board. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent the possibility of star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority".

Based upon the advances in technology and the enactment of the Open Meetings Law, the court in Ystueta found that a public body cannot adopt a general rule that prohibits the use of tape recorders.

In my opinion, the principle enunciated in Davidson remains valid, i.e., that a public body may prohibit the use of mechanical devices, such as tape recorders or cameras, when the use of such devices would in fact detract from the deliberative process. However, since a hand held, batter operated cassette tape recorder would not detract from the deliberative process, I do not believe that a rule prohibiting the use of such devices would be reasonable or valid.

Speaking from personal experience, I have given hundreds of presentations in the five years of my employment with the Committee. During many of the presentations, batter operated cassette recorders have been used. In many instances, I have known of their use only after the presentations have been given. Very simply, it is my contention that if one does not know of the presence of a tape recorder due to its unobtrusive character, it is impossible to argue that its use would in any way detract from the deliberative process.

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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-592

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

February 20, 1981

Gary J. Veeder, Supervisor
Mildred Hinsch, Town Clerk
Office of the Supervisor
Town Hall
Pleasant Valley, NY 12569

Dear Mr. Veeder and Ms. Hinsch:

I have received your letter and memorandum of July 19, as well as the news clippings attached to your correspondence. Please accept my apologies for any inconvenience my opinion may have caused.

You have asked for an opinion in consideration of facts that you presented relative to an oral opinion that I gave in which it was suggested that violations of the Open Meetings Law may have occurred.

I would like to refer at the outset to the memorandum written by Ms. Hinsch in which she wrote that she was "negligent" in that she "forgot to post a notice" prior to the meeting of January 12. She also wrote that it was explained "by Supervisor Veeder that this was to be a closed meeting to discuss contract negotiations with another town and, in order to speak freely, all agreed the meeting should be closed to the public." I would like to offer the following with respect to the foregoing.

First, as you are aware, §99 of the Open Meetings Law requires that notice be posted prior to all meetings. Therefore, even if a failure to post notice was inadvertent, compliance with the Law would not have been fully accomplished.

Second, it appears that you (Supervisor Veeder) informed the Clerk in advance of the meeting of January 12 that the meeting would be closed. In this regard, I do not believe that a public body can schedule a closed meeting. Section 97(3) of the Open Meetings Law defines "executive session" to mean that portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law prescribes a procedure that must be followed by a public body before it may enter into an 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, in order to go into an executive session, a member of a public body must initiate a motion to do so during an open meeting. The motion must identify in general terms the subject matter to be discussed, and it must be carried by a majority vote of the total membership of a public body. As such, it is clear that an executive session may be convened only after an open meeting has begun.

Third, it appears that the procedural steps for entry into executive session were not taken at the time of the meeting because nobody was present. From my perspective, if there was a basis for entry into an executive session, the procedure should have been followed when the member of the press appeared.

Lastly, with regard to the executive session itself, it is unclear whether the discussion could properly have been conducted behind closed doors.

It is noted that a description of a discussion as "contract negotiations" would not indicate whether a discussion would be appropriate for executive session. For

instance, while §100(1)(e) of the Open Meetings Law permits executive sessions for the purpose of discussing collective bargaining negotiations under the Taylor Law, which are contract negotiations, the cited provision is restricted to collective bargaining negotiations. Stated differently, some contract negotiations may be required to be considered during open meetings, while others might be conducted during executive sessions.

It is contended in your letter that an executive session was proper under the provision concerning the "proposed lease of real property". The provision in question in its entirety states that an executive session may be held to discuss:

> "...the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof" [see Open Meetings Law, §100(1)(h)].

If the account of the situation in the articles that you forwarded was accurate, it is my view questionable whether an executive session was properly held. It appears that the sites under consideration were known to the public. Consequently, it is difficult to envision how public discussion would "substantially affect the value" of real property. Moreover, if I understand the situation correctly, it appears that the negotiations concerned services to be provided rather than the proposed sale or lease of real property. If that is so, I do not believe that an executive session could properly have been convened.

If you would like to discuss the matter further, I would appreciate hearing from you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Sen. Jay P. Rolison

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-OML-AO-593

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

February 25, 1981

Andrew J. Fisher
[redacted]

Dear Mr. Fisher:

I have received your letter of January 20. Please accept my apologies for the delay in response.

You have raised questions regarding the application of the Freedom of Information and Open Meetings Laws to the Faculty Student Association Board of Directors at the State University College at Fredonia.

It is noted that the issue has arisen in the past and that, in my opinion, there is no definitive answer that may be given. I have enclosed two letters for your review. The first, dated January 12, 1981, was prepared by this office and advised that, based upon the trend in case law, it is possible that a faculty student association might be considered a "public body" subject to the Open Meetings Law or an "agency" subject to the Freedom of Information Law. The second letter prepared by the Office of Counsel for the State University reached a different conclusion and found that a faculty student association could not be considered either a public body or an agency subject to the Open Meetings Law or the Freedom of Information Law.

You also questioned the exemption in the Open Meetings Law regarding "matters made confidential by federal or state law" that appears in §103(3) of the Law. You asked whether the exemption applies to discussions such as those concerning personnel matters, negotiations of union contracts and similar issues when a board enters into an executive session.

In my view, none of the subjects that you cited would qualify as matters that are deemed confidential by law.

It is noted that the Open Meetings Law provides two mechanisms under which a public body may conduct private discussions. The first involves executive sessions. The phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §97(3)]. Further, §100(1) of the Law prescribes a procedure that must be followed by a public body before it may enter into an executive session, and paragraphs (a) through (h) of §100(1) specify and limit the areas of discussion that may properly be considered in executive session. A personnel matter concerning a particular individual could likely be considered during an executive session pursuant to §100(1)(f) of the Open Meetings Law. Similarly, a discussion of collective bargaining negotiations could be conducted behind closed doors in an executive session under §100(1)(e) of the Law.

The other means by which a public body may conduct private discussions would involve an exemption under §103. If a matter is exempt from the Open Meetings Law, the Law simply does not apply. As you indicated, §103(3) exempts from the Open Meetings Law matters made confidential by state or federal law. From my perspective, to be considered "confidential", there must be specific statutory direction to the effect that a particular issue, or more likely specific records, are exempted from disclosure. For instance, under the federal Family Educational Rights and Privacy Act (20 USC §1232g), education records identifiable to a particular student are confidential unless the student consents to disclosure. Consequently, if a public body discusses the content of education records, it would be considering a matter made confidential by federal law that would be exempt from 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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1907
OML-AO-594

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

March 3, 1981

Carolyn Seaman
[redacted]

Dear Ms. Seaman:

I have received your letter of February 5 in which you raised a series of questions regarding the implementation of the Freedom of Information Law by the Hamlin Fire District.

I would like to offer the following comments with respect to the statements made in your letter.

First, it is noted that fire districts and volunteer fire companies are agencies subject to the Freedom of Information Law. This conclusion was made clear by a decision rendered by the state's highest court, the Court of Appeals, in Westchester Rockland Newspapers v. Kimball [50 NY 2d 575 (1980)]. The decision concerned the status of a volunteer fire company under the Freedom of Information Law and found that, even though such a company may be a not-for-profit corporation that maintains a contractual relationship with a municipality, it is an "agency" that must comply with the Freedom of Information Law in all respects.

Second, in view of the decision cited in the previous paragraph, the records to which you made reference including minutes, treasurer's reports, budget documentation and annual reports, are in my opinion clearly available.

Third, and in a related area, §89(3) of the Freedom of Information Law requires that an agency make copies of available records upon request or upon payment of or offer to pay the requisite fees for photocopying.

Fourth, it has consistently been advised that a failure to complete a form prescribed by an agency cannot constitute a valid ground for a denial of access. Section 89(3) of the Law states in part that an applicant for records may be required to submit a request in writing that reasonably describes the records in which he or she is interested. Consequently, any request made in writing that reasonably describes the records sought should be sufficient.

Fifth, the form attached to your letter indicates that an applicant is required to state the reason for his or her request. In this regard, the Committee has advised and the courts have held that accessible records are equally available to any person, without regard to status or interest (see Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165). Consequently, an agency cannot require that the reason for a request be provided as a condition precedent to gaining access to records.

Sixth, the form indicates that it must be completed and mailed or presented to the secretary-treasurer of the District "two weeks prior to the request". In my view, that requirement would violate the time limits required for response under the Freedom of Information Law and the regulations promulgated by the Committee.

With respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you.

Seventh, you indicated that the commissioners of the fire district do not read aloud at meetings minutes or a treasurer's report. With respect to your comment, there is no provision of law of which I am aware that requires that minutes or a treasurer's report be read aloud in their entirety. However, it is reemphasized that those documents are available under the Freedom of Information Law.

Lastly, with respect to minutes, I direct your attention to the Open Meetings Law, a copy of which is attached. Under §101(3) of the Open Meetings Law, minutes of open meetings must be compiled and made available within two weeks of open meetings. Minutes reflective of action taken during an executive session must be compiled and made available within one week of the executive session to which they relate. The Committee has recognized that there may be situations in which a public body might not have the capacity to approve minutes within the time periods specified in the Open Meetings Law. Consequently, in order to comply with the Law, it has been suggested that unapproved minutes be marked as "unapproved", "draft", "non final", or "unofficial". By so doing, the public has the capacity to learn generally what transpired at a meeting, and at the same time, the members of a public body are given a measure of protection. Lastly, a copy of this opinion will be sent to the Hamlin Fire District. In addition, I will forward to the District each of the documents enclosed for 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:ss

cc: Hamlin Fire District

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-595

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

March 13, 1981

Charles J. Tiano
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tiano:

Thank you for your letter of February 12 and your continued interest in the Open Meetings Law.

You have requested an opinion regarding the notice that must be given under the Open Meetings Law when a town board holds "workshops" without formal notice.

As indicated in our previous correspondence to you, dated February 15, 1980, "workshops" held by a public body are "meetings" subject to the Open Meetings Law. Therefore, they are subject to notice requirements imposed upon public bodies by §99 of the Law. Section 99(1) does not require that a public body pay to place a legal notice in a newspaper or indicate any specific method of transmission of notice to the media. However, it does require that public notice of a meeting scheduled less than a week in advance be preceded by notice given to the news media and conspicuously posted in one or more designated public locations not less than seventy-two hours prior to the meeting.

Section 99(2) concerns notice of meetings scheduled less than a week in advance and requires that notice be given to the news media and the public in the same manner as prescribed by §99(1) "to the extent practicable" at a reasonable time before such meetings.

Your second question concerns the nature of business that can be transacted at "workshops" that you described. In this regard, the Open Meetings Law deals with requirements relative to the openness of public bodies' deliberative process; it does not authorize or specify the amount or nature of business that can be conducted. As such, the number of subjects placed on an agenda may generally be determined by a public body.

In your third question, you set forth a factual situation which in your view represents a conflict of interest. Although the Committee cannot render an opinion on the subject , there are two sources you could consult. Generally, Article 18 of the General Municipal Law entitled "Conflicts of Interest of Municipal Officers and Employees" sets forth the law in this area. In addition, if you wish to obtain a legal opinion on the matter, you might want to contact:

James Coon, Esq.
Principal Attorney
Division of Legal Services
162 Washington Avenue
Albany, NY 12231

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

BY: Pamela Petrie Baldasaro /ss
Pamela Petrie Baldasaro
Attorney

PPB/RJF/ss

cc: Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-596

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 23, 1981

Mr. David R. Battaglia
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Battaglia:

I have received your letter of February 16 and apologize for the delay in response.

According to your letter and the attached news article the Tonawanda Common Council scheduled an executive session to disclose proposed layoffs of City employees. Specifically, the article which appeared in the February 13 issue of the Tonawanda News stated in part that "[L]ayoffs of city workers will be the topic at a closed-door meeting of the Tonawanda Common Council at 10:30 a.m. Saturday..." In response to your questions regarding the legality of the closed door discussion, you indicated that an alderman "stated that he felt it was allowed under the Open Meetings Law, since some department cuts involve a singular person."

I would like to offer several comments with respect to the situation.

First, a public body cannot in my view schedule an "executive session" in advance of a meeting. Section 97(3) of the Open Meetings Law defines "executive session" to mean that portion of an open meeting during which the public may be excluded. Moreover, §100(1) of the Law prescribes a procedure that must be followed by a public body prior to entry into executive session. Specifically, the cited provision states in relevant part 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..."

In view of the provision quoted above, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. Further, since a motion to enter into an executive session must be made during an open meeting and carried by a majority of the total membership of a public body, in a technical sense, a public body can never know in advance of a meeting that an executive session can be held, for it cannot be known in advance whether the motion will be carried.

Second, from my perspective, a discussion of layoffs of public employees would not constitute an appropriate ground for executive session. The so-called "personnel" exception for executive session, as amended on October 1, 1979, permits a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added) [see Open Meetings Law, §100(1)(f)].

In addition, even before the clarifications of §100(1)(f) was made by means of the addition of the term "particular", it had been held judicially that a discussion of personnel layoffs is primarily a budgetary matter that would not fall within any of the specifically enumerated subjects listed in §100(1)(f) of the Open Meetings Law and, therefore, should be discussed openly (see <u>Orange County Publications v. City of Middletown</u>, Sup. Ct., Orange Cty., December 16, 1978).

If, however, during the course of a discussion, a public body considers whether or not a particular public employee has performed his or her official duties well or poorly, a public body could enter into an executive session at that time.

In sum, I concur with your contention that a discussion of layoffs should have been open, particularly if, according to the Tonawanda News, the layoffs would occur "because of a decline in anticipated revenue and to avoid a huge tax increase..." Clearly, under such circumstances, the major considerations would involve policy questions and not the manner in which a particular employee has performed his or her duties.

You have also raised questions concerning the scope of §100(1)(f) that enables a public body to enter into an executive session to discuss the "financial history" of a particular corporation. I do not believe that I could "enumerate" what can legally be discussed that would fall within the scope of the "financial history" of a corporation. In short, new situations and fact patterns are brought to the attention of the Committee every day, and it would be all but impossible to "enumerate" the situations in which the exception would apply.

You also asked whether §100(1)(f) would include a "corporation's ability to raise the necessary funds to complete work they contracted for with the city". In my view, it is possible that such a discussion might appropriately be discussed during an executive session, for it might involve the credit history of the corporation or perhaps a matter leading to the employment of a particular corporation.

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: Common Council

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOML-AO-597

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

March 26, 1981

Mrs. Sylvia K. Huber
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Huber:

I have received your thoughtful letter of February 16 and apologize for the delay in response.

You have raised several concerns regarding the implementation of the Open Meetings Law by the Corning-Painted Post School Board. Specifically, you have requested the Committee's view regarding a letter you have enclosed, written by a law firm engaged by the School Board in which it was advised that the Board could conduct a "closed door workshop".

Having reviewed the correspondence, I would like to offer the following observations.

First, it is noted that the courts have expansively interpreted the Open Meetings Law. Specifically, in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the Court of Appeals, the state's highest court, held that the definition of "meeting" includes any convening of a quorum of a public body for the purpose of conducting public business, whether or not an intent to take action exists, and regardless of the manner in which a gathering may be characterized. From the information you have presented in your letter, it appears that a quorum of the School Board was present at the closed door workshop. If a quorum was present, it appears that the workshop was a meeting subject to the Open Meetings Law in all respects.

Second, §99 of the Open Meetings Law requires that notice be given to the news media (at least two) and posted for the public prior to all meetings. In regard to the situation that you have described, it appears that the workshop meeting was scheduled less than a week in advance. If that was the case, notice should have been given in accordance with §99(2), which requires that notice be given to the news media and posted in one or more designated, conspicuous public locations at a reasonable time prior to the meeting.

Third, a public body, such as a school board, cannot schedule an executive session or "closed door workshop" in advance of a meeting. The phrase "executive session" is defined by §97(3) of the Open Meetings Law (see attached) to mean that portion of an open meeting during which the public may be excluded. Moreover, the Law sets forth a procedure that must be followed by a public body before it can enter into an executive session. Specifically, §100(1) of the Law states in relevant part 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..."

In view of the definition of "executive session" as well as the language quoted above, it is clear that a public body may conduct an executive session only after having convened an open meeting. A motion to enter into an executive session must be made during an open meeting, it must identify in general terms the subject matter to be considered, and the motion must be carried by a majority vote of the total membership of a public body. Therefore, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting. It is also noted that in a technical sense, a public body can never schedule an executive session in advance, for it cannot be known in advance whether a motion to enter into an executive session will indeed be carried by a majority of the total membership of a public body.

Fourth, you have submitted the table of contents that was presented at the closed door workshop and have indicated that the matters discussed at this meeting concerned the legal responsibilities of School Board members in a variety of areas. In reviewing the table of contents and your statements regarding the subject matter of the meeting, it would appear that none of these topics fell within any of the grounds for executive session as set forth in §100(1)(a) through (h) of the Law.

Fifth, §103 of the Law states that three areas of discussion are exempt from the Open Meetings Law. Stated differently, if a matter is exempt, the Law simply does not apply and a public body is not required to provide notice or follow the procedure for entry into executive session. In regard to the situation you have described, §103(3) provides that the Law does not apply to "matters made confidential by federal or state Law". Since the attorney-client relationship is privileged under the Civil Practice Law & Rules, a discussion held pursuant to the attorney-client relationship may be held outside the scope of the Open Meetings Law. However, in the situation presented in your correspondence, it appears that the law firm was engaged by the School Board in an educational capacity to conduct "teaching sessions" in the words of Mr. Hogan. In sum, if indeed the firm, which is not the retained counsel of the Board, was engaged to provide education to Board members, and not advice rendered pursuant to an attorney-client relationship, the exemption would not in my view apply. Further, if my contention is accurate, the gathering in question would have constituted a "meeting" subject to the Open Meetings Law.

Lastly, you have indicated that the closed door workshop was held in Binghamton, New York at a location outside of the District governed by the School Board. Although the Committee is unaware of any provision of law requiring a school board to meet at a location within a school district, I believe that all laws should be given a reasonable interpretation. In view of the legislative declaration appearing in §95 of the Open Meetings Law, I believe that it would be unreasonable for a public body to hold a meeting in a location in which members of the public might not have the capacity to attend.

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

BY Pamela Petrie Baldasaro
Attorney

RJF:jm

Enc.

cc: School Board
Hogan & Sarzynski

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1929
OML-AO-598

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

March 27, 1981

Bernice McPhillips
McPhillips, Fitzgerald, Meyer
& McLenithan
Attorneys at Law
288 Glen Street-P.O. Box 309
Glens Falls, NY 12801

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. McPhillips:

I have received your letter of February 23 and apologize for the delay in response.

As the legal representative of the Board of Education of the Schuylerville Central School District, you have requested an advisory opinion regarding the receipt of "a special request for certain information". Specifically, a member of the news media has requested a copy of the minutes of an executive session held by the Board on February 12, 1981. During the executive session, a grievance hearing was conducted pursuant to the terms of a collective bargaining agreement between the District and its Teachers' Association. You have contended that the information in question might result in a grievance alleging a breach of non-compliance with the terms of the existing contract.

First, although I am unfamiliar with the specific terms of the contract between the Teachers' Association and the District, you have intimated that the contract may contain provisions that require that certain records be withheld. If that is the case, the contract is in my view void to the extent that it conflicts with or in any way abridges rights of access granted by the Freedom of Information Law. Very simply, I do not believe that the District and a public

employee union have the capacity to engage in an agreement that conflicts with a statute passed by the State Legislature and signed by the Governor.

Second, it is emphasized that the Freedom of Information Law is permissive. Stated differently, the Law generally states that certain categories of records may be withheld; nowhere in the Law does it state that such records must be withheld. The only instance in which records must be withheld would involve a situation in which the records are specifically exempted from disclosure by statute under §87(2)(a). For example, in the context of school district records, the federal Family Educational Rights and Privacy Act requires that education records identifiable to a particular student or students be kept confidential with respect to all but the parents of students under the age of eighteen. As such, a school district would be precluded from disclosing education records, unless the disclosures are made in accordance with the specific provisions of the act. Otherwise, even if a ground for denial might be applicable, an agency, such as a school district, would not be compelled to withhold, if, for example, it is determined that disclosure would be in the public interest.

Third, it is unclear whether minutes were required to have been kept or even whether they should have been kept. You wrote that a grievance hearing was conducted during an executive session. In this regard, it is not entirely clear whether a hearing constitutes a "meeting" in all cases. For instance, as you are aware, §103(1) of the Open Meetings Law exempts from the provisions of the Law quasi-judicial proceedings. I have no knowledge as to whether the hearing in question could have been considered quasi-judicial. If it was quasi-judicial, it would fall outside the scope of the Open Meetings Law and the general requirements of the Open Meetings Law would not have been applicable.

Further, it is questionable whether action may be taken by a board of education during an executive session.

With regard to minutes of executive session, §101(2) of the Open Meetings Law 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..."

As I read §101(2), minutes of executive session must be compiled only when action is taken in executive session.

As such, public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

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 2d 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.

Fourth, from my perspective, whether or not minutes were required to have been kept is not determinative of issues regarding rights of access. Here I direct your attention to §86(4) of the Freedom of Information Law, which 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 breadth of the definition quoted above, any records prepared by or in possession of the District would fall within the scope of rights of access granted by the Freedom of Information Law. Consequently, whether the records in question may be characterized as minutes or other types of documents is in my view of no moment; they are in any case subject to the Freedom of Information Law.

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

In view of the foregoing, the question is whether the records fall within any of the grounds for denial. If, for example, a determination was made regarding the grievance, I believe that it would be available. Section 87(2)(g) of the Law states that an agency may withhold records that:

> "...are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

The language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available. Based upon the foregoing, if the records in question contain statistical or factual information, instructions to staff that affect the public, or final statements of policy or determinations, they must in my view be made available.

The other ground for denial that might be applicable is §87(2)(c), which provides that an agency may withhold records or portions thereof when disclosure would "impair present or imminent contract awards or collective bargaining negotiations." Based upon the facts that you have provided, it does not appear that the records would have an effect upon present or imminent collective bargaining negotiations.

Further, it is noted that in United Federation of Teachers v. New York City Health and Hospitals Corporation [428 NYS 2d 823 (1980)], a court granted access to some 1,500 grievances and decisions rendered on grievances signed by nurses represented by a competing union. In addition, the agency could not meet its burden or proving that disclosure would impair imminent contract awards or collective bargaining negotiations.

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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO - 599

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

April 6, 1981

Mr. John H. Galligan
Municipal Program Specialist
NY Conference of Mayors
119 Washington Avenue
Albany, New York 12210

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Galligan:

Thank you for your letter of February 27. Please accept my apologies for the delay in response.

The question you have posed is whether a compulsory interest arbitration hearing is subject to the Open Meetings Law.

In my view, the hearing that is the subject of your inquiry likely falls outside the scope of the Open Meetings Law for the following reasons.

It is noted initially that §103 of the Open Meetings Law contains three exemptions. If a subject is "exempt" from the Open Meetings Law, the provisions of the Law simply do not apply. The first exemption [§103(1)] states that the Open Meetings Law does not apply to "judicial or quasi-judicial proceedings, except proceedings of the public service commission."

In this regard, §209(4) of the Civil Service Law sets forth a procedure for compulsory interest arbitration for the officers or members of any organized fire department, police force or police department of any county, city (with the exception of New York City), town, village,

or fire or police district. Under the cited provision, a public arbitration panel is required to hold hearings on all matters related to the dispute.

Black's Law Dictionary (Revised Fourth Edition, 1968) defines "hearing" as a :

> "[P]roceeding of relative formality, generally public, with definite issues of fact or of law to be tried, in which parties proceeded against have right to be heard, and is much the same as a trial and may terminate in final order."

In addition, Black's defines "quasi-judicial" to mean:

> "[A] term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

Often it may be difficult to draw a line of demarcation between deliberations of a quasi-judicial as opposed to a quasi-legislative or administrative nature. In this regard, I direct your attention to a determination that sought to draw such a line with respect to the deliberations of a city zoning board of appeals. Specifically, in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, 418 (1978)], the court stated that:

> "We agree with Special Term 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 vote 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."

It appears that the deliberative process of the panel in question is similar to that described above. As such, it appears that the deliberation of the panel could likely be characterized as "quasi-judicial".

Further, §209(4)(c)(vi) of the Civil Service Law states that the determination of the public arbitration panel is "final and binding upon the parties". Such a determination is not subject to further approval by any local legislative body or other municipal authority; it is subject only to judicial review. It appears from the preceding statutory direction that the public arbitration panel, during a compulsory arbitration hearing, functions in a quasi-judicial manner.

Based upon the provisions of the Civil Service Law and the definitions of "hearing" and "quasi-judicial", it appears that the hearing held by the arbitration panel is quasi-judicial and, therefore, would be exempt from the Open Meetings Law.

Lastly, research into the legislative history of an amendment to §209 of the Civil Service Law appears to bolster a contention that a compulsory interest arbitration hearing is not subject to the Open Meetings Law. Prior to the addition of §209(4), a "public hearing" in §209(3) was required to be held by the legislative body of the unit of government involved, resulting in the legislative body taking appropriate action. In 1974, the compulsory interest arbitration section was added as §209(4) and required the public arbitration panel to hold hearings on all matters relating to the dispute. Since the Legislature did not add the modifier "public" (as in "public hearing") to the interest arbitration hearing language it might be assumed that the absence of the term public was intentional.

The specific powers granted to the arbitration panel to hear oral and written evidence, review facts and require the production of additional evidence were not similarly granted to the legislative bodies under §209(3). Perhaps this dissimilarity was intended to distinguish and emphasize the quasi-judicial authority granted to the arbitration panel.

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

BY: Pamela Petrie Baldasaro
Attorney

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-600

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

April 7, 1981

Mr. Tom Hoffman
Chairman-Park Project
430 East 65th Street
New York, NY 10021

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hoffman:

As you are aware, I have received your most recent inquiry regarding the interpretation of the Open Meetings Law.

You have raised questions concerning the accuracy of comments appearing in minutes of the Palisades Interstate Park Commission. On page 34 of the minutes, which you transmitted to this office, there is a section concerning the interpretation of the Open Meetings Law, which contains comments offered by Albert Caccese, Counsel to the New York State Office of Parks and Recreation.

Specifically, according to the minutes,

> "Mr. Caccese went on to say that the law defines a meeting as the formal convening of a public body for the purpose of officially transacting public business; and a public body 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. He also noted that there is no case law on the legislative intent as it regards

> committees and sub-committees and this, too, is open to interpretation. According to Mr. Caccese, the question is whether the committee or subcommittee is conducting public business as a governmental function and thereafter making a recommendation or taking official action".

He also indicated that certain discussions would not be subject to the Law, provided that the members present:

> "...take no official or final action..."

I respectfully disagree with the comments offered by Mr. Caccese for a number of reasons.

First and perhaps most importantly, the definitions of "meeting" and "public body" were altered in a series of amendments to the Open Meetings Law that went into effect on October 1, 1979. However, the explanations of "meeting" and "public body" by Mr. Caccese represent the original definitions, which were indeed sufficiently vague that their scope was questionable. In my opinion, both definitions are in their amended form clear.

With respect to the definition of "meeting", I would like to point out that the Court of Appeals in Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)] interpreted the definition expansively and held that any gathering of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Further, the redefinition of "meeting" was in my view intended to conform to the determination of the Court of Appeals.

It is also noted that the term "transact" no longer appears in the definitions of either "meeting" or "public body". The replacement of the term "conduct" for "transact" was in my opinion intended to ensure that the entire deliberative process be subject to the Open Meetings Law, and that the Law should clearly apply to more than only those meetings during which there is an intent to take action.

Although the definition of "public body" in the Open Meetings Law as originally enacted was unclear with respect to its coverage of committees, subcommittees and similar advisory bodies, an alteration of that definition now makes clear that such bodies are indeed subject to the Law. Section 97(2) of the Open Meetings Law now defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

Again, it is emphasized that the term "transact" has been replaced with "conduct". Moreover, the definition now makes specific reference to committees, subcommittees and similar bodies. Consequently, in my opinion, it is clear that a committee consisting of two or more designated to perform a duty collectively as a body is subject to the Open Meetings Law in all respects, even if it has only the capacity to recommend or advise.

Lastly, enclosed is a copy of a memorandum to which the revised Open Meetings Law is attached in which the changes in the Law are identified and explained. The memorandum was transmitted to all public bodies in August of 1979, prior to the effective date of the amendments to the Law, October 1, 1979. In order to assist the Commission in complying with the Law, copies of this opinion and the memorandum to which reference was made in the preceding sentence will be transmitted to the Commission.

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:ss
Enclosures
cc: Palisades Interstate Park Commission
Mr. Caccese

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1955
OML-AO-601

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

April 8, 1981

Mrs. Linda Campion
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Campion:

I have received your letter of March 5. Please accept my apologies for the delay in response.

You have raised questions regarding both the Freedom of Information and Open Meetings Laws. Enclosed for your consideration are copies of both statutes, as well as an explanatory pamphlet that may be useful to you.

It is noted at the outset that I have discussed your correspondence with Eileen O'Keefe, District Clerk of the Sachem Central School District. Based upon our conversation, it appears that the District has responded to your requests for information and that no controversy now exists. However, I would like to offer the following comments.

First, with respect to a School Board meeting held on February 10, you wrote that it was necessary to be carried up and down a full flight of stairs in your wheelchair in order to attend the meeting. Although Ms. O'Keefe informed me that the issue of access to the handicapped is now being considered, I would like to point out that §98(b) of the Open Meetings Law states that:

> "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

The language quoted above makes clear that a public body is not required to alter an existing facility or construct a new facility in order to accommodate physically handicapped persons. However, it is also clear that "reasonable efforts" must be made to ensure that meetings are held in facilities that permit barrier-free access to handicapped persons.

Second, as indicated earlier, it is my understanding that the District has satisfied your requests for records relative to the issue concerning the bus stop. Ms. O'Keefe informed me that certain memoranda from the Superintendent to the staff and the Board that are advisory in nature were withheld. From my perspective, a denial on that basis would be appropriate.

I direct your attention to §87(2)(g) of the Freedom of Information Law, which states that an agency may withhold records that:

> "...are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

Although inter-agency or intra-agency materials containing statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available, portions reflective of advice, suggestion, recommendation or opinion, for instance, may justifiably be withheld.

Under the circumstances, if indeed the memoranda were advisory in nature, it appears that a denial was 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
Executive Director

RJF:ss
cc: Eileen O'Keefe
Cathie DeRocco

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-602

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

April 10, 1981

Vivian H. Evans, Clerk
The Village of Speculator
Hamilton County
Speculator, NY 12164

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Evans:

I have received your letter of March 6 and appreciated your interest in complying with the Open Meetings Law. Please accept my apologies for the delay in response.

You have asked for advice regarding:

> "...when and under what circumstances, a meeting of the Mayor and Board of Trustees may be declared "Executive Session", and all persons not directly concerning are barred from attending."

Enclosed for your consideration is a copy of the Open Meetings Law as well as an explanatory pamphlet concerning both the Freedom of Information and Open Meetings Laws.

With respect to your question, I direct your attention to §100(1) of the Open Meetings Law. The cited provision describes the procedure that must be followed before a public body may enter into an executive session. In addition, paragraphs (a) through (h) of §100(1) indicate the eight areas of discussion that are appropriate for executive session. Those eight areas represent the only instances in which a public body may enter into an executive session.

Lastly, I would like to point out that §100(2) states that:

> "[A]ttendance at an executive session shall be permitted to any members of the public body and any other persons authorized by the public body."

Based upon the language quoted above, it is clear that the members of a public body may attend an executive session. Further, a public body may permit others to attend an executive session, if, for instance, the presence of such a person or persons would assist the public body in its deliberations.

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

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-603

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

April 13, 1981

Lee E. Koppelman
Director
Department of Planning
Veterans Memorial Highway
Hauppauge, L.I., NY 11787

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Koppelman:

I have received your letter and appreciate your interest in complying with the Open Meetings Law.

You have indicated that you are the chairperson of the Suffolk County Reapportionment Committee, which has been designated by the Suffolk County Executive to devise a reapportionment map for the Suffolk County Legislature and submit a report to the County Executive for consideration by the County Legislature.

Further, you wrote that:

> "[T]wo weeks ago, the members of the committee voted to declare the forthcoming meetings as closed working meetings so that the members could freely discuss their opinions relative to district lines. Assistant County Attorney Kent rendered a legal opinion stating that the committee could go into executive session".

You have requested an advisory opinion relative to the matter that you described. In this regard, I would like to offer the following comments.

It is noted initially that the Reapportionment Committee is in my view a "public body" that is required to comply with 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 conduct 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, or committee or subcommittee or other similar body of such public body".

By breaking the definition into its components, I believe that it may be concluded that the Committee in question is indeed a "public body".

First, the Reapportionment Committee is an entity that consists of two or more members.

Second, I believe that it is required to conduct its business by means of a quorum, whether or not there is any specific requirement concerning a quorum in the by-laws of the Committee or in the act that created it. I direct your attention to §41 of the General Construction Law, which defines "quorum" as follows:

> "[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. 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".

Based upon the provision quoted above, whenever three or more public officers or "persons" are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only by means of a quorum, a majority of the total membership. Consequently, even if there is no specific direction to the effect that the Reapportionment Committee must conduct its business by means of a quorum, §41 of the General Construction Law imposes such a requirement upon the Committee.

Third, the Committee in my opinion clearly conducts public business.

And fourth, the Committee performs a governmental function for a public corporation, in this instance, Suffolk County.

Since each of the conditions precedent to a finding that the Reapportionment Committee is a "public body" appear to have been met, I believe that it is a public body required to comply with the Open Meetings Law in all respects.

I would like to point out that the definition of "public body" discussed in the preceding paragraphs differs from the definition that appeared in the Open Meetings Law as originally enacted. Under the original statute, it was unclear whether committees, subcommittees and similar advisory bodies were subject to the Law. However, I believe that the definition as amended clearly includes such advisory bodies within the scope of the Law. Moreover, this point was confirmed in a recent decision, which found that a mayor's advisory task force is subject to the Open Meetings Law based upon the rationale I have offered above [see Matter of Syracuse United Neighbors v. City of Syracuse, AD 2d___; (Fourth Department, Appellate Division, March 27, 1981)].

It is also emphasized that, if the Assistant County Attorney has based his opinion in part upon the contention that a "working meeting" or "work session" is outside the scope of the Open Meetings Law, I would disagree. In this regard, under the Open Meetings Law as originally enacted, the Court of Appeals rendered an expansive opinion with respect to the scope of the definition of "meeting". In its decision, the Court found in essence that any convening of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see e.g., Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In addition, the definition of "meeting" that now appears in §97(1) of the Law was in my view intended to conform to the decision rendered by the Court of Appeals. Therefore, in my opinion, it is clear that the upcoming meetings that you have described are subject to the Open Meetings Law, even if they are denominated as "working meetings" or "work sessions".

Next, it is important to note that §97(3) of the Open Meetings Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law requires that a public body follow a prescribed procedure before it can enter into an executive session. Specifically, the cited provision states that:

> "Upon 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..."

In view of the language quoted above, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting.

Similarly, since a motion to enter into an executive session must be made during an open meeting and carried by a majority vote of the total membership of a public body, an executive session cannot, at least in a technical sense, be scheduled in advance of a meeting.

Lastly, §100(1) states that an executive session may be convened only to discuss one or more among eight areas deemed appropriate for executive session that are listed in paragraphs (a) through (h) of the cited provision. Based upon your letter and our telephone conversation, it appears unlikely that any of the eight areas of discussion that may properly be conducted during an executive session would arise during a meeting of the Reapportionment Committee. Consequently, it appears that the deliberations of the Committee must be conducted during open meetings in view of any person who seeks to attend.

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:ss

cc: County Executive Cohalan
Assistant County Attorney Kent

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-604

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

April 14, 1981

Vivian Weisman
Community Worker
United Community Centers, Inc.
833 Van Siclen Avenue
Brooklyn, NY 11207

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Weisman:

I have received your letter of March 6. Please accept my apologies for the delay in response.

You have sought advice with respect to two items appearing on a proposed agenda of a meeting of March 10 held by the District 19 Community School Board.

It is noted that I do not know whether either of the two resolutions that you cited was passed by the Board. Nevertheless, I would offer the following comments with respect to those resolutions.

Resolution Number 3, if passed, would state that:

> "[R]esolved that the Community School Board of District 19 go into 'executive session' on the 1st Wednesday of each month starting with April 1981 or whenever the need arises, to discuss 'personnel matters'".

As noted in our previous correspondence, I do not believe that a public body can schedule an executive session in advance of a meeting. In this regard, I direct your attention to §100(1) of the Open Meetings Law, which prescribes a procedure that must be followed by a public body before it may enter into an executive session. Specifically, the cited provision states in relevant part 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..."

Based upon the language quoted above, three steps must be taken before a public body may enter into an executive session. First, a member of a public body must make a motion during an open meeting to enter into an executive session. Second, the motion must identify in general terms the subject or subjects to be considered during an executive session. And third, the motion must be carried by a majority of the total membership of a public body. In view of the foregoing, I do not believe that an executive session may be scheduled to be convened at future meetings on a regular basis.

Moreover, the subject identified would not in my opinion qualify for an executive session in every instance. "Personnel matters" without further description may in some instances constitute appropriate topics for executive sessions, but it would not in others.

Section 100(1)(f) of the Open Meetings Law states that a public body may enter into an executive session to discuss:

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

It is emphasized that the language quoted above represents an alteration from the analagous provision that appeared in the Open Meetings Law as originally enacted. Under that statute, it was contended by many that discussions relative to personnel in general or with respect to policy matters that had a relationship to personnel could be considered

behind closed doors. However, by the insertion of "particular", it is clear that only those personnel matters that relate to a "particular person" may justifiably be considered during an executive session.

Moreover, due to the insertion of the word "particular", I do not believe that a motion to enter into an executive session to discuss "personnel matters" without additional qualification would be sufficient. For example, a proper motion to enter into an executive session might involve "the employment history of a particular person", or "a matter leading to the dismissal of a particular person".

The fourth resolution, if enacted, would provide that:

> "[R]esolved that the Community School Board of District 19, acting upon the recommendation of the Community Superintendent, approve zoning proposals (school by school) for school year 1981-1982, subject of a Public Hearing held February 17, 1981. There will be no discussion pro and con on this item since a Public Hearing was held on the subject. (copies of the proposal will be available at the front desk on or about Friday, March 6, 1981)."

It appears that the question in this instance concerns the propriety of not discussing the "pro and con on this item". In this regard, there is no requirement of which I am aware that the members of a public body discuss the issues before it. However, from a philosophical perspective, I believe that the concept behind the creation of public bodies was to bring a group of individuals with disparate views together in order to arrive at determinations preferable to those that could be made by a single individual. Stated differently, I believe that a public body is intended to deliberate as a body. Nevertheless, I know of no provision of law that would require that a discussion of "pros and cons" be conducted.

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:ss

cc: Community School Board District #19

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1966
OML-AO-605

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

April 15, 1981

Mr. Khalid Abdul Malik
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Malik:

I have received your letter of March 10. Please accept my apologies for the delay in response. You have requested an opinion with respect to your request made under the Freedom of Information Law that was directed to Local School Board #23.

Specifically, you wrote that, on March 2, you delivered a request to Local School Board #23. You were informed that you should visit the office on March 9 in order to obtain a determination regarding your request. At that time, you were informed by the Interim Acting Superintendent that he would not have the information that you requested and that he would not produce any of the records sought until he could speak with the Chairman of the Board of Education.

I would like to offer the following comments and observations with respect to the situation that you described and the nature of the records that you requested.

First, with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons,

or the receipt of a request may be acknowledged in writing if more than five days in necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In my view, a failure to respond within the designated time limits results in a denial of access that you may appeal to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet that may be useful to you.

Second, I direct your attention once again to the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law. Under §1401.2 of the regulations, the governing body, in this case the Board of Education, is required to designate one or more records access officers for the purpose of responding initially to requests. Section 1401.7 concerns the procedure by which an agency may deny access to records and the process by which a person denied access may appeal. It is specified in that provision that the records access officer shall not be the appeals officer [see §1401.7(b)]. Under the circumstances, if, for example, the Chairman of the Board of Education renders a determination on appeal following denials of access, I do not believe that the same individual should also make initial determinations in response to requests. If the records access officer and the appeals officer are the same person, the right to appeal would effectively be eliminated. Further, if that is the situation in the District from which the records have been requested, perhaps corrective action should be taken.

With respect to the records that you are seeking, your first area of request concerns copies of all minutes of resolutions of Local School Board #23 since February 1, 1978. In my view, those records are available under the Freedom of Information Law, for they represent determinations made by the Board that are accessible under §87(2)(g)(iii) of the Freedom of Information Law. In addition, I believe that they must also be compiled and made available under the Open Meetings Law, §101. Subdivision (1) of the cited provision states that:

> "[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."

Further, §101(3) of the Open Meetings Law requires that minutes of open meetings be compiled and made available within two weeks of such meetings.

Your second area of inquiry concerns minutes of meetings of the Executive Committee of the Local School Board #23 since June 1, 1977. Again, to the extent that such records exist, I believe that they must be made available. It is noted that a committee of a school board or other governing body is also subject to the Open Meetings Law, and, therefore, is required to create minutes [see attached Open Meetings Law, §97(2), definition of "public body"].

The third area of inquiry involves:

> "[A] list of all hired consultants, under the titles of Educational, Evaluation, Administrative or Artistic Performers under the employment of L.S.B. #23 since June 1, 1977, including copies of any forms filled out by said consultants and/or L.S.B. #23 that would detail:
>
> a. Length of time served (as consultants)
>
> b. Purpose and rationale for such employment

c. Rate of pay (including all time sheets)

d. All written authorization for consultants from whatever Personal Authority from L.S.B. #23

e. Whatever written descriptions underlining the nature of the consultant mentioned above."

It is noted that the Freedom of Information Law grants access to existing records. Section 89(3) of the Law states that an agency generally need not create records in response to a request. Therefore, if, for example, there is no list in existence reflective of hired consultants, the District would be under no obligation to create such a record on your behalf.

Nevertheless, I would conjecture that if indeed consultants have been hired, that the information in which you are interested might be contained within one or more among a group of records. For instance, checks, vouchers and similar financial records might indicate the length of time that a consultant serves as well as that person's rate of pay. A contract between the Board and a consultant might indicate the purpose and rationale for employment and the nature of duties to be performed. As such, if there is no single record containing the information that you have described, you might renew your request and qualify the types of records sought in accordance with the advice given above. Further, as noted earlier, I have enclosed an explanatory pamphlet regarding the Freedom of Information Law and the Open Meetings Law that contains a model letter of request which may be particularly useful to you.

Copies of this opinion, the Freedom of Information Law and the regulations will also be sent to Mr. Edwards and Mr. Boyland, in order that they may be given advice as well.

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
Encs.
cc: Mr. Carlos Edwards
Mr. William Boyland

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-606

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

April 15, 1981

Mr. John P. Wall
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wall:

I have received your letter on March 12 and appreciate your interest in the proper implementation of the Open Meetings Law. Please accept my apologies for the delay in response.

Your inquiry concerns a meeting convened by the Mayor of the Village of Liberty who had announced in advance of the meeting that the Board of Trustees' discussion of a sewage treatment plant would be closed to the public. You have requested advice from the Committee regarding the proper procedure for both "open and closed" meetings.

I would like to offer the following comments in regard to the questions you have raised.

First, a public body, such as a village board of trustees, cannot in my view schedule an executive session in advance of a meeting. The phrase "executive session" is defined by §97(3) of the Open Meetings Law (see attached) to mean that portion of an open meeting during which the public may be excluded. Moreoever, the Law sets forth a procedure that must be followed by a public body before it can enter into an executive session. Specifically, §100(1) of the Law states in relevant part 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..."

In view of the definition of "executive session" as well as the language quoted above, it is clear that a public body may conduct an executive session only after having convened an open meeting. A motion to enter into an executive session must be made during an open meeting, it must identify in general terms the subject matter to be considered, and the motion must be carried by a majority vote of the total membership of a public body. Therefore, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting. It is also noted that in a technical sense, a public body can never schedule an executive session in advance, for it cannot be known in advance whether a motion to enter into an executive session will indeed be carried by a majority of the total membership of a public body.

Second, in a related vein, a public body is required to provide notice to the news media and to the public prior to all meetings. It is emphasized that the courts have given an expansive interpretation of the definition of "meeting" [see Open Meetings Law, §97(1)]. Specifically, in Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the Court of Appeals, the state's highest court, held that the definition of "meeting" encompasses any situation in which a quorum of a public body convenes for the purpose of discussing public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized.

Section 99(1) of the Law concerning meetings scheduled at least a week in advance requires that notice be given to the news media (at least two) and posted in one or more designated, conspicuous public locations not

less than seventy-two hours prior to such meetings. Section 99(2) concerning meetings scheduled less than a week in advance requires that notice be given to the news media and by means of posting in the same manner as described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, it is clear that notice must be given to the public and the news media prior to all meetings.

Third, a public body may enter into an executive session only to discuss those matters deemed appropriate for executive session that are described in §100(1)(a) through (h) of the Open Meetings Law.

And fourth, one of the grounds for executive session includes a discussion of "proposed, pending or current litigation". Under the circumstances, it would appear that the quoted ground for executive session may have been applicable. From my perspective, §100(1)(d) is intended to enable public bodies to enter into executive session to discuss litigation strategy with respect to imminent or ongoing litigation. It is noted that many public bodies have in the past sought to enter into executive session to discuss "possible" litigation. In this regard, the Committee has advised that any subject could relate to "possible" litigation, and that litigation must be imminent in order to cite the provision in question appropriately.

I hope that the foregoing will be of assistance to you and has helped clarify your understanding of the Open Meetings Law. For your information, enclosed is a copy of the Open Meetings Law and an explanatory pamphlet on the subject. Should any further questions arise, please feel free to contact me.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY Pamela Petrie Baldasaro
Attorney

RJF:PPB:jm

Encs.

cc: Village Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-607

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

April 15, 1981

Vivian M. Joynt
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Joynt:

I have received your letter of March 10. Please accept my apologies for the delay in response.

You have raised several questions, many of which concern your capacity to employ a tape recorder at a meeting.

First, you indicated that you are one of ten members of the Vocational Education Council appointed by the Lackawanna Board of Education. You have asked whether you are considered a public official under the Open Meetings Law.

In all honesty, I do not know whether you could be considered a public official. However, I believe that it is clear that the Council upon which you serve is a "public body" subject to the Open Meetings Law. Section 97(2) of the Law as amended defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

It is noted that under the Open Meetings Law as originally enacted, numerous questions arose with respect to the applicability of the Law to committees, subcommittees and similar advisory bodies. The amendments to the definition of "public body" in my view make clear that such entities are subject to the Law. While the original Law made reference to groups that could "transact", the amendment makes reference to those that "conduct" public business. Further, at the end of the definition, specific reference is made to "committees, subcommittees and similar bodies". Based upon the alterations in the definition of "public body", I believe that the Vocational Education Council is subject to the Open Meetings Law in all respects.

Your second question is whether "without the consent of the council, can anyone other than council members attend the council meeting merely to sit and listen"? In this regard, if my contention that the Council is a public body subject to the Open Meetings Law is accurate, any person would have the right to attend and listen to its deliberations, unless an appropriate executive session is convened.

Your third area of inquiry concerns your unsuccessful attempts to use a small, battery operated tape recorder at a meeting of the Council. You wrote further that the Council voted to deny the use of the tape recorder on the grounds that (a) you "could somehow change the record of the proceedings" and that "(b) they could not speak as freely as if the meeting was not being taped". In my opinion, a public body can no longer adopt a rule that generally prohibits the use of tape recorders. As indicated in People v. Ystueta, which you cited in your letter, it has been held judicially that the use of a small, battery operated tape recorder does not detract from the deliberative process and that, as such, a rule prohibiting the use of such a device would be unreasonable. Therefore, it is my belief that you were indeed improperly denied the use of your tape recorder. In order to apprise the Board of Education of recent developments in case law, copies of the Ystueta decision and the opinion of the Attorney General to which you made reference will be sent to the Board.

Lastly, you indicated that you would like to use a tape recorder because you have a hearing impairment. In this regard, I direct your attention to §98(b) of the Open Meetings Law, which states that:

> "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law".

Further, §50(5)(c) of the Public Buildings Law defines "physically handicapped" to include:

> "...total or partial impairment of hearing or sight causing insecurity or likelihood of exposure to danger in public places..."

I do not know whether your hearing impairment causes insecurity or the likelihood of exposure to danger. Nevertheless, it might be contended that if indeed a hearing impairment precludes an individual from hearing the deliberations of a public body, a prohibition of the use of a tape recorder by a person with a hearing impairment would constructively deny that person of the capacity to assert his or her rights under the Open Meetings Law. It is emphasized, however, that whether or not the contention expressed above is valid, as indicated earlier, the Ystueta decision and the Attorney General's advisory opinion clearly state that a public body can no longer prohibit the use of tape recorders at an open meeting. Moreover, if your statement that the School Board uses "a large console tape recording device" is accurate, I cannot envision any rationale for the prohibition of another type of tape recording device at its meetings. Stated differently, if the Board's tape recorder does not detract from the deliberative process, I do not believe that your tape recorder could detract from the deliberative process.

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:ss

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-608

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

April 16, 1981

Joseph J. Carrus
Research Director, C.A.B.
775 Main Street
Dunkirk, New York 14048

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Carrus:

I have received your letter of March 10, which was forwarded to this office from the Department of Audit and Control. Please accept my apologies for the delay in response.

In your letter you raised the following question: "[C]an the Dunkirk Citizen's Action Board (C.A.B.) hold a private meeting in a city fire hall?" You wrote that Mayor Michalak of the City of Dunkirk advised you that only public meetings could be held in public buildings in order to comply with the Open Meetings Law.

First, there is no provision of the Open Meetings Law regarding the location of a meeting other than §98(b), which requires public bodies to make reasonable efforts to hold meetings in facilities which permit "barrier-free physical access to the physically handicapped". Further, I am unaware of any general provision of law that requires that a meeting held in a public building be open to the public. However, it is possible that a local law or charter may exist which specifies that meetings held in public buildings must be open to the public. If that is so in this instance, I concur with the Mayor's statement.

Second, in your correspondence, you indicated that the C.A.B. is a private, non-political organization requiring the payment of dues to gain membership. In this regard, §97(2) of the Open Meetings Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

Under the circumstances, it appears that your organization is not subject to the requirements of the Open Meetings Law, for it neither conducts public business nor performs a governmental function.

Enclosed for your consideration is a copy of the Open Meetings Law as well as an explanatory pamphlet which may be useful 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

BY: 

Pamela Petrie Baldasaro
Attorney

PPB:RJF:ss

Enclosures

cc: Mayor Michalak

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1970
OML-AO-609

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

April 17, 1981

Rose E. Clarkson
Town Clerk
Town of Pawling
160 Maple Boulvevard
Pawling, NY 12564

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Clarkson:

I have received your letter of March 12 and appreciate your interest in complying with the Open Meetings Law. Please accept my apologies for the delay in response.

You have asked that I define "work sessions" and "executive sessions" and "advise if either or both are open to the public or press". You have also asked whether "intra or inter" agency meetings are open to the public or press.

First, the phrase "work session" has been considered by many to mean a gathering of a public body during which it merely discusses public business, but in which there is no intent to take action. In this regard, shortly after the enactment of the Open Meetings Law in 1977, it was contended that so-called "work sessions", "agenda sessions", "planning sessions" and similar gatherings during which there was no intent to take action fell outside the scope of the Open Meetings Law. However, in a case concerning the status of work sessions, the Court of Appeals, the state's highest court, held in essence that any convening of a quorum of a public body for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which such a gathering may be characterized [see e.g., Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Further, in a series of amendments to the Open Meetings Law that went into effect on October 1, 1979, the definition of "meeting" [see §97(1) of the Open Meetings Law] was altered to conform with the direction provided by the Court of Appeals. In view of the foregoing, I believe that it is clear that a work session is a meeting subject to the Open Meetings Law in all respects. In addition, in view of the case law and the definition of "meeting", it has been suggested that the phrase "work session" should no longer be used, for it is synonymous with "meeting".

Second, the phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law describes the procedure that must be followed before a public body may enter into an executive session, and paragraphs (a) through (h) of the cited provision specify and limit the areas of discussion that may properly be considered during an executive session.

Third, you have raised a question regarding "intra or inter" agency meetings. In all honesty, I am not sure of the nature of meetings that you have identified. If, for example, you are referring to staff meetings, where no quorum of a public body is present, such gatherings would not be subject to the Open Meetings Law. In terms of its coverage, the Law applies only to meetings of a "public body", which is defined in §97(2) of the Law.

It is possible that you may be referring to the language of one of the grounds for denial appearing in the Freedom of Information Law. Specifically, §87(2)(g) of the Law states that an agency, such as a town, may withhold records that:

> "...are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Lastly, it is noted that neither the Freedom of Information Law nor the Open Meetings Law makes a distinction in terms of rights of access between the public and the news media. As such, if a proper executive session is convened, the public and the news media may be excluded. Conversely, if a meeting is open to the news media, presumably any member of the public would have the right to attend as well.

Enclosed for your consideration are copies of the Open Meetings Law, the Freedom of Information Law, and an explanatory pamphlet that deals with both subjects that may be useful 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

Robert J. Freeman
Executive Director

RJF:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1967
OML-AO-610

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

April 17, 1981

Barry P. Abisch
City Editor
The Daily Item
Westchester Rockland
Newspapers, Inc.
Port Chester, NY 10573

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Abisch:

I have received your letter of March 12. Please accept my apologies for the delay in response.

You have raised questions regarding rights of access to "agendas prepared in advance of three recent executive sessions held by the Harrison Board of Education". You have indicated further that the agendas are not distributed to the public, and in the case of one particular meeting, an executive session "was simply announced by the Board President, and the public was asked to leave".

In response to your questions and based upon the three agendas attached to your letter, I would like to offer the following observations.

First, there is no requirement of which I am aware concerning the creation of an agenda prior to a meeting. Nevertheless, as soon as an agenda exists, I believe that it constitutes a "record" subject to rights of access granted by the Freedom of Information Law.

It is emphasized that §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".

Based upon the language quoted above, it is clear that any information "in any physical form whatsoever" in possession of or prepared for an agency, such as a school district, constitutes a "record" subject to the Law.

Further, based upon a review of the agendas that you attached, it appears that they merely cite in general terms the subjects intended for discussion during proposed executive sessions. If this observation is accurate, I believe that they are available. If, for example, the agendas concerning recommendations by the Committee on the Handicapped identified particular students, or if the sections concerning personnel identified specific individuals, those aspects of the agenda might justifiably be deleted due to provisions of federal law as well as the Freedom of Information Law insofar as it pertains to unwarranted invasions of personal privacy. However, that degree of detail does not appear in the agendas that you sent and, as a consequence, I believe that they are available under §87(2)(g) of the Freedom of Information Law.

The cited provision states that an agency may withhold records that:

> "...are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available.

Under the circumstances, I believe that the agendas could properly be characterized as "intra-agency materials". However, they appear to consist solely of factual information that would be available under §87(2)(g)(i).

Second, the agendas concern only those subjects intended to be discussed during an executive session. In my opinion, a public body, such as a school board, cannot, at least in a technical sense, schedule an executive session in advance of a meeting. Section 97(3) of the Law defines "executive session" to mean that portion of an open meeting during which the public may be excluded. Moreover, §100(1) of the Law prescribes a procedure that must be followed by a public body before it can enter into an executive session. In relevant part, §100(1) states that:

> "Upon 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..."

Based upon the language quoted above, an executive session cannot in my view be scheduled in advance, for three steps must be taken before an agency may convene an executive session. A motion to enter into an executive session must be made by a member of the public body during an open meeting; next, the motion must identify in general terms the subject or subjects to be considered during the executive session; and lastly, the motion must be carried by a majority vote of the total membership of a public body.

Finally, paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the areas of discussion that may be appropriately conducted during an executive session. From my perspective, it is questionable whether many of the items appearing on the agendas for executive session could properly be discussed during an executive session.

For instance, on the executive session agenda of February 11, item I makes reference to a "personnel report". Although the report might deal with one or more of the subjects appearing in §100(1)(f) of the Open Meetings Law and therefore may be proper for discussion in executive session, on the other hand, it is possible that the report may deal with personnel in general. If that was the case, an executive session would not in my view have been proper.

On the agenda of the February 4 executive session, item III makes reference to an audit report, musical instrument policy, and a milk price increase request. Item V makes reference to a college boards review course, and a superintendent's recommendation concerning an enrollment study. From my perspective, it does not appear that any of the grounds for executive session could have been cited to discuss those issues.

The agenda of March 11 makes reference to several areas which in my opinion represent questionable subjects for discussion in executive session. For instance, a plan for positions, discussions of contractual obligations, an enrollment study, the use of schools by the Red Cross, a baseball team's trip to Florida and a complaint concerning a baseball scoreboard would not in my opinion likely qualify as appropriate subjects for executive session.

In order to fully attempt to inform the Harrison Board of Education of this opinion and the provisions of the Open Meetings Law, copies of the opinion, the Law, and an explanatory pamphlet on the subject will be transmitted to 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
Executive Director

RJF:ss

Enclosures

cc: Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-611

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

April 22, 1981

Charles Lee Quaintance
Attorney at Law
Empire National Bank Building
Highland Falls, NY 10928

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Quaintance:

I have received your letter of March 18 and appreciate your interest in complying with the Open Meetings Law. Please accept my apologies for the delay in response.

You have requested an advisory opinion concerning the status of a committee created by the Mayor of Cornwall-on-Hudson. Specifically, you wrote that the:

> "...Mayor has appointed a Committee, denominated The Harvard Black Rock Forest Select Committee, whose purpose is to inquire into the possible acquisition by one or more villages and/or towns for water supply purposes of real property owned by Harvard University known as Black Rock Forest. The membership of the committee is composed of various residents and non-residents of the four municipalities involved."

It is noted initially that the Committee is in my view a "public body" that is required to comply with 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 conduct 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, or committee or subcommittee or other similar body of such public body."

By breaking the definition into its components, I believe that it may be concluded that the Committee in question is indeed a "public body".

First, the Committee is an entity that consists of two or more members.

Second, I believe that it is required to conduct its business by means of a quorum, whether or not there is any specific requirement concerning a quorum in the by-laws of the Committee or in the act that created it. I direct your attention to §41 of the General Construction Law, which defines "quorum" as follows:

> "[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 of 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."

Based upon the provision quoted above, whenever three or more public officers or "persons" are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only by means of a quorum, a majority of the total membership. Consequently, even if there is no specific direction to the effect that the Committee must conduct its business by means of a quorum, §41 of the General Construction Law imposes such a requirement upon the Committee.

Third, the Committee in my opinion clearly conducts public business.

And fourth, the Committee performs a governmental function for a public corporation, in this instance, the Village of Cornwall-on-Hudson.

Since each of the conditions precedent to a finding that the Committee is a "public body" appear to have been met, I believe that it is a "public body" required to comply with the Open Meetings Law in all respects.

I would like to point out that the definition of "public body" discussed in the preceding paragraphs differs from the definition that appeared in the Open Meetings Law as originally enacted. Under the original statute, it was unclear whether committees, subcommittees and similar advisory bodies were subject to the Law. However, I believe that the definition as amended clearly includes such advisory bodies within the scope of the Law. Moreover, this point was confirmed in a recent decision, which found that a mayor's advisory task force is subject to the Open Meetings Law based upon the rationale I have offered above [see Matter of Syracuse United Neighbors v. City of Syracuse, ___ AD 2d ___; (Fourth Department, Appellate Division, March 27, 1981)].

Lastly, as you are likely aware, a public body may enter into an executive session to discuss one or more among eight topics listed in §100(1)(a) through (h) of the Open Meetings Law.

In this regard, I direct your attention to §100 (1)(h) which states that a public body may enter into an executive session to discuss:

> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

In view of the duties of the Commission, it is possible that it may convene executive sessions to discuss the acquisition of real property if indeed public discussion would "substantially affect" the value of the property.

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

FOIL-AO-1975
OML-AO-612

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

April 22, 1981

Mr. Andrew Golebiowski
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Golebiowski:

Thank you for your letter of March 13. Please accept my apologies for the delay in response.

You have raised several questions regarding the implementation of the Open Meetings Law. Specifically, you have requested an advisory opinion as to whether the Law is applicable to a standing committee of the College Senate of the State University College at Buffalo. In your correspondence, you indicated that on several occasions you have been unable to attend meetings of the Curriculum Committee due to the fact that these Committee meetings are held in executive session and without notice. Furthermore, you have expressed concern that the Curriculum Committee is meeting in violation of the Law.

I would like to offer the following observations with respect to the issue that you raised.

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

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body."

By analyzing the elements comprising this definition, it may in my opinion be concluded that the Curriculum Committee is a "public body" subject to the Open Meetings Law.

First, the Curriculum Committee is an entity that consists of two or more members.

Second, I believe that it is required to conduct its business by means of a quorum, whether or not there is any specific requirement concerning a quorum in the by-laws of the Committee or in the act that created it. I direct your attention to §41 of the General Construction Law, which defines "quorum" as follows:

> "[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 of similar body, a majority of the whole number of such persons or officiers, 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."

Based upon the provision quoted above, whenever three or more public officers or "persons" are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only by means of a quorum, a majority of the total membership. Consequently, even if there is no specific direction to the effect that the Curriculum Committee must conduct its business by means of a quorum, §41 of the General Construction Law imposes such a requirement upon the Committee.

Third, the Committee in my opinion conducts public business.

And fourth, the Committee performs a governmental function for the State University College at Buffalo, a component of the State University of New York corporation created within the New York State Department of Education. With your correspondence you enclosed a copy of the by-laws of the College. Under Artice 3, §A entitled "College Senate", the College Senate is designated as the "official agency through which the faculty and students engage in the governance of the College." Eleven specific areas of concern are designated to be considered by the College Senate. Section E of the same article requires the creation of a standing committee for each of the eleven areas. The Committee you described is assigned to one of these areas, i.e. curriculum. Furthermore, §F requires the College Senate to charge the Curriculum Committee with a "mission" and provide a frame of reference within which the Committee must operate. As such, the activities required of the Curriculum Committee are reflective of the conduct of public business and the performance of a governmental function for the state.

Since each of the conditions precedent to a finding that the Curriculum Committee is a "public body" appear to have been met, I believe that it is a public body required to comply with the Open Meetings Law in all respects.

I would like to point out that the definition of "public body" discussed in the preceding paragraphs differs from the definition that appeared in the Open Meetings Law as originally enacted. Under the original statute, it was unclear whether committees, subcommittees and similar advisory bodies were subject to the Law. However, I be-

lieve that the definition as amended clearly includes such advisory bodies within the scope of the Law. Moreover, this point was confirmed in a recent decision, which found that a mayor's advisory task force is subject to the Open Meetings Law based upon the rationale I have offered above [see Matter of Syracuse United Neighbors v. City of Syracuse, ___ AD 2d ___, (Fourth Department, Appellate Division, March 27, 1981)].

You have written that the State University Counsel, Sanford Levine, advised the College Senate President, Ann Egan, that "the College Senate is not a policy making body of the College, therefore it is not bound by the Open Meetings Law." However, Mr. Levine has apparently based his opinion in part upon the contention that a College Senate committee meeting is outside the scope of the Open Meetings Law, for it does not take formal action of make policy, but rather makes recommendations or acts in an advisory capacity. If those contentions form the basis of Mr. Levine's advice, I would respecfully disagree based upon the discussion of the scope of the definition of "public body" appearing in the preceding paragraphs.

If my contention that the Curriculum Committee is a public body is accurate, it would be required to comply with the notice provisions set forth in §99 of the Law. In brief, when 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 prior to a meeting. 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 before the meeting.

Additionally, §101 of the Law requires that minutes be taken of all meetings held by public bodies. In the case of an open meeting, §101(1) requires that the minutes shall consist of "a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Section 101(2) of the Law, which concerns minutes of executive sessions, requires that such minutes consist of "a record or summary of the final determination of such action, and the date and vote thereon.." It is noted that a public body may vote during a properly convened executive session, so long as the vote does not pertain to the appropriation of public monies. Further, the Open Meetings Law requires that minutes of executive session be compiled only when action is taken.

In such cases, the minutes must be compiled and made available within one week of an executive session. Therefore, when action is taken regarding the adoption of procedures, the action must be noted in minutes, which are accessible.

It is also noted that the Freedom of Information Law requires that a voting record be compiled that identifies each member of a public body and the manner in which the member voted in every instance in which a vote is taken [see attached Freedom of Information Law, §87(3)(a)].

You indicated that the Curriculum Committee meets in private. In this regard, under the Open Meetings Law as originally enacted, the Court of Appeals rendered an expansive opinion with respect to the scope of the definition of "meeting". In its decision, the Court found in essence that any convening of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see e.g., Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In addition, the definition of "meeting" that now appears in §97(1) of the Law was in my view intended to conform to the decision rendered by the Court of Appeals. Therefore, in my opinion, it is clear that the committee meetings that you have described are subject to the Open Meetings Law, even if any recommendations made or action taken is subject to further review by the College Senate.

Further, "executive session" is defined as a portion of an open meeting during which the public may be excluded [§97(3)]. As such, an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. In addition, §100 sets forth a procedure that must be followed before a public body may discuss its business behind closed doors. 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Similarly, since a motion to enter into an executive session must be made during an open meeting and carried by a majority of the total membership of a public body, an executive session cannot, at least in a technical sense, be scheduled in advance of a meeting.

Lastly, §100(1) states that an executive session may be convened only to discuss one or more among eight areas deemed appropriate for executive session that are listed in paragraphs (a) through (h) of the cited provision. Based upon your letter, it appears unlikely that any of the eight areas of discussion that may properly be conducted during an executive session would arise during a meeting of the Curriculum Committee. Consequently, it appears that the deliberations of the Committee must be conducted during open meetings in view of any person who seeks to attend.

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

Pamela Petrie Baldasaro

BY Pamela Petrie Baldasaro
Attorney

RJF:PPB:jm

Enc.

cc: Ann Egan
Robert Moisand

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1976
OML-AO-613

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

April 23, 1981

John M. Donoghue
Van DeWater and Van DeWater
Counselors at Law
Mill & Garden Streets
P.O. Box 112
Poughkeepsie, NY 12602

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Donoghue:

I have received your letter of March 19. Please accept my apologies for the delay in response.

As Counsel to a number of political subdivisions, you indicated that a number of your clients have encountered difficulties regarding the interpretation of the Freedom of Information Law by various members of the news media with respect to the obligation to disclose personnel recommendations prior to meetings. Specifically, you wrote that:

> "...a question has been raised concerning the accessibility of portions of an agenda prepared prior to a meeting of a Board of Education which lists personnel actions including the hiring, termination, leaves of absence for medical and other reasons, transfers in salary and the acceptance of discipline and other proceedings by a Board of Education... In many cases, the mere authorization for hiring of a teacher who has not yet notified their current employer or, for that matter, fully accepted employment, creates potential liability for both the Board of Education and the individual. Other matters dealing with applications for leave are sometimes withdrawn prior to the actual Board meeting. A number of those applications deal with sensitive,

> personal, family issues. Similarly, in many situations, Board agendas have contained references to terminations and replacements, some of which were withdrawn prior to actions by the Boards of Education".

You have contended that the recommendations need not be made public prior to meetings of boards of education.

I am in general agreement with your contentions and would like to offer the following observations.

First, there is no requirement of which I am aware that a public body must create an agenda prior to a meeting. However, from my perspective, once an agenda exists, it constitutes a "record" subject to rights of access granted by the Freedom of Information Law. It is noted that §86(4) of the Freedom of Information Law defines "record" broadly to include "any information kept, held, filed, produced or reproduced, by with or for an agency...in any physical form whatsoever..." In view of the foregoing,it is clear that an agenda is a "record" that falls within the scope of the Freedom of Information Law.

I would like to point out that several boards have indicated that they maintain what may be considered to be two agendas. The first simply identifies the proposed areas of discussion in general terms and is distributed to the public and the news media in advance of meetings. The second consists of detailed materials transmitted to Board members for their review prior to meetings. Such a procedure is appropriate in the view of many, for the public and the media can be apprised in advance of the general nature of topics to be considered at a meeting, and concurrently, the members of the Board and the administration have the capacity to review prior to the meeting the specific information to be discussed.

Second, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a school district, are available, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h).

Third, I believe that there are two grounds for denial that may appropriately be cited with regard to much of the information that you described. Perhaps most relevant is §87(2)(g), which states that an agency may withhold records that:

> "...are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations must be made available. Conversely, portions of such materials reflective of advice, recommendation, suggestion, impression and the like would in my view be deniable. Consequently, records containing a recommendation, for example, that may be accepted or rejected by the Board would in my view likely be deniable [see e.g., McAuley v. Board of Education, City of New York, 61 AD 2d 1048 (1978), ____NY 2d ____ (aff'd w/no opinion].

A second ground for denial of relevance is §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". If, as you indicated, issues deal with "sensitive, personal, family issues", perhaps the identities of the subjects of the discussions might result in unwarranted invasions of personal privacy. In those circumstances, records or portions of records might justifiably be withheld.

It has been suggested that if an agenda makes reference to named individuals, copies of the agenda might be made available after having deleted identifying details to protect privacy. For instance, if one of the areas of discussion appearing in an agenda is characterized as

"personnel matters", and a number of names are listed thereafter with the recommendations made to the Board, perhaps that portion of the agenda indicating only that personnel matters would be discussed should be made available, while the remaining portions under that heading that identify individuals could be deleted.

In situations in which individuals have applied for positions, it has been advised that records containing the identities of those individuals generally need not be made available. As you intimated, if, for example, an individual who is now employed by a neighboring school district applies for a position, it is possible that disclosure of his or her identity could jeopardize that person's current position. In such cases, it is my feeling that disclosure would indeed result in an unwarranted invasion of personal privacy.

In other cases, the identities of applicants might be disclosed. For example, if a position for which a civil service examination is required is under consideration, an eligible list identifying passing candidates and their scores is generally available to any person.

Fourth, it would appear that many of the areas of discussion that you identified could be conducted appropriately during executive sessions. Section 100(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

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

With respect to discussions of hiring, termination, leaves of absence, medical leaves, disciplinary matters, family issues and similar discussions dealing with particular individuals, it would appear that each might deal with the employment history of a particular person and therefore would constitute an appropriate subject for executive session.

Fifth, as you are aware, §100(1) of the Open Meetings Law requires that a motion to enter into an executive session be made during an open meeting and that such a motion identify in general terms the subject or subjects to be considered. This office has consistently advised that when a particular individual is the subject of a discussion to be held in an executive session, the motion to enter into an executive session need not identify the individual. If the subject of an executive session were to be identified in a motion, disclosure might result in an unwarranted invasion of personal privacy.

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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-614

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

April 23, 1981

Mr. Isidore Gerber
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gerber:

As you are aware, I have received your letter and a newspaper article attached to it that were sent by Daniel Dickens, Director of Municipal Affairs Examinations at the Department of Audit and Control.

In short, you have cited what you consider to be violations of law by the Village of Liberty and you asked whether the Department of Audit and Control or the Office of the Attorney General could take action in relation to such allegations. In this regard, I feel that I must reiterate the statements made by Mr. Dickens, i.e. that neither the Department of Audit and Control nor the Office of the Attorney General has the capacity to engage in the type of action that you are seeking. Similarly, as you are aware, the Committee on Public Access to Records has the capacity only to advise with respect to the Freedom of Information and Open Meetings Laws; it has no authority to compel a unit of government to comply with either law.

However, I would like to offer the following comments with respect to the newspaper article attached to your letter.

According to the article, the Mayor of the Village of Liberty indicated that dinner meetings of the Board of Trustees are announced at general meetings of the Board. From my perspective, if no additional notice is given, the notice provisions of the Open Meetings Law would not be appropriately followed.

Specifically, §99(1) and (2) of the Open Meetings Law provide that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto."

In view of the language quoted above, it is clear that notice must be given prior to all meetings to the news media (at least two) and posted for the public in one or more designated, conspicuous public locations. As such, an announcement made at a meeting without more would in my view be insufficient.

I would like to point out that, even though notice must be given to the news media, there is no requirement that the news media publish or otherwise publicize a notice it receives. Consequently, there may be situations in which a public body has given notice in accordance with the Law but in which the news media does not publish the 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:jm

cc: Mayor Frankel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-615

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

April 24, 1981

Jacquelyn Waite
Moriah's Concerned Parents
for Better Education
P. O. Box 133
Mineville, NY 12956

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Waite:

I have received your letter of March 19. Please accept my apologies for the delay in response.

Your inquiry concerns the implementation of the Open Meetings Law by the Moriah Central School District Board of Education. In this regard, I would like to offer the following observations.

First, with respect to the matter raised in your covering letter, you indicated that your organization requested that letters be read at a meeting of the Board of Education. However, you wrote that the letters were neither read nor acknowledged at the meeting. In my view, unless the School Board has adopted rules requiring that letters such as those that you described be read aloud at meetings, there is no provision of law of which I am aware that would require that those communications be read at meetings of the Board.

Second, your letter addressed to the Commissioner of Education raises several issues that focus upon the status of "workshops" held by the School Board.

I would like to point out initially that it has long been held that gatherings characterized as "workshops", "work sessions", "agenda sessions", "planning sessions" and similar gatherings have been found by the courts to be "meetings" subject to the Open Meetings Law in all respects. In terms of background, when the Open Meetings Law went into effect in 1977, questions arose throughout the state regarding the scope of the definition of "meeting". It was contended by many that the definition included only those gatherings during which there was an intent to take action. Nevertheless, in Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the Court of Appeals, the state's highest court, held that any convening of a quorum of a public body for the purpose of discussing public business is a "meeting" that falls within the scope of the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Consequently, in my view, there is no distinction between a so-called "workshop" and a "meeting". Further, notwithstanding the manner in which a gathering is denominated, it must be convened as a meeting open to the public. It is also noted that in a series of amendments to the Open Meetings Law that became effective on October 1, 1979, the definition of "meeting" was amended in accordance with the direction provided by the Court of Appeals.

Since a workshop is a "meeting", a public body, such as a school board, has the capacity to enter into an executive session where appropriate. However, it is emphasized that the phrase "executive session" is defined in §97(3) to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law prescribes a procedure that must be followed by a public body prior to entry into an executive session. Specifically, the cited provision states that:

> "Upon 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..."

In view of the language quoted above, it is clear that an executive session is not separate and distinct from a meeting, but rather is a portion thereof. In addition, it is clear that a public body must take particular procedural steps during an open meeting in order to enter into an executive session. It is also important to emphasize that a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, a public body may enter into an executive session only to discuss those subjects deemed appropriate for executive session that appear in paragraphs (a) through (h) of §100(1) of the Law.

Lastly, since a "workshop" is a "meeting", it must be preceded by notice given in accordance with §99 of the Open Meetings Law. Subdivisions 1 and 2 of §99 state that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto".

In view of the foregoing, it is clear that notice must be given to the news media (at least two) and posted for the public in one or more designated, conspicuous public locations, prior to all meetings, including so-called workshops.

Enclosed for your consideration are copies of the Open Meetings Law, which is attached to a memorandum that seeks to explain changes in the Law that became effective on October 1, 1979, and an explanatory pamphlet that may be useful to you. The same information as well as the foregoing opinion will be transmitted to the President 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
Executive Director

RJF:ss

Enclosures

cc: Mr. Philip Kaplan

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-616

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

April 27, 1981

Joseph J. Carrus
Research Director
Citizens Action Board
P. O. Box 453
Dunkirk, NY 14048

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Carrus:

I have received your letter of March 26. Please accept my apologies for the delay in response.

You wrote that in a recent judicial determination concerning a zoning board of appeals, it was held that the act of voting during a closed session by the Board constituted a violation of law. Your question is whether the petitioners may collect legal fees from the City Attorney or the City of Dunkirk.

In this regard, §102(2) of the Open Meetings Law states that:

> "[I]n any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party".

Consequently, if the suit was brought under the Open Meetings Law, and if the petitioners were successful, they may request that the court award reasonable attorney fees, which would be payable by the unsuccessful party, the City of Dunkirk. It is noted, however, that the award of attorney fees is discretionary on the part of a court. Stated differently, although a court may award reasonable attorney fees, it need not.

Lastly, if at all possible, I would appreciate receiving a copy of the decision to which you made reference.

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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1982
OML-AO-617

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

April 27, 1981

Mr. Robert Napierala
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Napierala:

I have received your letter of March 25. Please accept my apologies for the delay in response.

Your inquiry concerns a situation in which, according to your letter, the Town Board of Newark Valley approved a motion to meet in executive session. The reason for the executive session was "involvement of potential litigation". Following the meeting, you directed a request to the Town Supervisor for minutes of the executive session, and you were denied access.

You have asked for assistance in gaining access to the minutes of the executive session.

First, it is unclear in your letter whether the Town Board convened its meeting as an executive session or whether the executive session was called after an open meeting had begun. In this regard, I would like to point out that the phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Moreover, §100(1) describes a procedure that must be followed before a public body may enter into an executive session. Specifically, the cited provision states in relevant part 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..."

Based upon the language quoted above, a public body may enter into an executive session only after having convened an open meeting, and only when the procedural steps described above have been followed.

Second, your letter characterized the basis for entry into executive session has "potential litigation". Here I direct your attention to §100(1)(d) of the Open Meetings Law, which states that a public body may enter into an executive session to discuss "proposed, pending or current litigation". From my perspective, a discussion of "potential litigation" may not constitute a sufficient basis for entry into an executive session. In short, virtually any topic of discussion could be the subject of potential litigation. Further, it has consistently been advised that in order to qualify as "proposed" litigation, there must be a real threat or imminence of litigation. Consequently, based upon the facts presented in your letter, it is in my view questionable whether an executive session was properly held.

Third, you requested and were denied access to minutes of executive session. Assuming that an executive session was properly convened, minutes of the executive session would be required to be made available only if action was taken during the executive session. Section 101(2) of the Open Meetings Law states that minutes reflective of the action taken during an executive session must be compiled and made available in accordance with the Freedom of Information Law within one week of the executive session. However, if no action was taken, minutes of the executive session need not have been compiled.

Lastly, if indeed there was a record of the discussion conducted during an executive session, that record is in my view subject to rights granted by the Freedom of Information Law, whether or not it may be characterized as minutes.

Section 86(4) of the Freedom of Information Law defines "record" broadly to include:

> "...any information kept, held, filed, produce 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".

Consequently, if a record exists, it would be subject to rights granted by the Freedom of Information Law.

Without additional information regarding the nature of the discussion or the issue, I could not conjecture as to rights of access to any existing records. However, enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law and an explanatory pamphlet that may be useful 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

cc: Town Board

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1992
OML-AO-61

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

April 28, 1981

Stuart W. Lewis M.D.
Monad Medical Services, P.C.
1230 Dean Street
Brooklyn, NY 11216

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Dr. Lewis:

As you are aware, I have received your letter and the correspondence attached to it.

You have requested a "ruling" regarding a request for records that you directed to the Downstate Medical Center. In this regard, it is emphasized at the outset that the Committee does not have the authority to issue what may be characterized as "rulings"; on the contrary, the Committee has the authority to render advisory opinions under the Freedom of Information and Open Meetings Laws.

In terms of background, you requested records in possession of the Downstate Medical Center that pertain to you and which have a bearing upon your performance as a surgical resident in the Department of Surgery. You also requested statements appearing in records concerning your character or affecting your career, all evaluations and comments derived from the Residency Review Committee for a period of five years, minutes of meetings during which your performance, career and character may have been discussed, as well as correspondence with particular physicians within and outside of the Department of Surgery concerning you. You also requested documents "bearing upon the application by Dr. Robert Freund for appointment..." on your behalf to the faculty of the University and letters of referral or recommendation by Dr. Bernard Jaffe to any and all hospitals or agencies.

Your request was made under a variety of statutes, including the New York Freedom of Information Law, the Open Meetings Law, the federal Privacy Act and the federal Freedom of Information Act.

I would like to offer the following observations with regard to your inquiry.

First, you stated that the response to you by John Vigneau, Records Access Officer for the Downstate Medical Center, mistakenly characterized you as a member of the United University Professions collective bargaining unit and that, as such, rights of access to the contents of your personnel file were governed by the collective bargaining agreement between UUP and Downstate Medical Center. You wrote, however, that you have never been a member of UUP. In my view, rights of access under the Freedom of Information Law are not diminished by membership in a union, even if you were indeed a member. In brief, I do not believe that a collective bargaining agreement can serve to restrict rights of access to records granted by a statute enacted by the State Legislature.

Second, I must concur with the contention expressed by Mr. Vigneau that the federal acts to which you made reference are not applicable. As he indicated, the federal Privacy and Freedom of Information Acts apply only to records in possession of federal agencies. From my perspective, the most applicable provision of law is likely the New York Freedom of Information Law.

Third, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as the State University and its components, are accessible, except those records or portions thereof that fall within one or more grounds for denial appearing in §87(2)(a) through (h).

Fourth, it would appear, as indicated in Mr. Vigneau's response, that the most relevant ground for denial in §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public or final agency policy or determinations must be made available. Conversely, portions of inter-agency or intra-agency materials consisting of advice, recommendation, suggestion or impression, for example, may justifiably be withheld.

Under the circumstances, without having reviewed the records, I could not conjecture with respect to the extent to which the materials in question are accessible or deniable under §87(2)(g). Nevertheless, it is important to point out that the introductory language of §87(2) states that an agency may withhold "records or portions thereof" that fall within one or more of the grounds for denial. As such, I believe that it is clear that the Legislature envisioned situations in which a single record might be both accessible and deniable in part. Further, I believe that the language quoted above imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, might justifiably be withheld under one or more of the grounds for denial.

Fifth, you mentioned that the material that you are seeking is "evidently final agency policy since the State University in the person of Dr. Haffner has stated that the University will uphold Dr. Jaffe in his position". If indeed a record is reflective of the policy of the University or final determination made by an agency, I would concur that such a record would be available under §87(2)(g)(iii) of the Freedom of Information Law. However, if the record is reflective of advice that may be accepted or rejected by an executive or governing body, it would likely be deniable [see McAuley v. Board of Education, City of New York, 61 AD 2d 1048 (1978), __ NY 2d __ (aff'd w/no opinion)].

Sixth, there is another provision of law which might be applicable. Specifically, I direct your attention to the federal Family Educational Rights and Privacy Act (20 USC §1232g), which commonly known as the Buckley Amendment. The Buckley Amendment, in brief, concerns access to student records by parents of students under the age of eighteen and students enrolled in post-secondary institutions of education who are over the age of eighteen. If the records that you have requested, such as recommendations and evaluations, pertain to you in your capacity as a student, I believe that such records would be subject to the Buckley Amendment. Further, that Act states essentially that any "education record" identifiable to a student, with certain exceptions, is accessible to the student, unless he or she has waived his or her rights of access. Often, as a matter of course, students waive their rights to records such as letters of recommendation in order to ensure that such documents will be written in a forthright and honest manner. Stated differently, if students could review letters of recommendation, a professor might not be candid in his or her remarks. Again, it is unclear whether the records in question fall within the scope of the Buckley Amendment, but it is possible that they might.

Lastly, reference was made in Mr. Vigneau's response to you concerning the application of the Open Meetings Law to general faculty meetings, meetings of the Residency Review Committee and any Department meetings that may have had a bearing upon you. Mr. Vigneau suggested that none of the bodies that you identified would be subject to the Open Meetings Law.

While I agree that the Open Meetings Law would not likely be applicable to Department meetings, it is possible that it would have been applicable with respect to faculty meetings and the meetings of the Residency Review Committee.

In this regard, §97(2) of the Open Meetings Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body."

Based upon the letter sent to you by Mr. Vigneau, it appears that he implied that some of the entities to which you made reference are not required to conduct their business by means of a quorum. I would like to point out that §41 of the General Construction Law defines "quorum" to include any entity consisting of three or more public officers or persons that performs a governmental function collectively as a body. As such, if the entities to which you made reference do not operate under any specific quorum requirements, they may nonetheless be required to act by means of a quorum. Consequently, it is possible that they may be public bodies. However, without greater knowledge of the nature of the entities in question, I could not advise with certainty that they are subject to the Open Meetings Law.

It is also important to point out that a public body may enter into a closed or executive session to discuss:

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

It would appear that discussions of performance could have been discussed during executive sessions. Moreover, under §101(2) of the Open Meetings Law, minutes of executive session must be compiled only when action is taken during an executive session. Therefore, if a public body merely discusses but takes no action, minutes of an executive session need not be compiled. In addition, minutes of executive session are available in accordance with the provisions of the Freedom of Information Law. Therefore, it is possible that some minutes or other records of meetings might be accessible or deniable, depending upon their contents.

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: John R. Vigneau

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-619

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

April 29, 1981

Mr. Paul A. Martineau
Village Attorney
Village of Pleasantville
444 Bedford Road
Pleasantville, NY 10570

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Martineau:

I have received your letter of April 9 and appreciate your interest in complying with the Open Meetings Law.

You have asked for a written advisory opinion "with respect to whether or not a Financial Task Force appointed by the Village Board for the purpose of reviewing the Village's budget is subject to the Open Meetings Law."

It is noted initially that the Task Force is in my view a "public body" that is required to comply with 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 conduct 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, or committee or subcommittee or other similar body of such public body."

By breaking the definition into its components, I believe that it may be concluded that the Task Force in question is indeed a "public body".

First, the Task Force is an entity that consists of two or more members.

Second, I believe that it is required to conduct its business by means of a quorum, whether or not there is any specific requirement concerning a quorum in the by-laws of the Task Force or in the act that created it. I direct your attention to §41 of the General Construction Law, which defines "quorum" as follows:

> "[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. 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."

Based upon the provision quoted above, whenever three or more public officers or "persons" are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only by means of a quorum, a majority of the total membership. Consequently, even if there is no specific direction to the effect that the Task Force must conduct its business by means of a quorum, §41 of the General Construction Law imposes such a requirement upon the Committee.

Third, the Task Force in my opinion clearly conducts public business.

And fourth, the Task Force performs a governmental function for a public corporation, in this instance, the Village.

Since each of the conditions precedent to a finding that the Task Force is a "public body" appear to have been met, I believe that it is a public body required to comply with the Open Meetings Law in all respects.

I would like to point out that the definition of "public body" discussed in the preceding paragraphs differs from the definition that appeared in the Open Meetings Law as originally enacted. Under the original statute, it was unclear whether committees, subcommittees and similar advisory bodies were subject to the Law. However, I believe that the definition as amended clearly includes such advisory bodies within the scope of the Law. Moreoever, this point was confirmed in a recent decision, which found that a mayor's advisory task force is subject to the Open Meetings Law based upon the rationale I have offered above [see Matter of Syracuse United Neighbors v. City of Syracuse, ___ AD 2d ___, (Fourth Department, Appellate Division, March 27, 1981)].

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

FOML-AO-620

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

April 29, 1981

Anthony J. Pieragostini
Attorney and Counsellor at Law
126 Barker Street
Mount Kiscoe, New York 10549

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pieragostini:

I have received your letter of April 10 and appreciate your kind words and interest in complying with the Open Meetings Law. Please accept my apologies for the delay in response.

You have raised questions regarding the implementation of the Open Meetings Law by the Board of the Village/Town of Mount Kisco, particularly with respect to its handling of various appointments and reappointments made at its recent annual meeting. Specifically, you have contended that the appointments were made via an agenda and

> "[T]hat is to say, that the agenda was made up several days before the meeting and the Board members had the agenda with the appointees' names at least Friday before the Monday, April 6 meeting. It is my feeling that the decisions of the Board were made up prior to the public meeting. The Board apparently had decided at a prior time, either by a secret meeting or agreement over the phone or some other device, whom the Board would appoint to various positions. This includes the voluntary positions, the paid public official positions and other

> village business. The Board did not have any motions from any Board members at that public meeting. There were no motions to appoint John Doe to a certain position or board. The Board simply, by motion, accepted all the appointments to the various positions as stated in paragraph 2 of the agenda".

Having reviewed your letter and the attached agenda, I could not advise with certainty that a violation of the Open Meetings Law was committed. Nevertheless, based upon your allegations and the agenda, it would appear that decisions had been made prior to the meeting. If indeed the Board engaged in deliberations that led to the development of the agenda and the action that ensued, I would concur that the Open Meetings Law was likely violated.

It is emphasized that the courts have given the definition of "meeting" in the Open Meetings Law an expansive interpretation. As stated by the Appellate Division, Second Department, in a decision that was affirmed by the Court of Appeals:

> "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" [Orange County Publications v. Council of the City of Newburgh 60 AD 2d 409, 415; aff'd 45 NYS 2d 947 (1978)].

The court also found that the informal conferences or agenda sessions fall within the scope of the Open Meetings Law, for such gatherings "permit 'the cyrstallization of secret decisions to a point just short of ceremonial acceptance'" (id. at 416). In view of the foregoing, it is clear that any gathering of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which the gathering may be characterized.

As you are aware, a public body may under certain circumstances engage in executive sessions. In this instance, a review of the qualifications of particular individuals might justifiably have been discussed during an executive session. Section 100(1)(f) of the Open Meetings Law states that a public body may enter into an executive session to discuss:

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

Therefore, a discussion of the employment history of a particular person or a matter leading to the appointment of a particular person may have been considered during an executive session.

Nevertheless, it is emphasized that the phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §97(3)]. Further, §100(1) of the Law prescribes a procedure that must be followed by a public body during an open meeting before it may enter into an executive session. The cited provision states in relevant part 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..."

As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof.

Consequently, even if the Board had the capacity to enter into an executive session, it would first have been required to convene an open meeting preceded by notice given in accordance with §99 of the Law.

In sum, while I must reiterate that I cannot advise with certainty that the Open Meetings Law was violated, based upon the information that you have provided, if the Board deliberated in the preparation of its agenda and the ensuing action, the Board would not in my view have complied with 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:ss

cc: Board of Village/Town of Mount Kisco

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2000
OML-AO-621

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

April 30, 1981

Mr. Glen Curtis
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Curtis:

I have received your letter of April 19 and appreciate your interest in complying with the Open Meetings and Freedom of Information Laws. Your inquiry concerns the Board of Directors of the Dunkirk Housing Authority.

Specifically, you wrote that:

> "[T]he Board of the Authority has for years, met in 'Executive Session' whenever necessary and only in the past year or so has the local media (as well as certain members of the public) demanded access to the matters discussed during these sessions. For the most part, the Board Chairman has denied these requests, citing the Freedom of Information Act prohibits the release of the material."

Further, you indicated that the local news media protests "the Board's meeting in closed 'workshop' sessions or so-called 'working meetings'". You also asked whether minutes of the workshop or working meetings should be kept and whether an agency, such as the Dunkirk Housing Authority, is required to designate a records access officer.

I would like to offer the following observations with respect to your questions.

First, it is emphasized that a public body cannot in my view meet in an executive session. Section 97(3) of the Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) prescribes a procedure that must be followed by a public body before it can enter into an executive session. The cited provision states in relevant part 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..."

Based upon the language quoted above, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof, and that certain procedural steps must be taken during an open meeting before an executive session can be held. In addition, the ensuing paragraphs (a) through (h) specify and limit the areas of discussion that may be considered during an executive session. Consequently, a public body may not discuss the subject of its choice behind closed doors.

Second, I concur with your contention that gatherings characterized as "workshop sessions" or "working meetings" are subject to the provisions of the Open Meetings Law in all respects. It is noted that the courts have interpreted the definition of "meeting" expansively. The state's highest court, the Court of Appeals, held in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)] that any gathering of a quorum of a public body is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized. Based upon the direction provided by the Court of Appeals and an amendment designed to confirm the Court's opinion [see §97

(1)], it has been suggested that phrases such as "workshops", "work sessions", "agenda sessions", "planning sessions" should no longer be used, for each of those phrases is synonymous with the term "meeting".

Third, with respect to minutes, I direct your attention to §101 of the Open Meetings Law. In brief, subdivision (1) provides the minimum requirements for the contents of minutes. In the context of your question, if a public body engages in motions, proposals, resolutions, or if the public body takes action, each of those items must be referenced within minutes, whether the gatherings during which those activities are conducted are denominated as meetings or "work sessions", for example.

Section 101(2) concerns minutes of executive sessions. That provision states that a record of any action taken during an executive session must be recorded in minutes. However, it is emphasized that if, for example, a public body merely deliberates behind closed doors, but takes no action, minutes need not be compiled.

Assuming that minutes or any other records are created with respect to deliberations conducted behind closed doors, such records would in my view be subject to rights of access granted by the Freedom of Information Law. Section 86(4) of that 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..."

Consequently, to the extent that records exist, they are subject to rights of access.

Further, even though records or notes may be created with regard to discussions held during an executive session, that factor alone does not necessarily enable an agency to withhold the records. In short, §87(2) of the Law provides that all records are available, except those records or portions thereof that fall within one or more of the grounds for denial appearing in paragraphs (a) through (h) of the cited provision. Therefore, while records created with respect to executive sessions might in some instances be withheld, in others they may be required to be available under the Freedom of Information Law.

Lastly, §87(1) of the Freedom of Information Law requires the Committee to promulgate regulations of a procedural nature. In turn, each agency subject to the Law is required to adopt regulations consistent with and no more restrictive than those promulgated by the Committee.

Section 1401.2(a) of the Committee's regulations requires in part that the:

> "...governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records."

In view of the foregoing, it is clear that each agency is required to designate a records access officer.

In this instance, it is unclear whether the Dunkirk Housing Authority performs its duties under the aegis of the governing body of the City of Dunkirk. If that is so, the governing body would be required to designate one or more records access officers responsible for dealing with requests directed to the Housing Authority. If, however, the Housing Authority is independent, its Board of Directors would be required to designate one or more records access officers.

Enclosed for your consideration are copies of the Freedom of Information Law, regulations promulgated by the Committee, the Open Meetings Law, which is attached to a memorandum that explains the amendments to the Law that went into effect on October 1, 1979, and an explanatory pamphlet.

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
Encs.
cc: Dunkirk Housing Authority

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-1999
OML-AO-622

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

April 30, 1981

David H. Kelsey
President
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kelsey:

As you are aware, I have received your letter of April 13. You have raised several questions regarding the implementation of the Open Meetings and Freedom of Information Laws by the Akron Central School District Board of Education.

First and likely most important is your contention that the members of the Board feel that they may convene an executive session "for just about any reason" if they believe that the business at hand concerns issues that would be best discussed by the Board acting alone. Your contention is based upon a policy adopted by the Board on January 31, 1974, entitled "Executive Session at Regular Meetings", which states that:

> "[A]ny Board member may call for an Executive Session when business involves personalities or issues that are best discussed by the Board acting alone as a corporate body. No legislative action will be taken in executive session nor will any discussion be recorded in the minutes".

It is emphasized that the statement of policy quoted above was adopted prior to the enactment of the Open Meetings Law. From my perspective, it is out of date and fails to reflect the obligations of the School Board under the Open Meetings Law.

In this regard, the Open Meetings Law provides that a public body may enter into an executive session only to discuss matters specified in §100(1)(a) through (h) of the Law. If a topic of discussion does not fall within one or more among the eight items listed in §100(1), discussion must be held open to the public. In view of the foregoing, it is clear that a public body may not enter into an executive session to discuss the subject matter of its choice.

In a related vein, it is also emphasized that a public body must follow a procedure prescribed in the Law before it may enter into an executive session. Specifically, the introductory language in §100(1) states that:

> "Upon 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..."

In view of the provision quoted above, it is clear that a public body must take three procedural steps during an open meeting before it may enter into an executive session. A motion to enter into an executive session must be made by a member of the Board during an open meeting; the motion must identify in general terms the subject or subjects to be considered; and the motion must be carried by a majority vote of the total membership of the Board.

Second, with respect to a specific question that you raised, based upon the information that you have provided, I would agree that a discussion of a minority report from members of an educational study council should not likely have been considered during an executive session. You wrote that the report likely dealt with "planning and advising on basic educational policy, curriculum review, and other matters related to the improvement of the District's educational programs". You also wrote that "[O]ne of its more specific annual duties is to plan the yearly conference day for teachers".

Here, I would like to point out that although a discussion of "teachers" might deal with "personnel" in general, that factor alone would not in my view justify an executive session. Perhaps the ground for executive session cited most often is §100(1)(f), which deals with "personnel", among other subjects. Although the scope of the cited provision as it appeared in the Open Meetings Law as originally enacted in 1977 was unclear, I believe that an amendment to the cited provision that went into effect on October 1, 1979, specifies its scope. The cited provision states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

In view of the language quoted above and the insertion of the word "particular" by means of an amendment, it is clear that a public body may not discuss in executive session matters that deal with personnel in general or matters on policy that indirectly or tangentially relates to "personnel".

Third, you wrote that it is common practice for the Board to enter into executive sessions to discuss grievances. Apparently, the School Board has justified those executive sessions on the basis of §100(1)(d), which permits an executive session to discuss "proposed, pending or current litigation". In my view, the term "litigation" involves a judicial contest, and I do not believe that the discussion of a grievance involves a judicial contest. As such, §100(1)(d) would not in my view be applicable as a basis for entry into an executive session.

However, it is possible that §100(1)(f), which was quoted earlier, might be cited appropriately to discuss a grievance behind closed doors, if, for instance, the grievance pertains to the employment history of a "particular person" or a matter leading to the discipline of a "particular person". If the grievance concerns personnel policy, it would appear that it must be discussed during an open meeting.

Fourth, you raised questions regarding an executive session held for the purpose of discussing the District's transportation policy. In addition, you indicated that discussion might be held during a "scheduled executive session".

In my view, based upon contentions expressed earlier, a discussion of the transportation policy would not constitute a ground for executive session. Further, as intimated earlier, in a technical sense, a public body can never schedule an executive session in advance. If a motion to enter into an executive session must be made during an open meeting and carried by a majority vote of the total membership, it cannot be known in advance whether a motion to enter into an executive session will indeed be carried.

Fifth, you asked whether the Board must reflect in its minutes "the general area or areas of the subject or subjects to be considered" in a motion for entry into an executive session. To reiterate, §100(1) requires that a motion to enter into an executive session include such information.

Sixth, you indicated that it is the policy of the District to refuse to provide copies of minutes on the ground that minutes are unapproved. In this regard, I direct your attention to §101(3) of the Open Meetings Law. In brief, the cited provision states that minutes of open meetings must be compiled and made available within two weeks of such meetings. The Committee anticipated that the direction provided by the cited provision might result in problems, for often public bodies do not meet within two weeks and therefore cannot approve minutes. Consequently, in a memorandum sent to all public bodies in the state (see attached), it was advised that minutes must be made available within the prescribed time limits and that if they have not been approved, they should be marked as such. By signifying that minutes are "unapproved", "draft", or "non-final" and making such minutes available, the public can learn generally what transpired at a meeting, and a public body is concurrently given a measure of protection.

Moreover, unapproved minutes would be subject to rights of access granted by the Freedom of Information Law. "Record" is defined in §86(4) of the Freedom of Information Law 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..."

Consequently, as soon as a record exists, it is subject to rights of access granted by the Law.

Seventh, you asked whether the District is in violation of the Freedom of Information Law due to its failure to maintain a subject matter list. In response to your request for a subject matter list, you were informed that "all records of this School District are available to the public under the provisions of the Freedom of Information Law". I agree with your contention that such a statement would not be reflective of compliance with the Law. As a general rule, an agency is not required to create a record in response to a request. However, one of the exceptions to that rule is found in §87(3)(c), which requires that each agency shall maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article".

Further, in my view, the subject matter list is intended to assist the public in determining the types of records maintained by an agency, thereby assisting the public in describing the records in which they may be interested.

And eighth, you have raised questions regarding public participation at Board meetings. According to your letter, on October 28, 1980, the Board adopted a policy regarding public participation which states that:

> "[V]isitors to regular and special meetings of the Board of Education shall be heard at the pleasure of the Board. Visitors, other than employee group representatives, may address the Board during the first half hour of any such meeting (8:00-8:30) without being on the agenda. (see attached "Regular Meeting Board of Education Akron Central School District October 28, 1980")

As you are aware, the Open Meetings Law is silent with respect to public participation. Therefore, the Committee has advised that a public body need not permit public participation. However, it has also been advised that if a public body determines to permit public participation at meetings, that its policy must be reasonable and treat all members of the public in the same fashion. The policy quoted above states that any visitor may be heard "other than employee group representatives". In my view, such a policy would be unreasonable, for it singles out and essentially discriminates against a particular group. Stated differently, if members of the public in general are permitted to address the Board, representatives of employee groups should in my view be accorded the same opportunity.

In order to aid the Board in complying with the Freedom of Information and Open Meetings Laws, copies of this opinion as well as the two statutes, regulations promulgated by the Committee, the memorandum regarding changes in the Open Meetings Law to which reference was made earlier, and an explanatory pamphlet will be sent to the 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:ss

cc: Members of the School Board

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-623

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

May 1, 1981

Harvey Mandelkern
Deputy Counsel
NYS School Boards Association
119 Washington Avenue
Albany, New York 12210

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mandelkern:

I have received your letter of April 14 in which you requested an advisory opinion under the Open Meetings Law.

Specifically, you wrote that you received an inquiry regarding a situation in which the members of a board of education seek to discuss legal action against another member of the same board . The question is whether those discussions fall within the scope of the Open Meetings Law.

In all honesty, I am unaware of any judicial determinations that are pertinent to the situation that you described. However, it is possible that such a discussion may be exempt from the Open Meetings Law and, therefore, beyond the scope of its provisions.

As you are aware, the most commonly used vehicle for closing a meeting is the executive session. The phrase "executive session" is defined by the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded [see §97(3)]. Further, §100(1) describes a procedure that must be followed by a public body during an open meeting before it may enter into an executive session. The cited provision states in relevant part that:

> "Upon 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..."

In view of the language quoted above, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof.

One of the grounds for executive session concerns "proposed, pending or current litigation " [see §100(1)(d)]. Consequently, a public body may generally enter into an executive session when it discusses proposed litigation. However, under the circumstances that you described, that basis for closing a meeting would not serve the purposes of the board, for the member of the board who might be the subject of the litigation could be present. It is noted in this regard that §100(2) of the Open Meetings Law 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".

Therefore, any member of a public body has the capacity to be present at an executive session.

Nevertheless, there is another vehicle by which a public body may close its doors. Section 103 of the Open Meetings Law contains three exemptions. If an exemption is applicable, the provisions of the Open Meetings Law are inapplicable. Stated differently, if a discussion falls within the scope of an exemption, it is as though the Open Meetings Law does not exist. Therefore, when an exemption applies, notice need not be given and the procedural steps required to be accomplished prior to entry into an executive session under §100(1) need not be followed.

Of relevance to the situation that you described is §103(3), which states that the Open Meetings Law does not apply to "any matter made confidential by federal or state law". In this regard, although there is no statute that specifically states that a municipal attorney has a privileged relationship with the public body that he or she represents, case law by implication has long held that a municipal attorney may enjoy an attorney-client relationship with the officials of the municipalities by which he or she is employed [see e.g., Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 753 (1963); aff'd 17 App. Div. 2d 932; People ex rel. v. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. Consequently, if members of the Board individually or collectively seek the legal advice of an attorney acting in his capacity as an attorney, it would appear that such communications would be privileged and confidential under §4503 of the Civil Practice Law and Rules.

In view of the foregoing, to the extent that a privileged relationship exists, discussions held pursuant to that relationship would likely constitute "a matter made confidential by state law" that would fall within the exemption appearing in §103(3).

Therefore, under such circumstances, it is possible that a court would find that a discussion between particular members of a school board and an attorney could be conducted outside the scope of the Open Meetings Law and without the presence of the member of the board who is the subject of proposed litigation.

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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-624

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

May 1, 1981

Mr. Carl O. Olson
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Olson:

I have received your letter of April 15 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, the Chautauqua County Legislature consists of twenty-five members, thirteen of whom are democrats and twelve of whom are republicans. You also wrote that:

> "[B]oth parties use closed 'political caucuses' to conduct public business in private. Each party usually holds a closed caucus before each legislative session. (One of the caucuses is held in a restaurant.) Closed caucuses are repeatedly called during legislative sessions to discuss virtually every signifcant and/or controversial issue before the legislature. The purpose of the caucus is never stated. Two or three caucuses during a single session are not uncommon.
>
> "The legislators feel that the open meetings law permits them to use the 'political caucus' to discuss virtually anything they wish in private."

Your question concerns "the legality of a closed caucus attended by a majority of legislators for the purpose of discussing public business..."

As you are aware, under a recent judicial determination concerning the application of the Open Meetings Law relative to political caucuses, it would appear that any convening of a majority of the total membership of a public body constitutes a "meeting" subject to the Open Meetings Law.

I would like to make two points initially.

First, it is emphasized that the state's highest court has expansively construed the definition of "meeting" appearing in the Open Meetings Law. Specifically, in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the Court of Appeals held that the definition of "meeting" encompasses any situation in which a quorum of a public body convenes for the purpose of conducting public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Further, the definition of "meeting" that appeared in the Open Meetings Law as originally enacted was amended in a manner consisting with the direction provided by the Court of Appeals as part of a series of amendments to the Open Meetings Law that became effective on October 1, 1979.

As such, based upon the Court of Appeals' decision and the amended definition of "meeting", it would appear that any gathering of a quorum of a public body for the purpose of discussing public business is a "meeting" that must be convened open to the public and preceded by notice given to the news media and posted for the public in accordance with §99 of the Open Meetings Law.

Second, §103(2) of the Open Meetings Law exempts from its provisions "deliberations of political committees, conferences and caucuses".

The question, therefore, is whether the political caucuses that you described are exempt from the Open Meetings Law.

In this regard, the first judicial determination under the Open Meetings Law concerning political caucuses was recently rendered. Sciolino v. Ryan [431 NYS 2d 664 (1980)] dealt with a situation in which eight members of a common council representing a single political party held political caucuses while excluding the ninth member, the sole representative of a minority party. The facts in Sciolino as expressed by the court are as follows:

> "[O]n most Thursday afternoons the Democrat members of the Council meet in the mayor's office at the invitation of the Mayor and there they receive information about and discuss matters relating to government affairs that are likely to come before the City Council. As a result of the discussions, decisions are reached to include or not to include certain items on the agenda of the public meeting. Often invited to and attending these meetings are the City Manager, the City Clerk, and other members of the City's administration staff. Reporters, the minority members of the City Council, and the public are excluded from these meetings."

In determining the application of the Open Meetings Law relative to the exemption for political caucuses, the courts granted judgment to the minority member of the City Council:

> "...declaring that the word 'meeting', as set forth in section 98 of the Public Officers Law, includes the gathering or meeting of a public body for the purpose of transacting public business whenever a quorum is present, whether or not a vote of members of the public body is taken and whether or not minority members of the council are excluded and further declaring that the exemption of a 'political caucus' contained in section 103 of the Public Officers Law refers to meetings at which only political business and not public business is discussed and the term 'conducting public business' within the meaning of the open meetings law includes the discussion of any topics that may come

before the body at a regular public meeting" (id. at 668).

Based upon the holding in Sciolino, it appears that any convening of a majority of the members of the County Legislature would constitute a "meeting" subject to the Open Meetings Law. However, it is noted that the Sciolino decision has been appealed and is scheduled for argument in the Appellate Division, Fourth Department, on May 5.

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: County Legislature

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2008
OML-AO-685

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

May 5, 1981

Robert J. Whalen
School Board Trustee
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Whalen:

I have received your letter of April 22 and appreciate your interest in complying with the Freedom of Information Law.

According to your letter, you are a member of a school board which adopted a five dollar charge for school board minutes. Based upon your correspondence, it appears that the meetings are tape recorded but are never transcribed. In order to listen to and obtain a record of meetings, you have been required to pay a fee of five dollars. You have asked the Committee to advise you if this charge is legal.

It is emphasized at the outset that §101 of the Open Meetings Law requires that minutes of meetings be compiled. Specifically, subdivision (1) of §101 states that:

> "[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."

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

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

As such, a public body in my view has an affirmative duty to create minutes and voting records with respect to its meetings. Further, a tape recording of an entire meeting would not in my opinion constitute minutes as envisioned by the Open Meetings Law.

It is also noted that subdivision (3) of §101 of the Open Meetings Law states that minutes are available in accordance with the Freedom of Information Law and requires that minutes of open meetings be compiled and made available within two weeks of the date of such meetings.

The Committee has recognized that in some instances a public body might not meet to approve or make official minutes within the periods of time specified in §101(3). However, it has consistently been advised that the minutes be made available within the prescribed time periods, but that they may be marked as "draft", "unofficial", or "non-final", for example. By so doing, the public has the capacity to learn generally what transpired at a meeting and, concurrently, the members of the public body are given a measure of protection.

Second, an agency, such as a school board, in my view has the duty to make its records available to any person at the location for public inspection designated by the public body, regardless of the status of any individual or group that might seek access to such records [see e.g., Burke v. Yudelson, 368 NYS 2d 779; aff'd 51 AD 2d 673, 378 NYS 3d 165]. Therefore, minutes of school board meetings should be available to you upon request, regardless of your position as a member of the School Board.

Third, you indicated that the School Board has established a fee of five dollars to review the tape recordings of the meetings. Section 87(1)(b)(iii) of the Freedom of Information Law states in relevant part that:

> "the fees for copies of records... shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law."

Additionally, a governmental unit cannot charge an applicant under the Freedom of Information Law for inspection, search or research time expended in gathering the requested information. Specifically, §1401.8 of the regulations promulgated by the Committee states that no fee can be charged for the search, inspection, or certification of any records.

It is noted that in a situation in which a copy of a tape recording was requested, the court held that personnel time and salaries would not be used as the basis for the assessment of a fee (see e.g., Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978).

Lastly, as a member of the School Board, it is questionable in my view whether you should be required to follow the same procedures as members of the public under the Freedom of Information Law [see e.g., Gustin v. Joiner, 406 NYS 2d 138 (1978)].

From my perspective, when a public officer seeks information while acting in his or her capacity as a public officer, that person should not be required to follow the procedures generally applicable to the public under the Freedom of Information Law. In such a situation, a member of a board, for example, would not be requesting information as a member of the public based upon his or her "right to know", but rather as a representative of government who has a need to know in order to carry out his or her official duties.

Of course, it should be noted that there may be reasonable limitations that may be imposed upon public officers.

For instance, some records may be exempted from disclosure by statutes that permit disclosure only under specified circumstances, (i.e., the federal Family Educational Rights and Privacy Act, 20 U.S.C. §1232g).

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

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-626

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

May 7, 1981

Mr. Lawrence Malone
Attorney at Law
106 Orlando Avenue
Albany, NY 12203

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Malone:

Thank you for your letter of April 14.

According to your letter, the Committee on the Handicapped for the Albany City School District had scheduled a meeting during which a resolution concerning the funding of your child's educational program was to be resolved. Upon arriving at the meeting of the Committee, you were asked to leave on the ground that another case was being discussed. Upon your return to the meeting, you posed several questions to the Committee and after "perfunctory discussion" by the Committee, it voted unanimously against the position you presented. You indicated that in response to your inquiry the Committee admitted that it had discussed your child's educational program before you had entered the room, but no vote was taken until you were present.

Based on the situation you described, it is my opinion that the Open Meetings Law may not have been violated; however, provisions of the Education Law and regulations promulgated by the United States Department of Education were likely violated.

First, §103(3) of the Open Meetings Law provides that discussion of "any matter made confidential by federal or state law" is exempt from the Open Meetings Law and falls

outside its scope. Since records relative to handicapped children are confidential pursuant to the Education of the Handicapped Act (Public Law 94-142), any discussion of a handicapped child by means of records related to the child would be confidential and therefore outside the scope of the Open Meetings Law. I believe that this interpretation would be accurate even though you as a parent have the right to be present during discussions regarding your child as well as the right to review records pertaining to your child.

Second, despite the exemption from the Open Meetings Law, as noted earlier, §4402(3)(c) of the New York Education Law directs that a committee on the handicapped give notice to parents when evaluations of a child's educational placement will be discussed, and in addition, such a committee is required to provide the parents with the opportunity to address the committee. Further, §200.4(g)(2)(ii) of the regulations promulgated by the Commissioner of Education implicitly requires that a parent be permitted to attend conferences whenever possible. As such, I believe that there is an intent in New York law to encourage parents to participate in the meetings and deliberations of a committee on the handicapped.

Third, as a condition precedent to the receipt of funds under the Education of the Handicapped Act, states and school districts that receive funding through this Act are required to comply with the regulations adopted by the Department of Education (formerly the Department of Health, Education and Welfare). In part, §121a.345(a) of the regulations states that:

> "(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate".

The regulations also require a committee on the handicapped to take numerous steps to ensure the attendance of a parent or parents at the meeting; only when a committee is unable to convince the parents that they should be present and can document such efforts can the meeting be conducted without them.

In view of the direction given in the regulations quoted above, it is clear that a public agency, such as the Committee on the Handicapped, must make efforts to ensure that parents may attend meetings and that parents are fully aware of any discussions and deliberations that transpire at the meetings.

In sum, in my opinion, your exclusion from the meeting during which the issue of the funding of your child's educational program was discussed appears to have violated the New York Education Law and regulations, as well as the regulations promulgated by the United States Department 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
Executive Director

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Committee on the Handicapped

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOML-AO-627

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

May 8, 1981

Patricia Cullen
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Cullen:

I have received your letter of April 24, which raises several questions regarding the implementation of the Open Meetings Law (see attached) by the Brentwood Union Free School District.

The first item to which you made reference concerns the use of a printed agenda by the School District, a copy of which you enclosed with your correspondence. You have indicated that the agenda sets forth titles for discussion topics, but that it is not reflective of the subject matter actually discussed at a meeting. In this regard, there is no provision of law of which I am aware that requires a public body to distribute an agenda that identifies topics to be discussed, either in advance of or at the time of a meeting. Therefore, it is more than likely that the discussion matter of a particular meeting may not in every case conform to the topics as indicated on an agenda.

Additionally, you wrote that a period of thirty minutes is scheduled for questions from the audience to be answered regarding agenda items. Based upon experience at School Board meetings, you expressed a belief that questions are taken from the audience in an unfair manner, for the same people are repeatedly "ignored". While the Open Meetings Law states that the public has the right to attend and listen to the deliberations of public bodies (see §95), it is silent with respect to public participation. However,

if a public body determines to permit public participation, it may do so based upon reasonable rules that treat all members of the public equally.

Second, you made reference to the executive session scheduled in advance of the regular Board meeting as indicated in the enclosed agenda. According to your letter, these executive sessions were in the past held after the regular meeting, but they have recently been held the evening before the regular meeting. In this regard, I believe that the so-called "executive session" identified in the agenda attached to your correspondence is required to be convened as an open meeting. The definition of "meeting" was interpreted by the state's highest court to include any convening of a quorum of a public body for the purpose of discussing public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Further, §99 of the Law requires that notice of the time and place of all meetings be given to the news media (at least two) and posted in one or more designated, conspicuous public locations, prior to all meetings, whether they are characterized as regular, special or otherwise.

It is also important to emphasize that §97(3) of the Open Meetings Law defines "executive session" to mean that portion of an open meeting during which the public may be excluded. In addition, §100(1) of the Law sets forth a procedure that must be followed by a public body before it may enter into an executive session. 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, it is clear that a motion to enter into executive session must be made during an open meeting. Further, such a motion must identify in general terms the subject or subjects to be considered in executive session and it must be carried by a majority vote of the total membership of a public body. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. Moreover, from a technical point of view, I do not believe that a public body can schedule an executive session in advance of an open meeting, for it cannot be known whether a motion to enter into an executive session will indeed be carried by a majority of the total membership of a public body.

Further, it is important to point out that a public body may not enter into executive session to discuss the subject matter of its choice. On the contrary, paragraphs (a) through (h) of §100(1) of the Law specify and limit the subjects that may appropriately be considered during an executive session. In my view, a discussion of matters concerning employees or "personnel" in general would not constitute an appropriate ground for executive session. The so-called "personnel" exception for executive session, as amended on October 1, 1979, permits a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added) [see Open Meetings Law, §100(1)(f)].

Consequently, §100(1)(f) of the Law may be cited as the basis for an executive session to discuss employee matters only when the discussions pertain to a "particular" person in relation to the subjects identified in that provision.

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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosure

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 628

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

May 12, 1981

Michael B. Bluth
City Attorney
City of Dunkirk
Department of Law
City Hall
Dunkirk, NY 14048

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bluth:

Your letter of March 17 addressed to Theodore Berns of the Department of Audit and Control has been forwarded to the Committee on Public Access to Records. This office received your correspondence on May 5. Please accept my apologies for the delay in response.

According to your letter, the Common Council of the City of Dunkirk requested that you obtain an opinion "regarding the use of City facilities by private, politically oriented organizations". Specifically, following a meeting held in a City firehall by the Dunkirk Citizens' Action Board, Inc., a not-for-profit corporation, during which the Board excluded a college newspaper reporter, the Mayor stated that the Board could no longer use City facilities unless its meetings were open to the public. You have asked whether the Citizens' Action Board may call "executive sessions" or otherwise exclude the public from meetings conducted at City facilities.

As you may be aware, an advisory opinion raising similar issues was prepared at the request of Joseph Carrus, research director of the Citizens' Action Board. A copy of that opinion was sent to the Mayor of the City of Dunkirk. Nevertheless, I would like to offer the following observations.

It is noted that §97(2) of the Open Meetings Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

Based upon the materials attached to your letter, the Citizens' Action Board neither conducts public business nor does it perform a governmental function. Consequently, in my view, the Board need not conduct its meetings in accordance with the provisions of the Open Meetings Law, but rather with the provisions of the Not-for-Profit Corporation Law.

Assuming that the Board in question is not subject to the Open Meetings Law, there is no provision of law of which I am aware that would provide it with the right to meet on City or other public property. Therefore, if the City allows the Board to meet in City facilities, I believe that it may impose conditions upon the use of its facilities by non-governmental groups.

As you indicated in your letter, Mr. Kalteaux of the Department of Audit and Control stated that §414 of the Education Law might be useful in terms of direction. The cited provision in relevant part states that school district property may be used for particular functions, including meetings of a civic nature that pertain to the welfare of the community. However, such functions must be "non-exclusive" and open to the general public.

While there is no similar provision of law with which I am familiar that is applicable to a city, it would appear that the City of Dunkirk could adopt a similar requirement by means of policy, ordinance or local law.

In sum, first, the Citizens' Action Board in my opinion, falls outside the scope of the scope of the Open Meetings Law. Therefore, it is not in my view required to permit the public to attend its meetings. Second, I do not believe that the City of Dunkirk is required to permit the Citizens' Action Board to use City facilities for its meetings. And third, if the City chooses to permit the use of its facilities for meetings of non-governmental groups, I believe that it may do so with restrictions concerning, among other factors, the ability of the public to attend such 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
Executive Director

RJF:ss

cc: Adam F. Ciesinski

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-629

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

May 12, 1981

William A. Toomey, Jr.
Toomey and Dorfman
Attorneys and Counsellors at Law
11 North Pearl Street
Albany, New York 12207

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Toomey:

I have received your letter of May 1.

You have raised questions concerning:

> "...whether or not hearings before a Referee regarding a claimant, under the Worker's Compensation Law, are quasi-judicial hearings which can be closed to all, but parties to the individual hearing upon the request of the claimant".

In addition, you requested an opinion "on whether or not the type of hearing referred to above is a matter of public concern that should be opened to the public".

The hearings to which you made reference are not in my opinion subject to the Open Meetings Law and, therefore, need not be open to the public.

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

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

In this regard, since a referee is a single individual rather than an "entity" consisting of two or more members, no public body would be present. Consequently, I do not believe that the Open Meetings Law would be applicable to the hearings in question.

Second, §103(1) of the Open Meetings Law exempts from its provisions "judicial or quasi-judicial proceedings..." Based upon a definition of "quasi-judicial" and the direction provided by the Workers' Compensation Law, as well as the rules promulgated thereunder, it appears that a hearing conducted by a referee could be characterized as "quasi-judicial". Specifically, according to Black's Law Dictionary, "quasi-judicial" is:

> "[A] term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature".

Based upon a review of the Workers' Compensation Law, §20, and §§16, 17 and 25 through 27 of the rules promulgated thereunder, it would appear that each of the conditions precedent to finding that a hearing is "quasi-judicial" would be met in the case of a hearing conducted by a referee.

Third, even if the provisions of the Open Meetings Law were fully applicable, it would appear that the public could nonetheless be excluded from a hearing. Section 100(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

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

A hearing would presumably focus upon the medical and/or employment history of a particular individual. As such, an executive session could likely be convened even if the hearings in question were subject to the Open Meetings Law. It is reiterated, however, in my view, that a hearing before a referee would fall beyond the scope of the Open Meetings Law, for no public body is present and because of the quasi-judicial nature of such a proceeding.

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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOML-AO-[redacted]

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

May 21, 1981

Mr. John H. Galligan
NY Conference of Mayors
and Municipal Officials
119 Washington Avenue
Albany, NY 12210

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Galligan:

I have received your letter of April 20 in which you requested reconsideration of an advisory opinion rendered recently at your request regarding the status of a compulsory arbitration hearing under the Open Meetings Law.

According to your letter, it is your contention that the portion of the compulsory arbitration hearing described in Civil Service Law, §209(4)(c)(iii), during which a three person panel receives evidence on matters that are the subject of a labor dispute between a public employee and the employee organization, should be open to the public under the Open Meetings Law. Additionally, you have equated that portion of the compulsory arbitration hearing with the legislative public hearing required by Civil Service Law, §209(3)(c), and that portion of a public hearing where evidence is taken by a zoning board of appeals.

I would like to offer the following observations with regard to your comments.

It is noted at the outset that there appears to be no definitive judicial interpretation characterizing the status of a compulsory arbitration panel. In fact, in a concurring opinion, Judge Fuchsberg of the Court of Appeals discussed the delegation of powers by the Legislature to a compulsory arbitration panel and found that such powers may be "partly legislative, partly judicial, and partly administrative; they may even be described as sui generis [see City of Amsterdam v. Helmsley, 37 NY 2d 19, 35 (1975)]. Due to the absence of a clear judicial determination on the subject, the status of the panels in question under the Open Meetings Law is conjectural. However, it is my opinion that such panels function in a quasi-judicial manner and therefore are exempt from the Open Meetings Law for the reasons described in the ensuing paragraphs.

First, as indicated in my earlier opinion dated April 6, it is my view that the arbitration process in which a compulsory arbitration panel engages is similar to the activities described in legal dictionary definitions of "hearing" and "quasi-judicial". Furthermore, the following definition of "arbitration" bolsters this contention:

> "The submission for determination of disputed matter to private unofficial persons selected in manner proceed by law or agreement...the substitution of their award or decision for judgment of a court" (see Black's Law Dictionary, Revised Fourth Edition, 1968).

From my perspective, the term "arbitration" infers an activity of a quasi-judicial nature. In the case of your inquiry, the three arbitrators that comprise the panel do not merely "hear" the disputed conditions of employment which have led to an impasse, nor is their authority limited to the making of recommendations. On the contrary, the panel is required by statute to "make a just and reasonable determination of the matters in dispute" [Civil Service Law, §209(4](c)(v)] and to specify with particularity the basis for its determination.

Second, the legislative hearing that you equated with the compulsory arbitration hearing does not include the corresponding statutory authorization to compel the production of additional evidence or hear testimony on all matters relating to a dispute. The legislative body is authorized to conduct a public hearing to give the parties to the dispute an opportunity to explain their respective positions regarding findings of fact and recommendations reported by the fact-finding body to the chief executive officer of the government involved. In essence, the public hearing of the legislative body is restricted to a review of the report of the fact-finding body. Contrarily, the compulsory arbitration hearing legislation authorizes the panel to hear all matters related to the dispute and even refer issues back for further negotiations upon joint request of the public employer and the employee organization. That type of authority would appear to indicate a wide latitude of discretion statutorily vested in the panel that may be distinguished from the limited authority of a legislative body in relation to a public hearing.

Third, as previously noted in our correspondence, the absence of the adjective "public" from the arbitration panel hearing section of the law would appear to indicate that the Legislature intended to differentiate between the panel and the legislative body which is required to hold a "public hearing". Similarly, the panel's determination is "final and binding" [§209(4)(c)(vi)]; while no similar provision, however, is applicable to the legislative body's action taken subsequent to public hearings. Given the differences between the arbitration panel's hearing and the legislative body's public hearing, it is likely that the Legislature intended to distinguish the functions of these two types of hearings.

Lastly, you indicated the belief that the judicial interpretation in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], reinforces your position that an arbitration panel hearing is comparable to that portion of a zoning board of appeals meeting wherein evidence is heard at a public hearing. In my view, the procedures of a zoning board of appeals are not directly applicable to those of an interest arbitration hearing. In Orange County, supra,

the Appellate Division, Second Department, specifically noted that the portion of a city zoning board of appeals' meeting wherein evidence taken during a public hearing is weighed or deliberated is judicial in nature, as it affected the rights and liabilities of individuals (Orange County, 90, supra), despite the fact that the evidence was obtained at a public hearing.

In sum, it is my view that a compulsory interest arbitration panel hearing is exempt from the provisions of the Open Meetings Law due to its quasi-judicial nature and due to the distinctions in legislation between such a panel and the direction provided in Civil Service Law, §209(3)(e)(iii).

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

Pamela Petrie Baldasaro

BY: Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-631

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

COMMITTEE MEMBERS
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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 22, 1981

Ms. Sally L. Donnan
Sr. Louise M. Principe, CSJ
86 Edgewood Avenue
Albany, New York 12203

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Donnan and Sr. Principe:

I have received your letter of April 27, which arrived at this office on May 19.

You have raised questions regarding the implementation of the Open Meetings Law by the Board of Education of the City School District of the City of Albany. Specifically, you have indicated that when you and others with handicapping conditions attempted to attend a meeting of the Board to learn of a report issued with respect to a program for handicapped children in the Albany schools, you discovered that you "would have had to ascend some 46 steps." Since you were in wheelchairs, it was impossible to attend the meeting.

You have asked for an opinion regarding the responsibility of the Board of Education in this matter.

As you are aware, §98(b) of the Public Officers Law, which is commonly known as the Open Meetings Law, states that:

> "[P]ublic bodies shall make or cause to made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

I would like to make several observations with respect to the language quoted above.

First, it is clear that the cited provision imposes no obligation upon a public body to construct a new facility or reconstruct or renovate an existing facility to permit barrier-free access to physically handicapped persons.

Second, the Law does, however impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons.

Third, as a consequence, I believe that if a school board has the capacity to hold its meetings in a number of locations, the meetings should be held in the facility that is most likely to accommodate the needs of persons with handicapping conditions.

Under the circumstances, I believe that the School District maintains a number of buildings that would better accommodate handicapped persons than the facility that you described, which, to reiterate, requires that some 46 steps be ascended in order to attend a meeting. For instance, unless I am mistaken, entry into Albany High School can be accomplished without climbing any steps. Similarly, I believe that there are other buildings maintained by the Schoool District that would provide easier access to physically handicapped persons than the site of the meeting that you sought to attend.

Lastly, in order to assist you and apprise the Board of Education of its responsibilities under the Open Meetings Law, a copy of this opinion will be sent to the Board. Perhaps the opinion will lead to a change in policy by the Board that will result in a different choice of location for its meetings in order to enable many persons with handicapping conditions to attend.

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

FOIL-AO-2025
OML-AO-632

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

May 26, 1981

Mr. James Heary
Conboy, McKay, Bachman & Kendall
407 Sherman Street
Watertown, New York 13601

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Heary:

I have received your thoughtful letter of May 11 and appreciate your interest in complying with the Freedom of Information and Open Meetings Laws.

You have indicated that you are Counsel to the Jefferson County Industrial Development Agency (the "IDA") and that a number of questions have arisen with respect to access to its meetings and records, particularly with respect to the promotion of new industry in the County. You have contended that, for the IDA to function effectively, it must have the capacity to maintain the confidentiality of records that identify new industries with which discussions have been initiated.

With regard to your first area of inquiry, I would like to offer the following observations and comments.

It is noted at the outset that the IDA is in my view both an "agency" subject to the Freedom of Information Law and a "public body" subject to the Open Meetings Law.

Section 86(3) of the Freedom of Information Law (Article 6, Public Officers 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 of any one or more municipalities thereof, except the judiciary or the state legislature."

Since an industrial development agency is a "government entity" performing a governmental function for a municipality, it is in my view clearly an "agency" subject to rights of access granted by the Freedom of Information Law.

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

> "any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body."

Further, §856(2) of the General Municipal Law, which concerns the organization of industrial development agencies, provides that such an agency "shall be a corporate governmental agency, constituting a public benefit corporation". Since §66 of the General Construction Law defines "public corporation" to include a public benefit corporation, such as an industrial development agency, the corporate board of directors of an industrial development agency is an entity which consists of at least two members, is required to act by means of a quorum (see General Construction Law, §41) and performs a governmental function for a public corporation. Therefore, it is a "public body" as defined by §97 (2) of the Open Meetings Law.

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

Under the circumstances, I can envision three possible grounds for denial. However, in all honesty, the extent to which any of the grounds for denial might appropriately be asserted is questionable.

One ground for denial of potential relevance is §87(2)(c), which states that agency may withhold records or portions thereof which if disclosed would "impair present or imminent contract awards..." From my perspective, it is doubtful that the cited provision is applicable, because the situation that you described does not likely deal with a contract award.

A second ground for denial that may be relevant is §97(2)(d), which states that an agency may withhold trade secrets or other information maintained for the regulation of commercial enterprise when disclosure would cause substantial injury to the competitive position of the subject corporation.

In my view, it is possible that the cited provision may appropriately be cited with regard to at least some of the records with which you are dealing. Further, it is possible that even the disclosure of the identity of a corporation considering locating in Jefferson County might constitute a trade secret, for disclosure might give an advantage to competitors. Other information concerning the particulars of a corporation, such as its financial background and strengths and weaknesses might also if disclosed cause substantial injury to its competitive position.

It is noted that the standard found within §87(2)(d) is flexible and that it might be asserted properly in some cases and inapplicable in others, depending upon the nature of the corporation, its business and the factual circumstances of the situation.

A third potential ground for denial is §87(2)(g), which states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

As the language of the statute indicates, §87(2)(g) is applicable to communications between agencies as well as those between representatives of a single agency. Consequently, letters, memoranda and similar information communicated among representatives of the IDA and its staff would constitute intra-agency materials. It is emphasized, however, that §87(2)(g) contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available. Conversely, portions of inter-agency or intra-agency materials that are reflective of advice, recommendations, suggestion, impression and the like might justifiably be withheld.

Your second question concerns the status of three advisory committees designated by the IDA to assist its members in their deliberations. You have indicated that the committees have no authority to act, but rather have only the authority to recommend. Since the committees are advisory, you wrote that you have suggested that their meetings are not subject to the Open Meetings Law.

With all due respect to your position, I must disagree.

Although the status of advisory committees was questionable under the Open Meetings Law as originally enacted, amendments to the Open Meetings Law that became effective on October 1, 1979, in my opinion make clear

that advisory committees are subject to the Law in all respects. In fact, the definition of "public body" quoted earlier now makes reference to "committee or subcommittee or other similar body" of a public body, such as the board of directors of an industrial development agency. Moreover, in the earlier discussion of the status of an industrial development agency under the Open Meetings Law, a rationale concerning the coverage of an industrial development agency board of directors was presented under the definition of "public body". I believe that the same rationale would apply to committees created by an industrial development agency. Consequently, I believe that the committees to which you made reference are subject to the Open Meetings Law.

Your last question concerns applications that must be filed with the IDA by a prospective industry. Your question is whether the applications are available to the public "on demand before the Agency has had an opportunity to act on them at one of its meetings" (emphasis yours).

In this regard, I would like to offer two points.

Under the Freedom of Information Law and the regulations promulgated by the Committee (see attached), which govern the procedural aspects of the Freedom of Information Law, an agency is required to respond to a request made in writing within prescribed time limits. Specifically, §89(3) and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7(b)].

In view of the foregoing, assuming that an agency acknowledges the receipt of a request on the fifth business day after receipt of a request, it may take up to fifteen business days to respond initially to a request.

It is important to point out, however, that any records in possession of an agency are subject to rights of access granted by the Freedom of Information Law as soon as they come into to possession of the agency [see definition of "record", §86(4)]. Consequently, if, for example, the IDA does not meet for a lengthy period of time, a determination to disclose or withhold may have to be made before the Board has an opportunity to meet.

Further, as indicated earlier, one of the grounds for denial in the Freedom of Information Law concerns trade secret information which if disclosed would cause substantial injury to the competitive position of a particular corporation. It is possible that certain aspects of the application might be withheld until a determination regarding the application has been made. For instance, the trade secret exception might be applicable with respect to the list of business suppliers, major customers, the types of markets served, the corporation's terms of sale as well as financial information. In addition, there are aspects of the application which if disclosed might constitute "an unwarranted invasion of personal privacy" and therefore be deniable under §87(2)(b) of the Freedom of Information Law. For instance, it is possible that disclosure would result in an unwarranted invasion of personal privacy with respect to the addresses, social security numbers and other business affiliations of officers and directors.

Lastly, it is possible that there may be a ground for executive session with respect to some of the deliberations of both the IDA and its committees.

For instance, §100(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

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

Although the language quoted above is cited most often with respect to matters concerning "personnel", it also applies to discussions dealing with a corporation. In my view, it is likely that many of the discussions of an industrial development agency deal with the financial or credit history of a particular corporation. Therefore, to that extent, an executive session could in my opinion justifiably be convened.

Another ground for denial that might conceivably be cited is §100(1)(h), which states that a public body may enter into an executive session to discuss:

> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

If, for example, the County is purchasing, selling, or leasing its real property, and if disclosure would substantially affect the value of the property, an executive session could in my opinion be 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-633

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

June 1, 1981

Mr. Kenneth S. Kramer
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kramer:

I have received your letter of May 14 and appreciate your interest in complying with the Open Meetings Law.

Your initial area of inquiry concerns the requirements for holding an "executive session".

First, the phast "executive session" is defined in §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded.

Second, §100(1) prescribes a procedure that must be followed by a public body before it may enter into an executive session. Specifically, the cited provision states in relevant part 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..."

In view of the foregoing, it is clear that a public body must take three steps before it may enter into an executive session. A member of a public body must make a motion to enter into an executive session during an open meeting; the motion must identify in general terms the subject matter sought to be discussed during an executive session; and the motion must be carried by a majority vote of the total membership, notwithstanding the absence of members or vacancies on a public body. Section 100(1) also makes clear that an executive session is not separate and distinct from an open meeting, for an executive session may be conducted only after an open meeting has begun.

Your next area of inquiry concerns the maintenance of minutes. In this regard, §101 of the Open Meetings Law provides minimum requirements concerning the contents of minutes.

With respect to open meetings, §101(1) requires that minutes of open meetings:

> "...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."

Section 101(2) concerns minutes of executive sessions. It is noted that a public body may generally take action during a properly convened executive session, so long as the action does not involve the appropriation of public monies. Assuming that action is taken during an executive session, minutes reflective of that action must

> "...consist of a record or summary of the final determination of such action, and the date and vote thereon..."

Consequently, minutes of both open meetings and executive sessions are required to include reference to any action taken at a meeting by a public body.

It is important to point out that the law concerning the capacity to take action during an executive session differs with respect to public bodies in general as opposed to school boards. School boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

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 2d 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.

Further, §101(3) of the Open Meetings Law requires that minutes of open meetings be compiled and made available within two weeks of such meetings. Minutes of executive sessions must be compiled and made available within one week of the executive sessions to which they relate.

You have asked whether a meeting can be called without "reasonable public notice". In my view, every meeting, whether regularly scheduled, emergency, or otherwise, must be preceded by notice to the news media and the public by means of posting.

Here I direct your attention to §99 of the Open Meetings Law. With respect to meetings scheduled at least a week in advance, §99(1) requires that notice of the time and place of such meetings shall be given to the news media (at least two) and conspicuously posted in one or more designated public locations not less than seventy-two hours prior to such meetings. If a meeting is scheduled less than a week in advance, notice must be given to the news media and the public by means of posting in the same manner as described in §99(1) "to the extent practicable" at a reasonable time prior to such meeting. Consequently, even if a meeting is scheduled on short notice, I believe that notice must nonetheless be given to the news media and to the public by means of posting.

Next, you raised a question concerning which matters may be discussed behind closed doors. The Open Meetings Law requires that the deliberations of a public body be considered in publice, except to the extent that an executive session may be held. In this regard, §100(1)(a) through (h) of the Open Meetings Law specifies and limits the areas of discussion that may appropriately be considered during an executive session. Those topics represent that only instances in which an executive session may properly be convened.

Lastly, you have asked whether appointed, as opposed to elected officials, have the right to attend if the public is excluded. Section 100(2) of the Open Meetings Law states that:

> "[A]ttendance at an executive session shall be permitted to any member of the public body and any other person authorized by the public body."

Based upon the language quoted above, any member of a public body may attend an executive session, and in addition, a public body may permit "authorized" persons to attend an executive session. As such, persons other than members of a public body have no "right" to attend executive sessions. Further, from my perspective, as in the case of all provisions of law, I believe that §100 (2) should be given a reasonable interpretation. Stated differently, while a public body may permit persons other than its members to attend an executive session, I believe that the attendance of non-members should generally be restricted to those who may be involved in a particular controversy or who have specific knowledge or expertise that would aid the members of a public body in deliberating. Section 100(2) should not in my view be used as a means of discriminating or enabling a public body to select particular persons for the purposes of including or excluding them from an executive session.

Enclosed for your consideration is a copy of a memorandum transmitted by the Committee to all public bodies prior to October 1, 1979, the effective date of amendments to the Open Meetings Law. A copy of the Law as amended is attached to the memorandum. The same materials will be sent to the individuals identified 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

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Mrs. Joan Davidson
Mrs. Maureen O'Neill
Dr. Alan Protzel
Gerald Raymon, Esq.
Hon. Robbert J. Rose
Peter Wiler, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2032
OML-AO-634

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

June 2, 1981

Ms. Bette Segal
Director
Tri-State Regional Planning
Commission
One World Trade Center
New York, New York 10048

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Segal:

As you are aware, I have received your letter in which you requested an advisory opinion under both the Freedom of Information and Open Meetings Laws.

Your inquiry concerns the status of a community development corporation created by a village. Specifically, you have asked whether the meetings of the community development corporation board of directors are subject to the Open Meetings Law and whether the names of its members must be disclosed under the Freedom of Information Law.

In all honesty, I know of no judicial determination concerning the status of community development corporations under the Open Meetings Law. Nevertheless, I believe that such corporations are subject to the Open Meetings Law in all respects.

Article 6-A of the Private Housing Finance Law deals with community development corporations. According to §253 of the Private Housing Finance Law, community development corporations

> "...shall be incorporated and organized in the manner provided in the not-for-profit corporation law for not-for-profit corporations, except that the certificate of incorporation shall be approved by the commissioner [of the New York State Housing Finance Agency] instead of such approval or approvals as may be required by the not-for-profit corporation law."

In terms of the rationale behind the creation of community development corporations, §251 of the Private Housing Finance Law, entitled "Policy and purposes of article" states that:

> "[I]t is the policy of the state to promote the reconstruction and redevelopment of municipal urban renewal areas in a manner that will serve the civic, cultural and recreational needs of the community as a whole. There is need for local non-profit corporations to construct, with mortgage loan participation by the New York state housing finance agency and in furtherance of an urban renewal plan, civic, cultural and recreational structures and facilities and other capital development projects invested with a public interest, for the accomplishment of the purposes of article eighteen of the constitution and articles fifteen and fifteen-A of the general municipal law."

Based upon the statement of policy quoted above, it is in my opinion clear that a community development corporation is created and functions in order to carry out the public interest. Further, Articles 15 and 15-A of the General Municipal Law concerning urban renewal, also contain statements of policy based upon the promotion of the safety, health, morals and welfare of the people of the state (see General Municipal Law, §501). Section 501 of the General Municipal Law concerning urban renewal states that:

> "[I]t is necessary for the accomplishment of such purposes to grant municipalities of this state the rights and powers provided in this article. The use of such rights and powers to correct such conditions, factors and characteristics and to eliminate or prevent the development and spread of deterioration and blight through the clearance, replanning, reconstruction, rehabilitation, conservation or renewal of such areas, for residential, commercial, industrial, community, public and other uses is a public use and public purpose essential to the public interest, and for which public funds may be expended."

In Article 15-A of the General Municipal Law, the statement of policy and purposes appearing in §551 states that:

> "[I]t is hereby declared to be the policy of this state to promote the expeditious undertaking, financing and completion of municipal urban renewal programs by the creation of municipal urban renewal agencies which are hereby declared to be governmental agencies and instrumentalities and to grant to such urban renewal agencies the rights and powers provided in this article. The use of such rights and powers is a public purpose essential to the public interest, and for which public funds may be expended."

In view of the foregoing, it is in my opinion clear that the purposes of a community development corporation involve carrying out the public interest in a manner similar to and based upon the direction given to urban renewal agencies under the General Municipal Law. Therefore, even though a community development corporation may be a not-for-profit corporation, I believe that it falls within the definition of "public body" appearing in §97(2) of the Open Meetings Law and that it is 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 conduct 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, or committee or subcommittee or other similar body of such public body."

By breaking the definition into its components, I believe that each of the conditions precedent in the definition necessary to a finding that a community development corporation is subject to the Open Meetings Law can be met.

First, a community development corporation is an entity consisting of two or more members.

Second, a community development corporation is required to act by means of a quorum under §608 of the Not-for-Profit Corporation Law.

Third, based upon the direction provided in the Private Housing Finance Law and Articles 15 and 15-A of the General Municipal Law, I believe that a community development corporation conducts public business and performs a governmental function.

And fourth, the business of a community development corporation is in my opinion performed for a public corporation, in this case a village.

It is noted that in somewhat similar situations, it has been found judicially that not-for-profit corporations may be subject to either the Open Meetings Law or the Freedom of Information Law. For instance, the Appellate Division, Fourth Department, recently held that the Board of Trustees of Cornell University, a not-for-profit educational corporation, is subject to the Open Meetings Law when it deliberates with respect to its four statutory colleges [see Holden v. Cornell University Board of Trustees, Sup. Ct., Tompkins County, February 19, 1980; aff'd Appellate Division, Fourth Department, May 21, 1981]. Similarly, in Westchester Rockland Newspapers v. Kimball

[50 NY 2d 575 (1980)], the Court of Appeals found that a volunteer fire company, a not-for-profit corporation, is an "agency" subject to the Freedom of Information Law.

For the reasons described above, I believe that a community development corporation is a "public body" subject to the Open Meetings Law in all respects.

With regard to the names of the members of a community development corporation, assuming that the Open Meetings Law is indeed applicable, the identities of the members might be determined by attending a meeting. Further, assuming that the municipality for which the corporation performs its duties has possession of a record indicating the identities of the members of a corporation, such a record would in my view be accessible under the Freedom of Information Law, for there would be no ground for denial that could be appropriately cited to withhold such a record. In addition, it is possible that the New York State Housing Finance Agency maintains records reflective of the identities of the members of community development corporations. If that is the case, I believe that such records would be accessible from that agency as well.

According to our telephone conversation, the community development corporation in which you are interested does not keep minutes. In this regard, I would like to point out that §101 of the Open Meetings Law requires that minutes be compiled and made available. Minutes of open meetings must be made available within two weeks of such meetings and minutes reflective of action taken during executive sessions must be prepared and made available within one week of the executive sessions.

Lastly, it is emphasized that the Open Meetings Law provides the public with the right to attend and listen to the deliberations of public bodies. It confers no right upon the public to speak or otherwise participate at meetings of public bodies. Therefore, if a public body chooses to permit public participation at meetings, it may do so, but it need not.

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: Mayor, Village of Spring Valley

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2033
OML-AO-635

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

June 3, 1981

Mr. David R. Battaglia
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Battaglia:

I have received your letter of May 17 and appreciate your interest in complying with the Open Meetings Law.

As a member of the Tonawanda Board of Education, you have questioned practices of the Board with regard to discussions of items during executive sessions under the heading of "personnel". You have asked for an advisory opinion with respect to particular situations in which the "personnel exception" has been invoked.

It is noted at that outset that the so-called "personnel" exception for executive session appearing in the existing Open Meetings Law differs from the analogous provision in the original Open Meetings Law. Under the original §100(1)(f), a public body could 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..."

Numerous problems of interpretation arose with respect to the language quoted above. In many instances, public bodies entered into executive sessions to discuss matters that dealt with personnel policy, personnel in general, or subjects concerning personnel in a tangential manner. From the Committee's perspective, §100(1)(f) was intended largely to protect privacy. Consequently, the Committee advised that the exception in question might appropriately be cited to enter into executive sessions only when discussions concerned specific individuals. Moreover, in its annual reports to the Legislature on the Open Meetings Law, the Committee recommended legislation to clarify the Law in conjunction with its view of §100(1)(f).

In 1979, the Open Meetings Law was amended in several respects. One of the amendments involved a change in the scope of the "personnel" exception for executive session based upon the Committee's proposal. The cited provision now states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added)

In view of the alterations in §100(1)(f), it is in my view clear that an executive session regarding "personnel" may be conducted only with respect to those subjects listed in §100(1)(f) and, further, only with regard to discussions relative to a "particular" person.

In terms of the examples that you provided, the first concerns an executive session during with the Superintendent

> "...began discussion on the ability of the district to hire per diem and long-term substitute teachers from sources other than the preferred eligible list, which consists of previously employed teachers who are presently laid off."

I concur with your objections to the executive session, for the issue dealt with substitute teachers generally, rather than any particular individual.

I also agree that the second situation that you described would not in my view have constituted an appropriate discussion for executive session. That discussion concerned a review of a seniority list of District Administrators relative to the manner in which the list was compiled. Again, it would appear that there was no discussion of any particular individual on the list, but rather merely the means by which the list was created.

Following your objections to that executive session, you were informed that the issues could have been discussed during an executive session under the heading of "possible litigation". In this regard, §100(1)(d) of the Open Meetings Law states that a public body may enter into an executive session to discuss "proposed, pending or current litigation". It has been contended on several occasions that "possible litigation" constitutes an appropriate basis for entry into an executive session. I disagree, for virtually any subject discussed by a public body could be a topic of possible litigation. From my perspective, to be considered "proposed" litigation, there must be an imminence or a real threat of litigation in order to qualify under §100(1)(d) as "proposed" litigation. Consequently, I believe that "possible" litigation did not constitute an appropriate basis for entry into executive session.

Further, I agree with your contention that the seniority list to which you alluded would be available under the Freedom of Information Law.

It is noted in this regard that the courts have determined that public employees require a lesser degree of privacy than members of the public generally. Further, the Committee has advised and the courts have upheld the notion that records which are relevant to the performance of the official duties of public employees are available, for disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 50 Ad 2d 309 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); and Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, if records that identify public employees have no relevance to the manner in which public duties are performed, such records may be withheld on the ground that disclosure would indeed result in an unwarranted invasion of personal privacy.

Under the circumstances, it appears that the seniority lists are relevant to the performance of the official duties of both the teachers identified and the Board of Education. Further, the seniority list would be reflective of factual data that is available under §87(2)(g)(i) of the Freedom of Information Law.

You have asked for citations of any court cases that might be relevant. To the best of my knowledge, there is but one judicial determination that dealt directly with the scope of the "personnel" exception. Specifically, even before the clarification of §100(1)(f), in Orange County Publications v. City of Middletown (Sup. Ct., Orange Cty., December 26, 1979), it was held that:

> "...personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive sessions.' Therefore, the court declares that budgetary lay-offs are not personnel matters within the intent of Subdiv. 1.f. of §100..."

The only other suggestion that I can make is that you and others attempt to educate the members of public bodies with respect to the provisions of the Open Meetings Law. It is my hope that such a process will tend to enhance compliance with the Law.

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

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2058
OML-AO-636

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

June 5, 1981

Perry Godfrey
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Godfrey:

As requested, enclosed are materials that you requested concerning the status of a volunteer fire company under the Freedom of Information and Open Meetings Laws.

The materials include a decision rendered by the state's highest court, the Court of Appeals, which held that a volunteer fire company is an "agency" subject to the Freedom of Information Law [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In addition, I have enclosed recent advisory opinions on the subject.

Since the issuance of the Court of Appeals' decision, I have not written any opinions regarding the coverage of the Open Meetings Law with respect to volunteer fire companies. However, in view of the decision rendered under the Freedom of Information Law, I believe that it is clear that the board of a volunteer fire company would constitute a "public body" subject to the Open Meetings Law.

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

> "any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

By breaking the definition into its components, I believe that one may conclude that a volunteer fire company is a "public body".

First, the board of a volunteer fire company is an entity that consists of two or more members. Second, a quorum is required in order to conduct business under §608 of the Not-for-Profit Corporation Law. Third, based upon the Court of Appeals' decision, it is clear that a volunteer fire company conducts public business and performs a governmental function. And fourth, it is also clear that a volunteer fire company performs its duties for a public corporation, such as a village or town, for example.

Based upon the foregoing, I believe that each of the conditions precedent required to be met in order to find that an entity is a public body is met by the board of a volunteer fire company. Consequently, I believe that its meetings must be held in accordance with the provisions 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:ss

Enclosures

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-637

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 9, 1981

Ms. Anna T. Pratt
Town of Greenville
P. O. Box 38
Greenville, NY 12083

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Pratt:

I have received your letter of May 19 and appreciate your interest in complying with the Open Meetings Law.

You have asked whether the Town Board of the Town of Greenville must give public notice prior to conducting "meetings with the Town Police Department to go over departmental issues, such as: policy, schooling, schedules, and general running of said department, privately."

I would like to offer the following observations with respect to your inquiry.

First and perhaps most importantly, the Open Meetings Law is applicable to any gathering of a quorum of a public body in which public business is conducted. In determining the scope of the definition of "meeting" [see Open Meetings Law, §97(1)], the Court of Appeals, the state's highest court, found that any convening of a public body for the purpose of discussing public business is a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In addition, in 1979 the definition of "meeting" was amended to conform with the direction given by the Court. Consequently, I believe that a meeting conducted by the Town Board with the Police Department to discuss public business would constitute a "meeting" subject to the Open Meetings Law in all respects.

Second, §99 of the Open Meetings Law requires that notice be given prior to all meetings. Specifically, §99(1) of the Law concerning meetings scheduled at least a week in advance requires that notice be given to the news media (at least two) and posted for the public in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 99(2) concerning meetings scheduled less than a week in advance requires that notice be given to the news media and posted for the public in the same manner as described in §99(1) "to the extent practicable" at a reasonable time prior to such meetings. As such, I believe that the notice requirements of §99 of the Open Meetings Law must be accomplished whether meetings are regularly scheduled or otherwise.

And third, one aspect of your question deals with the capacity to engage in meetings "privately". In this regard, I direct your attention to §100(1)(a) through (h) of the Open Meetings Law. The cited provision specifies and limits the areas of discussion that may be considered by a public body during an executive session. From my perspective, it is doubtful that issues such as policy, schooling and the general running of the Police Department could be considered during an executive session, for it is unlikely that any ground for executive session would be applicable.

Enclosed for your consideration are copies of a memorandum distributed to public bodies prior to the effective date of amendments to the Open Meetings Law, October 1, 1979, the Law itself, which is attached to the memorandum, and an explanatory pamphlet that may be useful 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

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-638

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

June 9, 1981

Mr. Bert Gault
Staff Writer
Watertown Daily Times
260 Washington Street
Watertown, NY 13601

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gault:

I have received your letter of May 19 in which you raised a series of questions under the Open Meetings Law.

According to your letter, the Jefferson County Industrial Development Agency, a seven-member body, "merged" with a "sister organization", Jefferson County Industries, on July 1, 1980. Members of the Industrial Development Agency are appointed by the County Board of Supervisors; members of Jefferson County Industries are appointed by the Board of Supervisors, the Watertown City Council and the Jefferson County Chamber of Commerce. You wrote further that, since the merger, Jefferson County Industries has essentially ceased to exist. However, its members serve on committees of the Industrial Development Agency.

Your first question is whether the committees of the Industrial Development Agency are subject to the Open Meetings Law.

In order to respond to that question, it must first be established that an Industrial Development Agency is subject to the Open Meetings Law. In my view, the Board of such an agency is clearly a public body that falls within the framework of the Law.

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

> "any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

Further, §856(2) of the General Municipal Law, which concerns the organization of industrial development agencies, provides that such an agency "shall be a corporate governmental agency, constituting a public benefit corporation". Since §66 of the General Construction Law defines "public corporation" to include a public benefit corporation, such as an industrial development agency, the corporate board of directors of an industrial development agency is an entity which consists of at least two members, is required to act by means of a quorum (see General Construction Law, §41) and performs a governmental function for a public corporation. Therefore, it is a "public body" as defined by §97(2) of the Open Meetings Law.

With respect to committees of the Industrial Development Agency, I believe that a rationale similar to that offered in the preceding paragraphs regarding the status of the Industrial Development Agency would be applicable. Based upon your letter, the committees are composed of five members. Therefore, the committees are required to conduct their business by means of a quorum. Further, based upon your letter, they conduct public business and perform a governmental function for a public corporation, Jefferson County. Moreover, the definition of "public body" specifically states that a "committee or subcommittee" of a public body, such as an industrial development agency, is subject to the Open Meetings Law. Therefore, based upon the facts that you have presented, I believe that the committees in question are public bodies that fall within the scope of the Open Meetings Law.

You also raised questions concerning meetings of committees of the County Board of Supervisors. Again, based upon the definition of "public body", committees of the County Board of Supervisors are in my view clearly subject to the Open Meetings Law.

It is noted that meetings of all public bodies must be preceded by notice given in accordance with §99 of the Open Meetings Law. Section 99(1) concerning meetings scheduled at least a week in advance requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 99(2) concerning meetings scheduled less than a week in advance requires that notice be given in the same manner as that described in §99(1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, in my opinion, it is clear that notice must be given before all meetings, whether regularly scheduled or otherwise, and whether or not the meetings are conducted by a governing body, or by a committee, for example.

Lastly, you wrote that you are "particularly concerned" about the provision in the Open Meetings Law that permits executive sessions to be held for discussions of "the medical, financial, credit or employment history of a particular person or corporation..." The language that you cited appears in §100(1)(f) of the Open Meetings Law. Although you did not specify the substance of your concern, I would like to point out that the cited ground for executive session is applicable only with respect to those areas of discussion identified in §100(1)(f), and further, that those topics may properly be considered behind closed doors only with respect to matters concerning a "particular" person or corporation.

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:ss

cc: Jefferson County Industrial Development Agency

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2041
OML-AO-639

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

June 9, 1981

Carolyn J. Pasley
Assistant Counsel
State University of New York
State University Plaza
Albany, New York 12246

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Pasley:

I have received your letter of May 20 in which you offered several comments regarding an advisory opinion written at the request of Dr. Stuart Lewis, April 28, 1981.

I would like to offer the following observations with regard to the opinions you have expressed.

First, I thank you for enclosing copies of Article 31 of the Collective Bargaining Agreement negotiated by the United University Professions, Inc. (UUP) and the State of New York. You expressed concern that our letter to Dr. Lewis represents a belief that the State University has adopted a restrictive policy with respect to the rights of access of a state university employee (and/or a UUP member) to his or her personnel file. In his correspondence, Dr. Lewis stated that he had never been a member of UUP. Our response was intended to indicate to him that if he had been represented by UUP, his rights of access under the Freedom of Information Law could not have been curtailed or superceded by a negotiated agreement. In my view, rights of access under the Freedom of Information Law exist concurrently with any rights of access to personnel files granted by a negotiated agreement; however, rights granted by the Freedom of Information Law would not in my opinion be limited by the terms negotiated in a collective bargaining contract. Stated differently, to the extent that a collective bargaining agreement contains terms more restrictive than the Freedom of Information Law, it would be void to that extent, for a contract could not abridge rights granted by a statute.

Secondly, you commented on the Committee's view regarding the application of the Open Meetings Law to various entities of the Downstate Medical Center of the State University. As indicated in the earlier opinion, it was unclear from the facts in Mr. Vigneau's letter whether a State University faculty meeting and/or a meeting of the Residency Review Committee is subject to the Open Meetings Law. You indicated in your letter that the faculty of each State University operated campus is responsible for the "initiation, development and implementation of the educational programs" of the campus. Additionally, you wrote that although a faculty committee such as the Residency Review Committee "perform(s) significant responsibilities with respect to academic matters within the University", those responsibilities do not involve the performance of a "governmental function for the State or for an agency or department thereof". In this regard, case law has consistently held that the State University is an integral part of the government of New York State [see Ehrlich v. University of Houston, 69 AD 2d 75 (1979), rev'd on other grounds, 49 NY 2d 574 (1980)]. Moreover, in my view, the responsibilities of initiating, implementing, developing and/or undertaking of educational programs and academic matters, whether by the Regents, the Board of Trustees, the Councils, campus faculty, or a committee, subcommittee or advisory group thereof, involve the performance of a governmental function envisioned in the definition of "public body" in §97(2) of the Open Meetings Law. If such activities are not the types of governmental functions envisioned by the Legislature in its creation of the State University system, which activities could be considered governmental?

Many public bodies perform their duties by means of delegation. In this regard, under the original Open Meetings Law effective in 1977, it was unclear whether committees, subcommittees and similar advisory bodies were subject to the Law. However, I believe that the definition of "public body" as amended clearly includes advisory bodies within the scope of the Law. Moreover, this point was confirmed in a recent decision, which found that a mayor's task force was subject to the Open Meetings Law, even though it performed solely advisory duties [see e.g., Matter of Syracuse United Neighbors v. City of Syracuse, ___ AD 2d ___ (Fourth Department, Appellate Division, March 27, 1981)]. As such, I would like to reiterate the contentions expressed in the earlier opinion which advised that the entities in question appear to be public bodies subject to the Open Meetings Law.

As you are aware, even though an entity may be covered by the Open Meetings Law, that does not mean that all of its deliberations must be conducted in public. On the contrary, there are eight grounds for executive or closed sessions during which the public may be excluded.

Moreover, as noted in the opinion addressed to Dr. Lewis, §100(1)(f) of the Law authorizes a public body to enter into a closed executive session to discuss:

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

Based on the situation described in Dr. Lewis' correspondence, it appears that the ground for executive session quoted above could properly be cited when performance evaluations are considered, for discussions of that nature would likely deal with the "employment history" of a particular person.

I hope these comments are responsive to your concerns.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2044
OML-AO-640

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

June 10, 1981

Honorable George Friedman
Member of the Assembly
Room 704
Legislative Office Building
Albany, New York

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Assemblyman Friedman:

I have received your letter of June 9 and appreciate your interest in compliance with the Freedom of Information and Open Meetings Laws. You have raised a series of questions regarding community boards in New York City and I will attempt to respond to each.

Your first question is whether community boards of the City of New York are subject to the Freedom of Information and Open Meetings Laws.

In terms of background, community boards were created initially by local law No. 39, which was added to the New York City Charter in 1969. Under that provision, community boards were governed by §84 of the New York City Charter. Section 84 of the Charter was repealed by the passage of local No. 102 enacted in 1977. The cited provision was replaced by §2800 of the Charter entitled "Community Boards". According to §2800, the members of a community board are appointed by a bureau president. Further, it is clear that a community board performs duties of a governmental nature for the City of New York.

Based upon §2800 of the New York City Charter, I believe that a community board may be considered an "agency" subject to the Freedom of Information Law and a "public body" subject to the Open Meetings 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".

From my perspective, a community board is a municipal entity that performs a governmental function for a municipality, New York City. Therefore, it is in my view an "agency" subject to the Freedom of Information Law.

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

> "any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

By breaking the definition into its components, I believe that it may be concluded that a community board is a "public body" subject to the Open Meetings Law. First, it is an entity that may consist of up to fifty persons. Second, while there may be no specific reference in the City Charter to a quorum, §41 of the General Construction Law requires that any entity consisting of three or more persons designated to perform a duty collectively as a body can only do so by means of a quorum, a majority of the total membership. Third, based upon §2800 of the City Charter, a community board clearly conducts public business and performs a governmental function. And fourth, the duties of a community board are performed on behalf of a public corporation, the City of New York.

In view of the foregoing, I believe that a community board is clearly a "public body" subject to the Open Meetings Law in all respects.

It is also noted that the definition of "public body" as amended includes not only governing bodies that have the authority to take final action, but advisory bodies, committees and subcommittees as well. Further, it was recently held that an advisory body designated by a mayor constituted a "public body" subject to the Open Meetings Law [see e.g., Syracuse United Neighbors v. City of Syracuse, 437 NYS 2d 466, ____AD 2d____, (1981)]. In view of the case law and the thrust of applicable provisions of the Open Meetings Law, once again, I believe that a community board clearly falls within the scope of that law.

Your second question is whether a vote by a community board for the election of its officers may be conducted by secret ballot. In this regard, I direct your attention to §87(3)(a) of the Freedom of Information Law, which states that each agency shall maintain:

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

Since a community board is an "agency" subject to the Freedom of Information Law, it is required to create a record of votes indicating the manner in which each member voted in each instance in which a vote is taken.

Third, you have raised a question regarding the ramifications of a failure to adhere to the requirements of the Freedom of Information and Open Meetings Laws. Under the Freedom of Information Law, if, for example, a voting record envisioned by §87(3)(a) is not prepared, presumably any person would have the capacity to initiate a proceeding under Article 78 of the Civil Practice Law and Rules in the nature of mandamus to compel the board to perform a duty that it is required to perform.

In the case of the Open Meetings Law, if, for example, the provisions of the Law are not followed, a court may, upon good cause shown, make null and void action taken in violation of the Law (see §102).

Lastly, you raised a question regarding the jurisdiction of the Committee on Public Access to Records with respect to the interpretation of the Freedom of Information and Open Meetings Laws. In this regard, §89(1)(b)(ii) of the Freedom of Information Law states that the Committee shall:

> "...furnish to any person advisory opinions or other appropriate information regarding this article..."

Similarly, §104(1) of the Open Meetings Law states that the Committee shall:

> "...issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the provisions of the open meetings law..."

It is also noted that, although an opinion rendered by this office is solely advisory, numerous judicial decisions have relied upon advisory opinions rendered by the Committee. Further, two Appellate Divisions have found that an opinion of the Committee should be upheld, unless the opinion is found to be unreasonable [see e.g., Sheehan v. City of Binghamton, 59 AD 2d 808, (1977); Miracle Mile Associates v. Yudelson, 68 AD 2d 176 (1979)].

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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-641

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

June 11, 1981

Maryann Sorese
Record Newspapers
P.O. Box 248
Port Jefferson, NY 11777

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Sorese:

I have received your letter of May 22 in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry concerns the implementation of the Open Meetings Law by a village planning board, particularly with respect to the convening of executive sessions. Specifically, you wrote that:

> "[I]n cases where an applicant is submitting a site plan for land whose sale is not yet finalized, the village planning board will close the meeting citing section 95, line H of the state's open meeting law..."

I would like to offer the following observations with respect to your letter.

First, it is noted that the Open Meetings Law has undergone a series of amendments since its original effective date, January 1, 1977. One of the changes involves a renumbering of its provisions. Consequently, while the Open Meetings Law once consisted of §§90-101 of the Public Officers Law, it now is found in §§95-106 of the Public Officers Law. The provision concerning executive sessions now appears as §100.

Second, the basis for entry into an executive session that is the focal point of your letter is §100(1)(h). That provision states that a public body may enter into an executive session to discuss:

> "...the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof".

You suggested that the language quoted above is applicable only to the proposed acquisition, sale or lease of real property by a public body, and that it is not applicable to the proposed acquisition, sale or lease of real property by others.

I agree with your contention. From my perspective, the thrust of the Open Meetings Law is based upon the principle that deliberations of public bodies must be open, unless public discussion would damage or impair a governmental process. In those instances in which a governmental process would be impaired, an executive session may invariably be convened based upon the one or more among eight grounds for executive session appearing in §100(1)(a) through (h) of the Law. Further, a review of the eight grounds for executive session tends to bolster this position. In virtually each instance, the capacity to enter into an executive session is based upon the potential harm to a governmental process that might arise if matters were discussed in public.

In this instance, I cannot envision how a discussion of an application regarding a site plan for land that has not yet been sold would, if publicly discussed, affect the capacity of a planning board to perform its official duties. Further, it is reiterated that §100(1)(h) is in my opinion intended to be applicable only in those situations in which a public body seeks to acquire, sell or lease real property. It is also important to point out that discussions of the subject matter described in §100(1)(h) may be conducted

during executive sessions only when publicity would substantially affect the value of the property. Under the circumstances, since records relating to the site plan application must be made available, it is difficult to envision how publicity following disclosure would substantially affect the value of the property.

Perhaps more importantly, §7-728(1) of the Village Law states that:

> "[F]or the purpose of providing for the future growth and development of the village and affording adequate facilities for the housing, transportation, distribution, comfort, convenience, safety, health and welfare of its population, such board of trustees may by resolution authorize and empower the planning board to approve plats showing lots, blocks or sites, with or without streets or highways, and to conditionally approve preliminary plats. For the same purposes and under the same conditions, the board of trustees may, by resolution, authorize and empower the planning board to approve the development of plats, entirely or partially undeveloped and which have been filed in the office of the clerk of the county in which such plat is located prior to the appointment of such planning board and the grant to such board of the power to approve plats. Before such approval is given, a public hearing shall be held by the planning board".

In view of the requirement that a public hearing must be held prior to approval, publicity must of necessity be given with respect to the details of an application before a village planning board. Consequently, I do not believe that §100(1)(h) of the Open Meetings Law could justifiably be cited to close a meeting.

Once again, however, I concur with your point of view that §100(1)(h) may be cited only with respect to the property acquisition, sale or lease of real property by a public body, and that it is not applicable to discussions of such transactions by the private parties.

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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-642

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

June 12, 1981

Mr. William Grzyb
Environmental Association
of Fort Johnson
Lepper Road
Fort Johnson, NY 12070

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Grzyb:

As you are aware, I have received your letter of June 8 in which you raised questions regarding two gatherings of the Town Board of the Town of Amsterdam during which the public was excluded.

According to your letter, on May 18 during a meeting of the Town Board, the Town Supervisor indicated that two consultants were present to meet with the Board after its regular meeting regarding a proposed sewer district in the Town. Although you asked to attend the gathering between Town officials and the consultants, the Supervisor indicated that you could not attend.

You also wrote that on June 4, another meeting was held between Town officials, including all of the members of the Town Board, and the two consultants. You stated that public notice was not given, that the Supervisor indicated that the discussion would again deal with the proposed sewer district, and that if your attendance was known in advance, "the meeting would have been cancelled."

Your question concerns the legality of the meetings in question. In this regard, I would like to offer the following observations.

First, it is emphasized that the key provision of the Open Meetings Law, the definition of "meeting" [see §97(1)], has been interpreted expansively by the courts. Specifically, in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the state's highest court, the Court of Appeals, found that any convening of a quorum of a public body, such as a town board, constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which the gathering may be characterized.

Based upon the direction provided by the courts as well as the language of the Open Meetings Law, I believe that the two gatherings identified in your letter constituted "meetings" that fell within the scope of the Open Meetings Law.

Second, §99 of the Open Meetings Law requires that notice be given prior to all meetings. In the case of meetings scheduled at least a week in advance, §99(1) requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings.

In the case of meetings scheduled less than a week in advance, §99(2) states that notice must be given in the same manner as described in §99(1) "to the extent practicable" at a reasonable time prior to such meetings.

Third, the Open Meetings Law provides two mechanisms by which a public body may exclude the public from its deliberations. The most often cited basis for closing a meeting involves the convening of an executive session. In this regard, §97(3) of the Law defines executive session to mean that portion of an open meeting during which the public may be excluded. Further, §100(1) prescribes a procedure that must be followed by a public body before it may enter into an 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

In view of the language quoted above, it is clear 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.

It is also important to point out that a public body cannot convene an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §100(1) specify and limit the areas of discussion that may appropriately be considered during an executive session.

Based upon the information that you have provided, it does not appear that a discussion of the proposed sewer district with consultants would have fallen within any of the grounds for executive session.

The other means by which a public body may engage in closed deliberations would involve a situation in which a discussion is exempt from the Open Meetings Law under §103. Again, based upon the information that you have provided, it does not appear that any of the exemptions listed in §103 could have been cited to remove the discussions from the scope of the Open Meetings Law.

If indeed there were neither grounds for executive session nor exemptions from the Open Meetings Law that could have been cited to close the meetings that you identified, I believe that the Open Meetings Law was likely violated.

Lastly, you asked "what can be done to prevent public officials from violating the Open Meetings Law." From my perspective, most violations of the Open Meetings Law do not occur with knowledge on the part of public officials that violations have been committed. In most instances in which violations occur, it appears that the violations involve a lack of familiarity with the provisions of the Open Meetings Law. Consequently, perhaps the best method of seeking to ensure compliance with the Open Meetings Law involves efforts to educate the public and government officials with respect to the rights granted and the responsibilities imposed by the Law. In an effort to provide education of this nature, copies of this opinion, the Open Meetings Law, and an explanatory pamphlet on the subject will be sent to officials of the Town of Amsterdam.

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
Town Attorney
Town Supervisor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2047
OML-AO-643

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

June 12, 1981

Wayne O. Alpern
Law Offices
170 Broadway
New York, NY 10038

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Alpern:

As you are aware, I have received your letter of May 29 in which you requested an advisory opinion under the Freedom of Information and Open Meetings Laws.

Your inquiry generally concerns the process by which the New York State Council on the Arts (NYSCA) arrives at its determinations. Specifically, you indicated that NYSCA's determinations involve numerous stages, including "what NYSCA refers to as 'auditors', 'staff', 'panels', 'committees', 'subcommittees', and finally, 'council'". You also wrote that:

> "[C]ouncil is theoretically the only body authorized to make 'final' decisions. However, there is little question that council decisions are not only very strongly influenced and reflective of reviews and recommendations made at lower levels within the agency, but in fact generally ratify without challenge or exception such prior 'determinations'".

It is your contention that the "final determination" made at the end of the decision-making process by the Council should be viewed:

> "as a ratification or confirmation of prior determinations by staff, panels and committees which the agency calls recommendations".

According to your letter:

> "...NYSCA's apparent position is that panels are advisory bodies that do not make final determinations, and no council members sit on the panels, and therefore OML requirements are inapplicable. It is further indicated that committee meetings go into executive sessions in order to consider specific grant applications".

On the basis of the information that you provided, your first area of inquiry raises a series of questions concerning the applicability of the Open Meetings Law to the groups specified.

Perhaps the most important provision of the Open Meetings Law relative to your inquiry is the definition of "public body". Section 97(2) of the Open Meetings Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

Based upon the language quoted above, it is my view that each of the groups that you identified concerning the application of the Law (panels, committees, subcommittees and the Council) constitute public bodies subject to the Open Meetings Law, except meetings of staff. From my perspective, gatherings among staff of an agency would not constitute meetings subject to the Open Meetings Law, for

staff would not constitute a public body. It is noted in this regard that a series of amendments to the Open Meetings Law recommended largely upon recommendations made by the Committee became effective on October 1, 1979. One of the amendments concerns a redefinition of "public body". In its deliberations that led to a recommendation concerning the definition in question, it was clearly intended that the definition of "public body" should not be construed to include meetings of staff. In my view, a gathering of staff members does not generally represent a meeting among individuals designated to perform a duty collectively as a body. Further, the identities of staff members working with respect to particular duties often changes, for there is likely no designation of a group of individuals to perform their duties in a collegial manner acting as a single voice.

The other groups that you mentioned, however, such as panels, committees, subcommittees and the Council itself, are public bodies, for each of the conditions precedent to a finding that they constitute public bodies may in my view be met.

First, each of those groups would be an entity consisting of two or more members.

Second, whether the groups in question are comprised of public officers, others, or a combination of both, they are in my view required to perform their duties by means of a quorum. It is noted in this regard that §41 of the General Construction Law defines "quorum" and states that:

> "[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. 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 of "quorum" quoted above, it is clear that any group of three or more public officers or persons charged with any public duty to be performed or exercised by them collectively as a body can do so only by means of a quorum, a majority of the total membership.

Third, each of the groups in question in my view conducts public business and performs a governmental function, for each analyzes applications made to the Council and performs a step in the deliberative process that influences the final determination by the Council.

And fourth, the functions performed by those groups are carried out for an agency of state government, NYSCA.

As such, I believe that each of the requirements necessary to a finding that an entity is a "public body" is present with respect to the groups that you mentioned.

Moreover, the amendments to the definition of "public body" tend to strengthen a contention that advisory bodies, such as the panels, committees and subcommittees that you mentioned, are "public bodies". Specifically, the language in the definition of "public body" as originally enacted made reference to entities that "transact" public business, and it was argued by many that advisory groups with only the capacity to recommend and with no authority to take action were not covered by the Law, because they do not "transact" public business, i.e., take final action. The substitution of the term "conduct" in my opinion represents an intent to include committees, subcommittees and other advisory groups that have no

authority to take final action, but merely the authority to advise. The inclusion of committees, subcommittees and "similar" bodies in the definition also indicates an intent on the part of the Legislature to include advisory bodies within the scope of the definition of "public body", for such groups generally have no authority to take final action.

In addition, in a recent determination rendered by the Appellate Division, Fourth Department, it was found that both an advisory committee and an advisory task force designated by a mayor constituted public bodies subject to the Open Meetings Law [see e.g., Syracuse United Neighbors v. City of Syracuse, 437 NYS 2d 466, ___ AD 2d ___ (1981)].

In reaching its conclusion, the Court stated that:

> "[W]hile neither of the committees here usurp the powers of other municipal departments and their recommendations may be characterized as advisory only, in that they did not bind the common council or other city departments, it is clear that their recommendations have been adopted and carried out without exception. To hold that they are not public bodies within the meaning of the Open Meetings Law would be to exalt form over substance. Both committees perform vital governmental functions affecting the municipality and its citizenry, and their recommendations receive the automatic approval of the common council. To keep their deliberations and decisions secret from the public would be violative of the letter and spirit of the legislative declaration in section 95 of the Public Officers Law" (id. at 468).

Based upon the amendments to the definition of "public body" and the thrust of recent case law, it is my view that the panels, committees, subcommittees and the Council itself constitute "public bodies" subject to the Open Meetings Law in all respects.

Assuming that the conclusion expressed above is accurate, I believe that any gathering of a quorum of any of the entities identified above would constitute "meetings" as defined by the Law.

It is noted in this regard that the Court of Appeals held in 1978 that the definition of "meeting" should be construed to include any gathering of a quorum of a public body for the purpose of discussing public business, whether or not there is an intent to take action, and regardless of the manner in which the gathering may be characterized.

In terms of the capacity to close meetings, the Open Meetings Law permits a public body to engage in executive sessions under §100. In addition, §103 identifies three exemptions from the Open Meetings Law.

In my view, based upon the information that you have provided, none of the three exemptions appearing in §103 could be cited to remove a meeting of the groups that you identified from the coverage of the Open Meetings Law.

With respect to executive sessions, §100(1) lists eight areas of discussion that may be conducted during executive sessions. It is noted that a public body must follow a procedure prescribed in the Law before it may enter into an executive session, for §97(3) defines "executive session" to mean a portion of an open meeting during which the public may be excluded. In brief, the procedure for entry into an executive session [see §100(1)] involves three components: a motion to enter into an executive session made during an open meeting, the identity in general terms of the subject sought to be discussed behind closed doors; and a vote to carry the motion by a majority of the total membership of a public body.

Based upon a review of the grounds for executive session, it appears that only one might be applicable. Specifically, §100(1)(f) permits a public body to enter into an executive session to discuss:

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

While most of the areas identified in the language quoted above would not appear to be present in discussions of the groups in question, it is possible that some discussion might deal with the employment or financial history of a particular person or corporation. To the extent that §100(1)(f) would be applicable, or to the extent that any of the remaining grounds for executive session may appropriately be cited, the groups in question would have the capacity to enter into an executive session.

Your next area of inquiry involves rights of access to records in possession of NYSCA under the Freedom of Information Law. The documents in which you are interested are cited on page three of your letter and are numerous. In all honesty, without greater familiarity with the contents of specific records, it is all but impossible to provide specific direction. Nevertheless, I would like to offer the following comments.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as NYSCA, are accessible, except to the extent that records fall within one or more of the grounds for denial listed in §87(2)(a) through (h).

It would appear that virtually all of the documents identified would constitute inter-agency or intra-agency materials. In this regard, §87(2)(g) of the Freedom of Information Law states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public or final agency policies or determinations must be made available. Therefore, to the extent that the records in question consist of statistical or factual information, instructions to staff that affect the public, or final agency statements or policy or determinations, they must in my view be made available.

Conversely, to the extent that the materials contain advice that is solely reflective of opinion and not factual information opinion which the agency relies in carrying out its duties, they would be deniable [see e.g., Miracle Mile Associates v. Yudelson, 68 AD 2d 176 (1979)]. It is also noted that factual information is in my view available, even though it may be contained in what may be characterized as pre-decisional materials [see e.g., Miracle Mile, supra, Polansky v. Regan, 427 NYS 2d 161 (1980)].

I believe that minutes of meetings of the panels, committees, subcommittees and the Council are also available, particularly if it is assumed that each of those entities is subject to the Open Meetings Law. Under §101 of the Open Meetings Law, public bodies are required to prepare minutes. In the case of motions, proposals, resolutions, and actions taken during open meetings, minutes must be compiled and made available within two weeks of such gatherings. Minutes reflective of action taken during executive sessions must be compiled and made available during one week of the executive sessions.

Further, although the determination made by a panel or committee, for example, might not be reflective of the final determination of NYSCA, it would in my view nonetheless be the final determination of the panel or committee. As such, I believe that those determinations are accessible under the Law, even though they may not represent the last step of the decision-making process. In this regard, it has been held that the term "final" (as in "final determination") should not be accorded an ordinary dictionary definition, for such a construction "would produce an unreasonable result by denying access to all opinions, orders and determinations except those made by the highest agency. Adopting the legal definition...permits the access intended under subdivision 5 of section 89 at each stage of an often multilevel administrative process" (Miracle Mile, id. at 182).

Lastly, it is noted that §87(3)(a) of the Freedom of Information Law requires that a voting record must be compiled in every instance in which a vote is taken in which the manner in which each member voted is indicated.

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:ss

cc: New York State Council on the Arts

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-204
OML-AO-644

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

June 12, 1981

Ms. Peggy Vega, Chairperson
Bronx Community Board No. 10
3100 Wilkinson Avenue
Bronx, New York 10461

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Vega:

I have received your letter of May 28 and appreciate your interest in complying with the Freedom of Information and Open Meetings Laws.

You have requested a "ruling" from this Committee "as to whether or not this vote can be by a ballot given to each member, or whether it must be an open vote identifying each member's vote."

Please be advised that the Committee does not have the authority to issue "rulings". On the contrary, the Committee is authorized to render advisory opinions under both the Freedom of Information Law [Public Officers Law, §89(1)(b)(ii)] and the Open Meetings Law [Public Officers Law, §104(1)]. Therefore, the comments provided in the ensuing paragraphs should be considered advisory.

In my view, a community board is prohibited from voting by secret ballot.

In terms of background, community boards were created initially by local law No. 39, which was added to the New York City Charter in 1969. Under that provision, community boards were governed by §84 of the New York City Charter. Section 84 of the Charter was

repealed by the passage of local No. 102 enacted in 1977. The cited provision was replaced by §2800 of the Charter entitled "Community Boards". According to §2800, the members of a community board are appointed by a bureau president. Further, it is clear that a community board performs duties of a governmental nature for the City of New York.

Based upon §2800 of the New York City Charter, I believe that a community board may be considered an "agency" subject to the Freedom of Information Law and a "public body" subject to the Open Meetings 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."

From my perspective, a community board is a municipal entity that performs a governmental function for a municipality, New York City. Therefore, it is in my view an "agency" subject to the Freedom of Information Law.

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

> "any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body."

By breaking the definition into its components, I believe that it may be concluded that a community board is a "public body" subject to the Open Meetings Law. First, it is an entity that may consist of up to fifty persons. Second, while there may be no specific reference in the City Charter to a quorum, §41 of the General Construction Law requires that any entity consisting of three or more persons designated to perform a duty collectively as a body can only do so by means of a quorum, a majority of the total membership. Third, based upon §2800 of the City Charter, a community board clearly conducts public business and performs a governmental function. And fourth, the duties of a community board are performed on behalf of a public corporation, the City of New York.

In view of the foregoing, I believe that a community board is clearly a "public body" subject to the Open Meetings Law in all respects.

It is also noted that the definition of "public body" as amended includes not only governing bodies that have the authority to take final action, but advisory bodies, committees and subcommittees as well. Further, it was recently held that an advisory body designated by a mayor constituted a "public body" subject to the Open Meetings Law [see e.g., Syracuse United Neighbors v. City of Syracuse, 437 NYS 2d 466, ___ AD 2d ___, (1981)]. In view of the case law and the thrust of applicable provisions of the Open Meetings Law, once again, I believe that a community board clearly falls within the scope of that law.

Since a community board is an "agency" subject to the Freedom of Information Law, it is in my view required to follow the direction provided by that statute. Specifically, §87(3)(a) of the Freedom of Information Law requires that each agency shall maintain:

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

As such, a community board is required to create a record of votes indicating the manner in which each member voted in each instance in which a vote is taken. Further, I believe that the record of votes should be contained within minutes required to be compiled under §101 of the Open Meetings Law. The cited provision requires that minutes include the vote taken at 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-645

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

June 12, 1981

Ms. Mary-Ann Ulwick
Reporter
The Standard Star
92 North Avenue
New Rochelle, NY 10802

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Ulwick:

As you are aware, I have received your letter of May 28, as well as the materials appended to it.

The question raised in the correspondence is whether a recently created entity known as the Pelham Council of Governing Boards is a public body subject to the Open Meetings Law.

According to the materials that you transmitted, the Council in question consists of a maximum of twelve members, including the Town Supervisor, the Mayors of Pelham and Pelham Manor, the President of the Board of Education, one additional member from each of the public corporations mentioned previously, and the chief administrators of each of those units of government. Further, according to a release issued by the Pelham Board of Education, the purpose of the Council is:

> "[T]o discuss and exchange information on issues and problems of mutual concern to all four Pelham governments, in order to enhance their ability to maintain and improve the quality and attractiveness of Pelham as a community."

Based upon the information that you have provided, I believe that the Council of Governing Boards is a "public body" subject to the Open Meetings 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 conduct 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, or committee or subcommittee or other similar body of such public body."

By breaking the definition into its components, I believe that each of the conditions precedent necessary to a finding that the Council constitutes a public body can be met.

First, the Council is an entity consisting of two or more members, and as noted earlier, consists of up to twelve.

Second, I believe that the Council is required to conduct its business by means of a quorum, even though the acts that may have created the Council make no specific reference to any quorum requirements. In this regard, I direct your attention to §41 of the General Construction Law, which defines "quorum" and states that:

> "[W]henever three of 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 consti-

> tute 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 of "quorum" quoted above, it is clear that any group of three or more public officers or persons charged with any public duty to be performed or exercised by them collectively as a body can do so only by means of a quorum, a majority of the total membership.

Third, based upon the description of the purpose of the Council, I believe that it was created to conduct public business and perform a governmental function. Specifically, in the statement of purpose, it is indicated that the Council intends to discuss and exchange information on issues and problems of mutual concern to each of the governments within Pelham in order to improve the quality of the community. Further, the subjects of possible discussion identified in the release issued by the Board of Education include "strengthening the tax base, youth-related problems and programs, effective and beneficial uses of public property." From my perspective, those topics clearly reflect an intent to discuss or conduct public business and perform a governmental function.

And fourth, the duties of the Council are being carried out for several public corporations, i.e., the Town of Pelham, the Villages of Pelham and Pelham Manor, and the Pelham School District.

It is also noted that the definition of "public body" as it appeared in the original Open Meetings Law, effective January 1, 1977, was unclear insofar as it applied to advisory bodies. Under that provision, it was often contended that a committee, subcommittee or advisory body that had no power to take action but only the capacity to recommend fell outside the scope of the Open Meetings Law. That contention was based upon the language of the definition of "public body" which made reference to the capacity to "transact" public business.

Nevertheless, in a decision affirmed by the Court of Appeals, the state's highest court, it was found that the term "transact" should be accorded its ordinary dictionary definition, i.e., to discuss or conduct [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. As such, even under the original Open Meetings Law it appeared that the authority to take final action was not a condition precedent to a finding that an entity was a "public body" subject to the Open Meetings Law.

More importantly, in order to ensure that committees, subcommittees and similar advisory bodies would be subject to the Open Meetings Law, the definition of "public body" was altered as part of a series of amendments to the Open Meetings Law that became effective on October 1, 1979. It is emphasized in this regard that the term "transact" was replaced by "conduct". Moreover, the definition now makes specific reference to committees, subcommittees and similar bodies.

It is also noted that in a recent decision rendered by the Appellate Division, it was found that advisory bodies that were not created by public bodies, but rather by an executive, constituted public bodies subject to the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 437 NYS 2d 466, ___ AD 2d ___ (1981)].

For the reasons expressed in the preceding paragraphs, it is my opinion that the Council on Governing Boards is 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:jm
cc: Frank M. DeBellis, Town Attorney
Anthony J. Noto, Chairman

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-646

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

June 17, 1981

Carolyn J. Pasley
Assistant Counsel
State University of New York
State University Plaza
Albany, New York 12246

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Pasley:

Thank you for your comments of May 27 in which you responded to an April 22 opinion written at the request of Mr. Andrew Golebiowski.

You have indicated that the opinion was in your view based on inadequate information regarding the College Senate of the State University College at Buffalo and its application to the Open Meetings Law. In particular, you wrote that the College Senate is not a governing body of the College and neither the College Senate nor its Committees conduct "public business" or perform a "governmental function for the state".

I would like to make the following observations with respect to your concerns.

First, in support of your contention that the College Senate or a committee thereof is not performing a governmental function, you cited Bigman v. Siegel [NYLJ, September 29, 1977 (Sup. Ct., Queens County)]. The Bigman case was decided before the definitions of "meeting" and "public body" were altered in a series of amendments to the Open Meetings Law that became effective on October 1, 1979. With respect to the definition of "meeting", in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the Court of

Appeals interpreted the definition expansively and held that any gathering of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Further, the redefinition of "meeting" was in my view intended to conform with the determination of the Court of Appeals.

Second, §97(2) of the Open Meetings Law as amended defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

It is noted that the term "transact", which appeared in the original definition and which apparently was the basis for the Bigman decision, no longer appears in the definitions of either "meeting" or "public body". The replacement of the term "conduct" for "transact" was in my opinion intended to ensure that the entire deliberative process be subject to the Open Meetings Law, and that the Law should clearly apply to more than those meetings during which there is an intent to take action. Consequently, the decision in Bigman, which held that "[t]here is not such compelling reason to require public meetings of advisory groups", has effectively been reversed under the new §97(2) of the Open Meetings Law.

Additionally, you stated that the College Senate "provides recommendations and advice to the College President on a number of educational matters such as the development of new programs in the College curriculum and the establishment of the academic calendar". In my view, such activities, whether by the College Council or the College Senate, whether advisory in nature or otherwise,

constitute the conducting of public business and the performance of a governmental function for the state, i.e. the operation of the State University system, as envisioned in Orange County Publications v. Council of the City of Newburgh, supra, and the Open Meetings Law as amended. Consequently, I disagree with your contention that only the College Council and the State University Board of Trustees "conduct" public business.

Third, a recent Appellate Division, Third Department decision found that Cornell University, which functions as both a private and public institution, is a public body subject to the requirements of the Law (see Holden v. Board of Trustees of Cornell University, Appellate Division, Third Department, May 21, 1981) to the extent that it functions on behalf of the SUNY Board of Trustees under the Education Law regarding the land grant Colleges at Cornell and the University's law enforcement functions.

I hope these comments are responsive to your concerns.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

RJF:PPB:sls

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2060
OML-AO-647

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

June 19, 1981

Theodore W. Micek, Jr.
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Micek:

I have received your letter, which raises questions regarding both access to records and the conduct of meetings in the Copenhagen Central School District.

Your first question concerns access to minutes of meetings of the Board of Education. According to your letter, on May 6, you requested the minutes of the School Board meeting of April 22. In response you were informed that the minutes had not yet been typed and that the attorney for the District advised the Clerk that minutes should be withheld until they are approved. You also cited a book published in 1970 entitled "School Law" in which it was stated that minutes need not be approved prior to making them available to a taxpayer.

In my opinion, any person may gain access to minutes of an open meeting of a public body within two weeks of the meeting. I direct your attention to §101 of the Open Meetings Law, which in subdivision (1) prescribes the minimum contents of minutes of open meetings and in subdivision (3) requires that minutes of open meetings be compiled and made available within two weeks of such meetings.

Before the provision cited above went into effect on October 1, 1979, the Committee recognized that in some instances a public body might not have the opportunity to approve minutes within two weeks. As such, in a memorandum

transmitted to all public bodies in the state, including school boards, it was advised that unapproved minutes be compiled and made available within two weeks as required by law, but that they be marked "unapproved", "draft", or "non-final", for example. By so doing, the public can generally be aware of what transpired at a meeting, and at the same time, the recipient of unapproved minutes is given notice that the contents are subject to change, thereby giving a board and its members a measure of protection.

Your second area of inquiry pertains to a situation in which a group of concerned citizens submitted a petition to the Board prior to its regularly scheduled meeting. Since the minutes failed to make reference to the petition, you asked whether reference to the petition must be included in the minutes.

Once again, I direct your attention to §101(1) of the Open Meetings Law, which prescribes minimum requirements concerning the contents of minutes of open meetings, and states that:

> "[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".

Based upon the language quoted above, it appears that there was no requirement that the minutes make reference to the submission of the petition.

Your third question concerns a denial of access to records indicating the names of twenty students who attend the Copenhagen schools tuition free. In this instance, a federal law, the Family Educational Rights and Privacy Act (20 U.S.C. §1232g) determines rights of access. In brief, the Act states that any "education record" that identifies a particular student is confidential, unless the parent of the student consents to disclosure. As such, unless the parents of the students in question have consented to disclosure, I would agree that the names must remain confidential.

The final question raised in your letter pertains to a contention by the Superintendent that you "had no right to ask questions at a board of education meeting..." I concur with the statement made by the Superintendent. The Open Meetings Law gives the public the right to attend and listen to the deliberations of public bodies; it does not, however, grant the public to speak or otherwise participate at meetings. Therefore, if the School Board chooses to permit the public to ask questions at meetings, it may do so. Nevertheless, it need not, for there is no right to participate granted by the Open Meetings Law or any other law of which I am aware.

Lastly, enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law, which is attached to a memorandum explaining changes in the Law that became effective on October 1, 1979, and an explanatory pamphlet that may be useful to you. The same materials, as well as a copy of 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:ss

Enclosures

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-648

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

June 19, 1981

Alan M. Protzel, D.D.S.
Bethpage Medical Center
4277 Hempstead Turnpike
Bethpage, NY 11714

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Dr. Protzel:

I have received your letter of June 4 and appreciate your kind words.

According to your letter, "[P]rior to every School Board meeting the members, with the administration meet to discuss 'the agenda'" in private. Your question is whether the discussion of the formation of an agenda is a proper subject for an "executive" meeting.

In this regard, soon after the Open Meetings Law became effective in 1977, numerous questions arose with respect to the status of so-called "work sessions", "agenda meetings", "planning sessions" and during which public bodies met to discuss public business, but in which no action would be taken. The status of such gatherings was clarified by the Court of Appeals, the state's highest court, in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Specifically, the Court found that the definition of "meeting" appearing in §97(1) of the Open Meetings Law is applicable to any convening of a quorum of a public body for the purpose of discussing public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Moreover, the original definition of "meeting" was amended in 1979 to ensure that its statutory language conform with the clear direction given by the Court of Appeals.

In view of both the language of the Open Meetings Law as amended and its expansive judicial interpretation, it is in my opinion clear that the "agenda meeting" described in your letter is a "meeting" subject to the Open Meetings Law that must be convened open to the public.

It is also noted that every meeting of a public body must be preceded by notice given in accordance with §99 of the Law. In the case of meetings scheduled at least a week in advance, §99(1) requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours before such meetings. In the case of meetings scheduled less than a week in advance, §99(2) states that notice must be given in the same manner as that prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such meetings. Consequently, it is clear that notice must be given prior to all meetings, whether they are regularly scheduled or otherwise.

It is emphasized that the phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded [see attached, Open Meetings Law, §97(3)]. Further, §100(1) of the Law prescribes a procedure that must be followed before a public body may enter into an executive session. Specifically, the cited provision states in relevant part 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..."

Based upon the language quoted above, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. Is is also clear that an executive session cannot be held until after a public body has convened an open meeting.

Lastly, paragraphs (a) through (h) of §100(1) of the Open Meetings Law specify and limit the subjects that may appropriately be considered during an executive session. Only to the extent that one or more among the grounds for executive session arises, and only after having followed the procedure required for entry into an executive session, can a public body conduct 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

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2062
OML-AO-649

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

June 22, 1981

Mrs. E. Kostiuk
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kostiuk:

I have received your letters of May 27 and June 10.

You have requested an advisory opinion regarding the availability of minutes allegedly taken at a closed meeting of the Town Board of the Town of Riverhead on April 20, 1981. To date, you have made two requests under the Freedom of Information Law and been denied on both occasions. In particular, you have contended that the minutes include a reprimand of a Riverhead dog warden for removal of your dog from your property.

First, it is unclear in your letter whether the Town Board convened its meeting as an executive session or whether the executive session was called after an open meeting had begun. In this regard, I would like to point out that the phrase "executive session" is defined by §97(3) of the Open Meetings Law (see attached) to mean a portion of an open meeting during which the public may be excluded. Moreover, §100(1) describes a procedure that must be followed before a public body may enter into an executive session. Specifically, the cited provision states in relevant part 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..."

Based upon the language quoted above, a public body may enter into an executive session only after having convened an open meeting, and only when the procedural steps described above have been followed.

Assuming that an executive session was properly convened, minutes of the executive session would be required to be made available only if action was taken during the executive session. Section 101(2) of the Open Meetings Law states that minutes reflective of the action taken during an executive session must be compiled and made available in accordance with the Freedom of Information Law within one week of the executive session. However, if no action was taken, minutes of the executive session need not have been compiled.

Second, if a formal vote to reprimand the dog warden was taken by the Town Board during an executive session, that record is in my view available under the Freedom of Information Law, whether or not the reprimand is found within records characterized as minutes.

The Freedom of Information Law is based upon a presumption of access. Section 87(2) of the Law states that all records of an agency, such as a town, are available, except those records or portions thereof that fall within one or more grounds for denial appearing in paragraphs (a) through (h) of the cited provision.

In my view, the reprimand you are seeking is accessible under the Freedom of Information Law, notwithstanding possible invasions of privacy. In this regard, I direct your attention to §87(2)(b) (see attached) of the Law, which states that an agency may withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy". Although subjective judgments must often be made regarding the extent to which one's privacy might be invaded, the courts have provided significant direction, particularly with respect to the privacy of public employees. Under the Freedom of Information Law and other areas of law, the courts have found that public employees enjoy a lesser right to privacy than the public generally, for public employees have a greater duty to be accountable than any other identifiable group. Further, it has been held on several occasions that records that are relevant to the performance of public employees' official duties are available, for disclosure in such cases would constitute a permissible rather than

an unwarranted invasion of personal privacy, [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905, (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Contrarily, if information concerning a public employee is irrelevant to the performance of his or her official duties, a denial may be proper, for disclosure might indeed result in an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, November 22, 1977).

When a town board votes to issue a reprimand to one of its employees, based upon case law, I believe that disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy, for the reprimand is relevant to the manner in which a named public employee performs his official duties. This contention is bolstered by the decisions cited above, at least one of which dealt with an invasion of privacy of a similar nature. In Farrell, supra, it was held that reprimands of named public employees were available, for the reprimands were relevant to the performance of the official duties of the public employees involved and because the reprimands essentially constituted "final determinations" that are available.

Third, one of the other grounds for denial which could apply to the situation is §87(2)(g), which states that an agency may withhold 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..."

It is important to emphasize that the provision quoted above contains what in effect is a double negative. While an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records.

Under the circumstances, the determination rendered during or following the executive session might be considered "intra-agency" material. Nevertheless, I believe it may also be characterized as a "final determination" of the Town Board that is required to be made available.

Fourth, you attached to your correspondence copies of the Town of Riverhead's response to your Freedom of Information Law request. These copies indicated that your requests were denied because they constituted a "confidential disclosure". A claim of confidentiality can in my opinion be invoked, only where a specific statute authorizes confidentiality [see Freedom of Information Law, §87(2)(a)]. I am unaware of any relevant statute which would authorize the Town of Riverhead to deny the information you are seeking under a claim of confidentiality.

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

BY: Pamela Petrie Baldasaro

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

Enclosures

cc: Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-650

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

June 22, 1981

Charles V. Eible
Superintendent of Schools
Hendrick Hudson School District
61 Trolley Road
Montrose, New York 10548

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Eible:

I have received your letter of June 8 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter:

> "[R]ecently, the Board of Education of the Hendrick Hudson School District was requested to meet in Executive Session with a representative group of residents for the purpose of discussing specific names of individuals, along with their background and qualifications, for consideration by the Board for appointment to a district committee to study the future use of a school to be closed. The Board granted the request. That decision was challenged by a local reporter, Maryanne Yurchuk, of the Croton-Cortlandt News".

In my opinion, the executive session was likely proper.

It is noted at the outset that the phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded. In addition, §100(1) of the Open Meetings Law prescribes a procedure

that must be followed by a public body, such as a school board, before it may enter into an executive session. Specifically, the cited provision states in relevant part 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..."

Based upon the language quoted above, it is clear that an executive session may be convened only after a public body has carried a motion made during an open meeting by a majority vote of its total membership in which the subject matter for the executive session is described in general terms.

Paragraphs (a) through (h) of §100(1) of the Law specify and limit the areas of discussion that are appropriate for executive session. In my view, §100(1)(f) could justifiably have been cited to discuss the issue in question. That provision states that a public body may enter into an executive session to discuss:

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

Under the circumstances described in your letter, it appears that the Board would likely have discussed the "employment history" of a particular person, as well as a "matter leading to the appointment" of a particular person or persons. Therefore, I believe that the subject considered by the Board fell within the scope of §100(1)(f) and, as such, was appropriate for executive session.

In sum, assuming that the procedure described in §100(1) was followed by the Board of Education before it entered into executive session, I believe that the Board would have complied with 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:ss

cc: Maryanne Yurchuk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-651

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 24, 1981

Mr. Vincent J. Vecchiarella
Superintendent of Schools
McGraw Central School District
West Academy Street
P. O. Box 556
McGraw, New York 13101

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Vecchiarella:

I have received your letter of June 8, in which you raised a series of questions regarding the application of the Open Meetings Law.

Your questions involve a situation in which a Concerned Citizens' Group seeks to meet with the Board of Education without your presence or the presence of the public. As such, the issue, which has several variations described in your letter, is whether the Open Meetings Law would be applicable to such gatherings.

The first situation that you described would involve a gathering of the Concerned Citizens' Group in which all members of the School Board were invited to attend a private meeting.

In my view, assuming that individual Board members knew that the remaining Board members were invited, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law. It is important to point out that the definition of "meeting" has been interpreted expansively by the courts. Specifically, in Orange County Publications v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], it was found by the state's highest court, the Court of Appeals, that

the definition includes any gathering of a quorum of a public body for the purpose of discussing public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized. Therefore, if the members of the Board meet as a board with knowledge that a quorum of the Board will or may be present, such a gathering would constitute a "meeting". Further, as you are aware, all meetings are open to the general public. Consequently, a meeting held by the Board with the Citizens' Group should in my view be non-exclusive and open to the general public.

Your second question is whether the School Board, which consists of seven members, may appoint a committee of three members to meet in private with the Citizens' Group. In my opinion, the answer must again be in the negative. Here I direct your attention to the definition of "public body", which includes:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body."

Although the definition of "public body" was unclear in the Open Meetings Law as originally enacted with respect to the coverage of committees, subcommittees and similar advisory bodies, amendments to the Law that became effective on October 1, 1979, make clear that such groups are themselves "public bodies" subject to the Law. In fact, at the end of the definition, specific reference is made to committees, subcommittees and similar bodies of a public body. A committee of three board members would, therefore, also be subject to the Open Meetings Law. Consequently, I believe that a gathering between a committee of the Board and the Citizens' Group must also be an open meeting.

Your third question involves a situation in which a three member committee is designated to meet with the Citizens' Group, but in which other Board members expressed an intention to attend. Since the meeting between the three member committee and the Citizens' Group would be covered by the Open Meetings Law, I believe that any person could attend such a meeting, including members of the School Board.

Lastly, as you are aware, the Law enables a public body to enter into an executive session only in accordance with the eight grounds for executive session appearing in §100(1)(a) through (h) of the Law. As such, if a citizens group or any person seeks to meet with a school board or a committee of the board, such meetings would be required to be open, except to the extent that an executive session might properly be 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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2067 CML-AO-652

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

June 24, 1981

Joseph G. Halloran, Director
Syosset Public Library
225 South Oyster Bay Road
Syosset, New York 11791

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Halloran:

I have received your letter of June 4, 1981.

In your original request for an opinion, you asked for guidance regarding rights of access to library personnel records by an individual library trustee. In our opinion of May 1, it was advised that specific direction in this area was limited to a 1967 Supreme Court case, Gorton v. Dow, 54 Misc. 2d 509. Your more recent correspondence seeks advice regarding the propriety of using regulations promulgated by the Commissioner of Education, which provide direction to school board members concerning access to school employee personnel records.

I would like to make the following comments in response to your inquiry.

First, the Commissioner of Education's regulations mentioned in Section 3:64 of "School Law" are found in 8 NYCRR 84. Specifically, §84.2 of these regulations, which apply only to school board members, states that:

> "[E]xamination of school employee personnel records by the Board of Education shall be conducted only at executive sessions of the board. Any board member may request the chief school officer to bring the personnel records of a designated employee or em-

> ployees to an open meeting of the board. The board shall then determine whether to conduct an executive session for the purpose of examining such records. The chief school officer shall present such records to the board at the executive session. Such records shall, in their entirety, be returned to the custody of the chief school officer at the conclusion of the executive session of the board."

As indicated in our previous opinion, the holding in Gorton v. Dow, supra, emphasized that library trustees could implement regulations for inspection of library records as long as such regulations were reasonable and did not obstruct the trustee's right to investigate those records. Further, in the case of school boards, it has been held judicially that a member has not only the right to view personnel records, but also the obligation to do so. In my opinion, although the regulations quoted apply to school boards and not library trustees, rights of access of library trustees of necessity should be analogous to those of school board members in order that they may carry out their official duties [see Gustin v. Joiner, 95 Misc. 2d 277, aff'd 68 AD 2d 880]. Enclosed for your consideration is a copy of Gustin v. Joiner which may be useful to you.

Lastly, notwithstanding the direction given to school boards under the Commissioner's regulations, it is important to note that the Open Meetings Law governs both the procedure for entry into executive session and the areas of discussion that may be considered during an executive session. In terms of procedure, §100(1) states in relevant part 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..."

Based upon the language quoted above, it is clear that an executive session may be held only after a public body has convened an open meeting, and only after a motion made in public generally identifying the subject to be considered is carried by a majority of the total membership.

I would also like to point out that so-called "personnel" matters regarding specific individuals may often be considered during an executive session. One of the grounds for executive session is §100(1)(f), which states that a public body may close its doors to consider:

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

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

BY Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-65

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

June 29, 1981

Ms. Ellen E. Conovitz
Regional Representative
Office of the Lieutenant Governor
114 Old Country Road
Mineola, New York 11501

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Conovitz:

I have received your letter of June 18 in which you requested a "ruling" under the Open Meetings Law.

It is emphasized at the outset that the Committee on Public Access to Records does not have the authority to issue "rulings". The Committee, however, is authorized to render advisory opinions under both the Freedom of Information and Open Meetings Laws.

According to your letter, you are interested in attending a "meeting of the committee appointed by the Supervisor of the Town of Hempstead." Further you wrote that:

> "[T]he committee has been appointed to deal with the future of the Hempstaed Solid Waste Recovery Plant which is currently closed...The committee consists of elected officials and local residents and will be meeting at the Hempstead Town Hall."

It is your view that any citizen should be able to attend the meeting of the committee in question.

I agree with your contention.

In my opinion, the central question is whether the committee is a "public body" subject to the Open Meetings Law. In this regard, §97(2) of the Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body."

By viewing the definition in terms of its components, I believe that each condition necessary to a finding that the committee is a public body can be met.

First, the committee in question is an entity consisting of more than two members.

Second although there may be no specific requirement that the committee conduct its business by means of a quorum, I believe that it is nonetheless required to do so. The term "quorum" is defined by §41 of the General Construction Law as follows:

> "[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. 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."

Based upon the language quoted above, it is clear that any group of persons or public officers consisting of three or more members designated to perform a duty collectively, as a body, may only do so by means of a quorum, a majority of the total membership. Therefore, even if there is no specific quorum requirement, the committee may in my view perform its duties by means of a quorum.

Third, based upon your description of the functions of the committee, I believe that it conducts public business and performs a governmental function.

And fourth, its duties are performed on behalf of a public corporation, the Town of Hempstead.

Based upon the foregoing analysis, I believe that the committee designated by the Town Supervisor has each of the characteristics necessary to a finding that it constitutes a public body.

I would also like to point out that the status of committees, subcommittees and similar advisory bodies was unclear under the definition of "public body" as it appeared in the Open Meetings Law as originally enacted. However, in a series of amendments to the Open Meetings Law that became effective on October 1, 1979, the definition of "public body" was altered to ensure that advisory bodies, such as the committee, fall within the scope of the Open Meetings Law. Specifically, the original definition made reference to entities that "transact" public business. Often it was contended that an advisory body having only the power to recommend and no authority to take final action was not subject to the Open Meetings Law, for it could not "transact" public business. In order to ensure that such bodies are included within the framework of the Law, the term "transact" was replaced with "conduct". Moreover, the definition now makes specific reference to committees, subcommittees and similar bodies.

Lastly, in a decision rendered recently by the Appellate Division, it was held that entities similar to the committee that you described are "public bodies" subject to the Open Meetings Law. In Syracuse United Neighbors v. City of Syracuse [473 NYS 2d 466, ___ AD 2d ___ (1981)], it was held that a "Homestead Committee" and a Mayor's Task Force were public bodies subject to the Open Meetings Law in all respects. It is noted that both the Homestead Committee and the Task Force were designated by the Mayor of the City of Syracuse and consisted of members of the Common Council and others. In its findings, the Court stated that:

> "To hold that they are not public bodies within the meaning of the Open Meetings Law would be to exalt form over substance...To keep their deliberations and decisions secret from the public would be violative of the letter and spirit of the legislative declaration in section of the Public Officers Law..." (id. at 468).

In both Syracuse United Neighbors and the case of the committee you have described, groups were designed to perform a duty collectively by the chief executive officer of a municipality. Due to their similarity and the direction provided by the Court, I believe that the committee in question is 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
Executive Director

RJF: jm

cc: Town Supervisor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2073
OML-AO-654

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

June 29, 1981

Lorna Kramer, Assistant Clerk
Delaware County Board of Supervisors
Office of the Clerk
Court House
Delhi, New York 13753

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kramer:

I have received your letter of June 16 and appreciate your interest in compliance with the Open Meetings Law.

According to your letter, a reporter recently requested that minutes be furnished within two weeks of the date of meetings of the Delaware County Board of Supervisors, as required by §101 of the Public Officers Law (Open Meetings Law). You wrote, however, that the Board is concerned that the minutes, which may not be approved until a month following the meeting, may be inaccurate if disclosed within two weeks. You have asked for a "ruling" on the matter.

First, it is noted that the Committee on Public Access to Records does not have the statutory authority to issue "rulings" of a binding nature. However, the Committee is authorized to render advisory opinions under both the Freedom of Information and Open Meetings Laws.

Second, prior to the effective date of amendments to the Open Meetings Law, October 1, 1979, which included a provision requiring that minutes of open meetings be made available within two weeks of such meetings, the Committee recognized that minutes might not be approved in every instance within two weeks. Consequently, in a memorandum that was transmitted to all public bodies (see attached), it was suggested that unapproved minutes be made available within the specified time limit, but that they

be marked "unapproved", "draft", or "non-final", for example. By so doing, a person in receipt of unapproved minutes could learn generally what transpired at a meeting, but at the same time a board and its membership is given a measure of protection by indicating that the minutes are subject to change.

And third, even before the enactment of the requirement that minutes be made available within two weeks of meetings, it was advised under the Freedom of Information Law that minutes, unapproved or otherwise, are subject to the Law as soon as they exist.

In this regard, I direct your attention to §86(4) of the Freedom of Information Law, which defines "record" broadly 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..."

Further, although minutes might not be approved, they would likely constitute factual information that is available [see Freedom of Information Law, §87(2)(g)(i)].

In sum, I believe that minutes must be made available within two weeks of meetings as provided by law, but that such minutes may be marked, as suggested earlier, in order to ensure rights of access while concurrently indicating that they may be subject to change.

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:ss

Attachment

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-655

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

COMMITTEE MEMBERS
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DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 30, 1981

Ms. Patricia Petersen
Board Member
Pioneer Central School
RR 1 Box 167
Arcade, NY 14009

The ensuing advisory opinion is based solely upon the facts presented in the correspondence.

Dear Ms. Petersen:

I have received your letter of June 18 and appreciate your continued interest in complying with the Open Meetings Law.

Your correspondence concerns the capacity to enter into executive session as well as the nature of a motion employed to enter into an executive session.

I would like to offer the following observations with respect to your letter and the attached correspondence.

First, with regard to the wording of a motion to enter into an executive session to discuss a matter pertaining to a "particular person", it has consistently been suggested that the motion need not identify the individual who may be the subject of the discussion in executive session. There are many situations in which public disclosure of the identity of the person under discussion might involve serious privacy considerations. In order to demonstrate such situations, I would like to review the applicable ground for executive session. Specifically, §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 a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, disci-

pline, suspension, dismissal or removal of a particular person or corporation..."

What if, for example, an employee of the school district is having medical or psychiatric problems? What if an employee has been accused of criminal or other activity that could result in dismissal? What if an unfounded complaint is made against a teacher by a student through the student's parents? What if the Board seeks to interview several candidates for the position of superintendent, one of whom may be an assistant superintendent and another who might be employed by a neighboring district? In each of those circumstances, it is possible that public disclosure of the identities of the subjects of the discussion could result in unnecessary personal hardship. In such situations, I do not believe that the Law requires that the identity of the individual who is the subject of the discussion must be included within the motion to enter into executive session. In short, by means of analogy to the Freedom of Information Law, disclosure could result in an "unwarranted invasion of personal privacy."

Consequently, I agree with your contention that the identity of the individual who is the subject of a discussion in executive session need not be included in a motion for entry into executive session.

With respect to the remainder of the issues raised in a letter sent by the Superintendent to the School District Attorney, I am in general agreement with the response of the attorney. It is reiterated that matters relating to personnel in general or to personnel policy should be discussed in public, for such matters do not deal with any "particular" person. Further, I agree that the exception for executive session regarding collective bargaining negotiations is restricted to those situations in which the District is negotiating with a public employee union.

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: Henry B. Heslop, Superintendent
Robert M. Walker, Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-656

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

June 30, 1981

Mr. Alex J. Daszewski
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Daszewski:

I have received your recent letter in which you complained with respect to the implementation of the Open Meetings Law by the Glenville Town Board and its Supervisor, William Baird.

Specifically, according to your letter and the attached news article, a meeting of the Town Board was held at Town Hall on Thursday, June 4. However, the meeting was not preceded by notice, and both the Supervisor and Town Attorney, in your words, "claimed ignorance" with respect to the application of the Open Meetings Law. The meeting in question was characterized as a "planning session" and the Supervisor apparently believed that a discussion of personnel matters could be held outside the scope of the Open Meetings Law.

I would like to offer the following observations with respect to your comments.

First, and perhaps most importantly, the application of the Open Meetings Law has been given an expansive interpretation by the courts. The definition of "meeting" was unclear in the Open Meetings Law as originally enacted, and many public bodies engaged in gatherings known as "work sessions", "planning sessions", and "agenda sessions", during which there was no intent to take action but merely an intent to discuss. It was argued that those gatherings fell outside the Open Meetings Law, for no action would

be taken. Nevertheless, in a landmark decision, the Court of Appeals, the state's highest court, found that the definition of "meeting" includes any situation in which a quorum of a public body convenes for the purpose of discussing public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Moreover, in a series of amendments to the Open Meetings Law that went into effect on October 1, 1979, the definition of "meeting" was altered in order to clearly conform with the direction provided by the state's highest court. Consequently, it is in my view clear that the so-called "planning session" that you described constituted a "meeting" subject to the Open Meetings Law in all respects.

Second, as you intimated, all meetings must be preceded by notice to the news media (at least two) and the public by means of posting. Section 99(1) concerning meetings scheduled at least a week in advance requires that notice be given to the news media and posted in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 99(2) concerning meetings scheduled less than a week in advance requires that notice be given in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings.

According to the news article, notice of the meeting was given by the Supervisor to the Board and other participants in a letter dated May 27, some eight days before the meeting. As such, notice should in my opinion have been given to the news media and the public by means of posting not less than seventy-two hours prior to the meeting.

Third, it is emphasized that even in a situation in which an entire meeting might qualify for discussion in executive session, notice must nonetheless be given and the meeting must be convened open to the public. The phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean that portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law prescribes a procedure that must be followed by a public body prior to entry into an executive session. Specifically, the cited provision states in relevant part that:

> "[U]pon a majority 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 not action by formal vote shall be taken to appropriate public moneys..."

In view of the foregoing, a motion to enter into an executive session must be made during an open meeting, the motion must identify in general terms the subject to be considered, and the motion must be carried by a majority vote of the total membership of a public body. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof.

Fourth, a public body cannot enter into an executive session to discuss the subject of its choice. On the contrary, §100(1)(a) through (h) of the Law specifies and limits that areas that may appropriately be considered during an executive session.

In this regard, based upon the news article, it appears that the majority of the matters considered would not fall within any of the grounds for executive session. For instance, a possible conversion to propane fuel in Town vehicles would not in my opinion constitute an appropriate ground for executive session.

Lastly, with respect to minutes, §101(1) concerning minutes of open meetings states that:

> "[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."

The language quoted above contains minimum requirements concerning the contents of minutes. Under the circumstances, even if no action was taken, it would appear

that minutes would have been required to include reference to the proposals that were described in the news article. In addition, it is likely that a motion to adjourn, for example, was made.

In order to apprise the Board of this opinion, a copy will be transmitted to the Supervisor and the 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
Executive Director

RJF:jm

cc: William Baird
Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO-657

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

July 9, 1981

Ms. Kathryn Thomas
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Thomas:

I have received your letter of June 23, in which you raised questions regarding the scope of the Open Meetings Law.

Specifically, according to your letter, a Committee on Health Needs was appointed by the Chairman of the Fulton County Board of Supervisors and was subsequently approved by tne entire Board. In terms of membership, the Committee in question is composed of five County supervisors, several other County officials, and representatives of the health community. You have indicated that the purpose of the Committee is to "decide health care needs of Fulton County". Although you attempted to attend its first meeting on June 22, you were informed that the Committee decided to meet privately. Further, your letter also indicates that the County Attorney advised that the Committee had the right to meet privately.

In my view, the Committee on Health Needs is a "public body" subject to the Open Meetings Law in all respects. This opinion is based upon the language of the Open Meetings Law as amended, as well as a recent judicial determination.

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

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

Based upon a review of each component of the definition, I believe that each condition precedent to a finding that the Committee in question is a public body can be met.

First, the Committee is clearly an entity consisting of two or more members.

Second, although the acts that created the Committee may not have made reference to any quorum requirement, I believe that the Committee may carry out its duties only by means of a quorum. In this regard, I direct your attention to §41 of the General Construction Law, which defines "quorum" to mean:

> "[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. 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 quoted above, I believe that any group of three or more public officers or persons charged with any duty to be performed collectively as a body can perform its duties only by means of a quorum, a majority of the total membership.

Third, based upon your description of the duties of the Committee on Health Needs, I believe that it conducts public business and performs a governmental function.

Fourth, the duties of the Committee are carried out on behalf of a public corporation, Fulton County.

I would also like to point out that the coverage of the Law with respect to committees, subcommittees and advisory bodies was unclear in its initial version enacted in 1977. The amended definition of "public body", however, makes specific reference to committees, subcommittees, and similar bodies. As such, I believe that there was a clear intent on the part of the Legislature that bodies, such as the Committee on Health Needs, fall within the scope of the Open Meetings Law.

Enclosed for your consideration is a copy of the Open Meetings Law, which is attached to a memorandum explaining changes in the Law that went into effect in 1979.

Lastly, the Appellate Division recently confirmed that advisory bodies are subject to the Open Meetings Law. In Syracuse United Neighbors v. City of Syracuse [437 NYS 2d 466, ___ AD 2d ___ (March 27, 1981)], it was held that advisory bodies designated by the Mayor of the City of Syracuse constituted "public bodies" subject to the Open Meetings Law. In its decision, the court stated that "[T]o hold that they are not public bodies within the meaning of the Open Meetings Law would be to exalt form over substance...To keep their deliberations and decisions secret from the public would be violative of the letter and spirit of the legislative declaration in section 95 of the public officers law" (id. at 468).

Once again, based upon the language of the Open Meetings Law as amended, as well as recent case law on the subject, I believe that the Committee on Health Needs is a public body subject to the Open Meetings Law in all respects.

Copies of this opinion, the Open Meetings Law and the memorandum to which reference was made earlier, will be sent to the persons designated 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:ss

Enclosure

cc: Thomas Dawd, Chairman
Peter Wilson
Ellen Hood

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-658

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

July 15, 1981

George Shebitz
Board of Education of the
City of New York
Office of Legal Services
Education Division
110 Livingston Street
Brooklyn, New York 11201

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Shebitz:

I have received your letter of July 6 in which you asked that I review two resolutions adopted by the New York City Board of Examiners and advise with respect to their propriety.

According to the minutes of the Board of Examiners' meeting of April 14, the following two resolutions were carried as follows:

> "[M]rs. Fitzgerald moved that, effective as of today's stated meeting, the minutes of the stated and special meetings of the Board of Examiners be structured 'pro forma' and that the opinions and comments of the members of the Board on issues under discussion including reasons for affirmative or negative votes, not be made part of said minutes; and
>
> "Mrs. Fitzgerald moved that, effective as of today's stated meeting, motions that are not carried not be made part of the minutes of the stated or special meetings of the Board of Examiners".

Relevant under the circumstances is §101 of the Open Meetings Law concerning minutes. The cited provision contains minimum requirements concerning the contents of minutes. Specifically, §101(1) concerning minutes of open meetings states that:

> "[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."

The language quoted above indicates that minutes of meetings need not consist of a verbatim transcript of all conversations or comments that may have occurred at a meeting of a public body, such as the Board of Examiners. However, to reiterate, §101(1) provides direction concerning the minimum requirements relative to the contents of minutes of open meetings.

With respect to the first resolution, I must admit that I am not sure of the meaning of the direction given to the effect that minutes be "structured 'pro forma'". Nevertheless, it is my view that minutes need not include the opinions and comments of members with respect to issues discussed or the reasons for affirmative or negative votes.

The second resolution, however, does in my opinion clearly violate the Open Meetings Law. The resolution indicates that motions that are not carried should not be made part of minutes of "the stated or special meetings of the Board of Examiners". In this regard, since §101(1) requires that minutes consist of a record or summary of "all motions, proposals, resolutions and any other matter formally voted upon", it is clear that the Law requires that reference be made to any vote that is taken following the introduction of a motion, proposal or resolution, whether or not it is carried. Further, I believe that reference must be made in minutes to any motion or proposal that is made even if no 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:ss

cc: Mrs. Fitzgerald, Chairman
Board of Examiners

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-659

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

July 21, 1981

Mr. Ron Patafio
Editor
The Reporter Dispatch
One Gannett Drive
White Plains, NY 10604

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Patafio:

I have received your letter of July 16 in which you requested an advisory opinion regarding a "ban on tape recording" by a public body during its open meetings.

According to your letter, during a discussion of the sale of a school and a referendum on the issue of a bond anticipation note by the Central 7 Board of Education in Greenburgh, "a reporter turned on a micro-cassette tape recorder to ensure an accurate record of figures being cited..." However, he was informed that Board policy prohibits the use of a tape recorder at meetings and was directed to turn off the recorder, or else the meeting would be adjourned.

In my opinion, a public body cannot prohibit the use of a "micro-cassette" recorder at open meetings by means of policy.

In terms of background, until mid-1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the

City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt reasonable rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee on Public Access to Records had consistently advised that the use of tape recorders should not be prohibited in situations in which the devices used are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was essentially confirmed in a decision rendered in June of 1979. That decision arose when two individuals sought to bring their tape recorders to a meeting of a school board. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which government and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent the possibility of star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings

> does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

Based upon the advances in technology and the enactment of the Open Meetings Law, the court in Ystueta found that a public body cannot adopt a general rule that prohibits the use of tape recorders.

In my opinion, the principle enunciated in Davidson remains valid, i.e., that a public body may prohibit the use of mechanical devices, such as tape recorders or cameras, when the use of such devices would in fact detract from the deliberative process. However, since a hand held, battery operated cassette tape recorder could not detract from the deliberative process, I do not believe that a rule prohibiting the use of such devices would be reasonable or valid.

It is also noted that an unofficial opinion of the Attorney General based upon the Ysueta decision coupled with the Open Meetings Law also found that a public body cannot prohibit the use of a small battery-operated tape recorder at open meetings (see attached opinion, May 13, 1980).

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: School Board

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-660

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

COMMITTEE MEMBERS

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BASIL A. PATERSON
IRVING R. SEIDMAN
GILBERT P. SMITH, Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 21, 1981

Edward V. Voetsch, Ed.D.
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Dr. Voetsch:

I have received your letter of July 11 in which you requested an advisory opinion regarding the capacity of the Town of Wheatfield Zoning Board of Appeals to enter into an executive session.

According to your letter, the Zoning Board of Appeals of the Town has for years conducted executive sessions to consider testimony or evaluate the credibility of those who speak for or against an application before the Board. You wrote, however, that you read that a petitioner had contacted this office and was informed of the "illegality" of an executive session and that this office would be informing the Board by written notice of your "breech [sic] of some aspect of the Sunshine Law". You also indicated that you are somewhat confused in view of my comments relating to the controversy relating to the capacity to conduct executive sessions by zoning boards of appeals.

I agree that there is confusion regarding the level of openness at which zoning boards of appeals must operate.

The focal point of the problem as I see it is §103 (1) of the Open Meetings Law, which states that judicial or quasi-judicial proceedings are exempt from the Open Meetings Law. Stated differently, if a matter is exempt from the Open Meetings Law, its provisions simply do not apply.

Traditionally, zoning boards of appeals have been found to engage in quasi-judicial proceedings when they deliberate toward a determination. As such, it would appear initially that zoning boards may deliberate in private.

However, it is important to point out that there are distinctions between the requirements of openness of city zoning boards of appeals, as opposed to town and village zoning boards of appeals

Specifically, §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 regulations less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, both §§267(1) of the Town Law and 7-712 (1) of the Village Law have long provided that all meetings of town and village zoning boards of appeals "shall be open to the public". Since those provisions are apparently less restrictive than the Open Meetings Law, they remain in effect.

With respect to city zoning boards of appeals, there is no provision analogous to either §267 of the Town Law or §7-712 of the Village Law. As such, even though a city zoning board of appeals may engage in deliberations similar to those of their town and village counterparts, their deliberations are exempt from the Open Meetings Law to the extent that they may be considred "quasi-judicial".

Although there are several judicial determinations that deal with the capacity of town and village zoning boards of appeals to engage in closed sessions, there is but one decision that interpreted the issue directly and expansively. Specifically, I have enclosed for your consideration a copy of Matter of Katz (Sup. Ct., Westchester County, NYLJ, June 25, 1979), which held that a town zoning board of appeals cannot cite either the exemption for quasi-judicial proceedings or close its deliberations under the provisions of the Open Meetings Law relative to the capacity to hold executive sessions. In essence,

the court found that §267(1) of the Town Law is less restrictive than the Open Meetings Law, thereby negating the application of the Open Meetings Law to a town zoning board of appeals. As such, the cited provision of the Town Law, and not the Open Meetings Law, was considered to have been applicable. Further, as a consequence, the court found that the town zoning board of appeals could not enter into executive sessions based upon a literal interpretation of the language of the applicable Town Law provision.

It is possible that we may have discussed or that you may have read of legislation that would have brought all zoning boards of appeals within the scope of the Open Meetings Law. Under that legislation, city zoning boards of appeals would have been required to conduct their deliberations during open meetings for the first time. Concurrently, all zoning boards of appeals, including those at the town level, would for the first time have been permitted to enter into executive sessions based upon the grounds for executive sessions appearing in §100 of the Open Meetings Law (see attached). From my perspective, the legislation was favorable because it would have brought all zoning boards of appeals within the same requirements of openness and enabled all zoning boards of appeals to enter into executive sessions where appropriate. Nevertheless, the Governor recently vetoed that legislation.

In sum, I agree that there is confusion regarding the responsibility of zoning boards of appeals regarding the openness of their deliberations due to the inconsistencies in the laws under which such boards operate. However, based upon §267 of the Town Law, as indicated in Katz, it appears that a town zoning board of appeals does not have the capacity to enter into an executive session or otherwise close its deliberations.

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
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-661

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

COMMITTEE MEMBERS
THOMAS H. COLLINS
MARIO M. CUOMO
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IRVING P. SEIDMAN
GILBERT P. SMITH, Chairman
DOUGLAS L. TURNER

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 22, 1981

Carolyn J. Pasley
Assistant Counsel
State University of New York
State University Plaza
Albany, New York 12246

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Pasley:

I have received your letter of July 7 containing additional comments with respect to an advisory opinion of April 22 rendered by this office.

It is your contention that an entity of the State University system, such as a College Senate Curriculum Committee, does not fall within the amended definition of "public body" appearing in §97(2) of the Open Meetings Law, which now clearly includes a "committee, subcommittee or other similar body of such public body".

You have contended further that the Open Meetings Law in your view applies only to entities of the State University which "govern" by direct statutory authorization under §353 and §356 of the Education Law. In my view, your contention is too restrictive, particularly in light of the language of the Open Meetings Law as amended and recent case law cited in our previous correspondence (e.g., Matter of Syracuse United Neighbors v. City of Syracuse ___ AD 2d ___, Fourth Dept., Appellate Division, March 27, 1981), which held that the Open Meetings Law applies to bodies that do not govern, but act solely in an advisory capacity.

Despite our differences of opinion, I found our recent meeting most helpful and anticipate similar exchanges in the future.

If I can be of assistance to you, please feel free to call.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-662

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

July 23, 1981

Mr. James E. Switzer
Support Services Manager
Wayne Central School District
District Administrative Offices
6076 Ontario Center Road, South
Ontario Center, New York 14520

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Switzer:

I have received your recent letter in which you requested copies of a number of advisory opinions rendered by the Committee under the Freedom of Information and Open Meetings Laws. In addition, you raised a question concerning the implementation of the Open Meetings Law regarding notice and executive sessions.

Specifically, your question concerns the manner in which a public body should

> "...provide public notice for an executive session portion of a public meeting where such executive session is continued from evening of one day to noon of the following day?"

I would like to offer the following observations regarding the question.

First, as you are likely aware, the phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Consequently, an executive session is not separate and distinct from an open meeting, but rather is a portion thereof.

In the same vein, it is noted that §100(1) of the Law prescribes a procedure that must be followed by a public body before it may enter into an executive session. The cited provision states in relevant part 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 be formal vote shall be taken to appropriate public moneys..."

Again, based upon the language quoted above, it is clear that an executive session is a portion of an open meeting and that a motion to enter into an executive session must be made during an open meeting.

Second, with respect to notice, I offer two suggestions, the results of which would be the same.

If a topic is being discussed in executive session, but the discussion cannot be concluded on the evening of a meeting, and if the discussion must be continued at some time in the future, it would in my view be possible to recess the meeting to be continued at a later date. In fairness to the public and to comply with the spirit of the Law, however, it is suggested that information, i.e., notice, be given to those in attendance as well as the news media to the effect that the Board has recessed and that the discussion will continue at a specific time and place.

In the alternative, I believe that a more favorable solution would simply involve adjourning a meeting and convening a new meeting at a future date, such as the next day. In this regard, it is emphasized that the Open Meetings Law does not impose restrictions upon a public body in terms of its capacity to convene a meeting.

Section 99(1) concerning notice of meetings scheduled a least a week in advance requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 99(2) concerns notice of meetings scheduled less than a week in advance. That provision

requires that notice be given to the news media and the public by means of posting in the same manner as prescribed by §99(1) "to the extent practicable" at a reasonble time prior to such meetings. As such, even though a discussion might not be completed, a meeting could be adjourned and a new meeting convened on the following day, so long as the notice provisions described in subdivision (2) of §99 are met. Accomplishment of the notice provisions might involve telephoning local news media representatives and posting in the locations designated by the 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
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-663

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

August 12, 1981

Mr. Richard Duffee
Concerned Citizens of Peekskill
P.O. Box 855
Peekskill, New York 10566

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Duffee:

As you are aware, I have received your letter of July 21. Please accept my apologies for the delay in response.

You have raised a number of issues regarding the implementation of the Open Meetings Law by the Peekskill Board of Education. Notwithstanding what apparently was a critical report of the Board's activities by the State Education Department, it appears that there may be fundamental misunderstandings on the part of the Board regarding its responsibilities under the Open Meetings Law. In the ensuing paragraphs, I will seek to respond to the issues that you raised in the hope that my comments will serve to provide education regarding the Open Meetings Law to the Board of Education.

It is emphasized at the outset that the courts have rendered expansive interpretations of the scope of the Open Meetings Law. Perhaps the landmark decision rendered under the Law concerned the scope of the definition of "meeting" [see attached Open Meetings Law, §97(1)] and found that the definition encompasses any gathering of a quorum of a public body for the purpose of discussing or conducting public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978).

I would also like to point out that the phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded [see §97(3)]. Further, §100(1) prescribes a procedure that must be followed by a public body before it may enter into an 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Based upon the language quoted above, it is clear that an executive session is not separate and distinct from an open meeting, but rather that an executive session is a portion of an open meeting.

In this regard, you wrote that so-called "special meetings" are often held the night before regular meetings in order to hold executive sessions. In my view, there is no distinction in terms of obligations or responsibilities between a special meeting and a regular meeting under the Open Meetings Law. Unless a ground for executive session may appropriately be cited, such gatherings, regardless of their characterization, must be held open to the public.

You also wrote that on one occasion, a closed meeting was held prior to a regular meeting. Based upon the provisions of the Open Meetings Law and the case law described in the preceding paragraphs, a public body cannot in my opinion hold a closed meeting prior to an open meeting. Stated differently, if a quorum of the Board met prior to the regular meeting, that gathering was itself a meeting that should have been convened open to the public and preceded by notice to the public and the news media given in accordance with §99 of the Open Meetings Law.

Your letter and the attached news articles also indicate that a great deal of the Board's discussion of the District's budget was held during executive sessions. You indicated further that those executive sessions were held on the basis that the Board would be considering "personnel". In my opinion, which is based upon the factual circumstances described in the news articles and the specific language of the Open Meetings Law, it is likely that the executive sessions were improperly held.

As you are aware, the Open Meetings Law specifies and limits the areas of discussion that may properly be considered during executive sessions [see §100(a) through (h)]. Although some areas of discussion relative to "personnel" might appropriately be discussed during an executive session, I would like to emphasize that the so-called "personnel" exception for executive session in the Open Meetings Law was clarified in a series of amendments to the Law that went into effect on October 1, 1979.

The original Open Meetings Law, §100(1)(f), permitted a public body to 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..."

Under the language quoted above, public bodies often entered into executive sessions to discuss matters concerning personnel in general or matters that dealt with policy related to personnel. However, the Committee had consistently advised that the provision in question was intended to protect the privacy of individuals and not to shield matters of policy under the guise of privacy. As such, the Law was amended and now states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

In view of the insertion of the term "particular" in §100 (1)(f) as amended, it is clear that an executive session convened to discuss "personnel" must deal with a particular person.

Under the circumstances, I do not believe that a discussion of the budget and determinations concerning the positions to be excised would constitute appropriate subjects for executive session. Moreover, even before the amendment described above was enacted, it was held jucially that personnel layoffs are primarily budgetary matters and are "not among the specifically enumerated personnel subjects" appearing in §100(1)(f) of the Law that are proper for discussion in executive session (see Orance County Publications v. City of Middletown, Sup. Ct., Orange County, December 6, 1978). In short, I do not believe that discussions of the budget, including personnel layoffs, could appropriately have been considered during executive sessions by the Board of Education.

You also wrote that, with respect to the Board's special meeting of July 13, no minutes were taken. Nevertheless, you indicated that at that meeting, the Board voted to postpone a discussion of by-laws and policy and to "adjourn to executive session" to discuss personnel. That session apparently lasted some three hours. Two comments should be made with respect to this aspect of your letter.

First, §101 of the Open Meetings Law requires that minutes be compiled and made available within specified time limits. With respect to minutes of open meetings, §101(1) states that:

> "[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".

Therefore, if at its special meeting the Board voted in any manner, whether to table a discussion or to enter into an executive session, that motion, the date and the vote, must be recorded in minutes. Further, §101(3) requires that minutes of open meetings be compiled and made available within two weeks of such meetings. It is also emphasized

that §87(3)(a) of the Freedom of Information Law requires that a record of votes be maintained that identifies each member who voted and the manner in which the members voted in every instance in which a vote is taken.

Lastly, with regard to minutes of executive session, §101(2) of the Open Meetings Law requires 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 §101(2), minutes of executive session must be compiled only when action is taken in executive session.

As such, public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

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 2d 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 view of the foregoing, a school board may deliberate in executive session in accordance with §100(1) of the Open Meetings Law, but it may not in my opinion vote during an executive session, except when the vote pertains to a tenure proceeding.

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:ss

cc: Commissioner of Education
Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2135
OML-AO-664

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

August 12, 1981

Ms. Loretta Prisco
Parents Action Committee
for Education
30 Westbury Avenue
Staten Island, NY 10301

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Prisco:

As you are aware, I have finally received your letter of July 23. As I explained to you in our telephone conversation today, this office did not receive your initial communication, and your second letter, which is dated July 15, reached us on July 27. Please accept my apologies for the delay in response.

You have raised a series of issues regarding the implementation of the Open Meetings Law by Community School Board #31 on Staten Island. I will attempt to deal with each of them in the following paragraphs.

You indicated that the Board conducts two types of meetings, which are known as "discussion meetings" and "regular meetings". Apparently, the so-called "discussion meetings" are held for the purpose of discussion only, and no agenda is published with respect to those meetings. Further, according to your letter, the Board's by-laws state that "official action of the Board must be taken at regular meetings..." You also wrote that members of the public cannot address the Board at discussion meetings, but that time is allotted for the public to raise questions at the "regular meetings". In this regard, it is your view that the procedure described above

> "...is contrary to the spirit and intent of decentralization and the Open Meetings Law inasmuch 1) The public has no prior notification of the agenda for Discussion Meetings and 2) the public has no opportunity at these Discussion Meetings to address the Board on issues prior to the Board taking what they may consider to be 'official actions'."

With respect to your contentions, it is important to point out that the Open Meetings Law confers a right upon the public to "observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" [see Open Meetings Law, §95]. The Open Meetings Law does not grant a right upon the public to speak or otherwise participate at meetings of public bodies. Consequently, it has consistently been advised that a public body may but need not permit public participation at its meetings. However, if a public body chooses to permit public participation, it should do so by means of reasonable rules that treat members of the public equally. As such, it is my view that the failure of the Board to permit public participation at its discussion meetings does not constitute a violation of the Open Meetings Law.

Further, with respect to agendas, there is no law of which I am aware that requires a public body to prepare an agenda prior to a meeting. Therefore, if no agendas are prepared with regard to the discussion meetings, again, I do not believe that any provision of law would be violated.

Nevertheless, if agendas for the discussion meetings are prepared but are not distributed, there may be another vehicle by which you may gain access to the agendas. Here I direct your attention to the Freedom of Information Law. That Law states in brief that all records of an agency, such as a school district, are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in the Law [see attached, Freedom of Information Law, §87 (2)(a) through (h)]. Assuming that agendas are prepared in advance of the discussion meetings, they would in my view constitute records subject to rights of access granted by the Freedom of Information Law. Moreover, if the agendas merely consist of a factual listing of the general subject matter to be considered at the discussion meetings, I believe that they would be available under the Freedom of Information Law [see §87(2)(g)(i)].

Next, despite the distinction made in the by-laws between regular meetings and discussion meetings, I do not believe that there is any distinction between the two under the Open Meetings Law. In this regard, it is noted that the state's highest court held in 1978 that so-called "work sessions" and similar gatherings during which there is an intent only to discuss and no intent to take action are "meetings" subject to the Open Meetings Law in all respects [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NYS 2d 947 (1978)]. As such, both the discussion meetings and the regular meetings fall within the requirements of the Open Meetings Law.

You noted that officials of the Board informed you that they contacted this office and that my advice was that the Board may "vote at a Discussion Meeting, ANNOUNCE the vote at a Regular Meeting without taking a roll-call vote at said Regular Meeting and still have that vote be valid and considered an 'official action'" (emphasis yours). It is possible that I advised that since there is no legal distinction between a regular meeting and a discussion meeting under the Open Meetings Law, there would be no prohibition imposed upon the Board with respect to its capacity to conduct a vote or take action at a discussion meeting. Nevertheless, if that advice was indeed given, it was likely given without knowledge of the by-law to which you made reference in your letter. If indeed the by-law prohibits the Board from taking action at any gathering other than a regular meeting, I do not believe that it can take action at a discussion meeting and thereafter announce its vote at a regular meeting. Although the deliberations of the Board at discussion meetings might serve to coalesce the feelings of the Board regarding a particular issue, any official action must, according to the by-laws, be taken at a "regular meeting". As such, I believe that official actions as well as roll-call votes must be taken during regular meetings of the Board.

I would also like to point out that the Freedom of Information Law requires that each agency, including a board of education, maintain:

> "a record of the final vote of each member in every agency proceeding in which the member votes..." [see §87 (3)(a)].

As such, in every instance in which a vote is taken, a voting record must be compiled which identifies each member who voted and the manner in which that person voted.

You have also raised questions concerning the subjects that may be considered during an executive session. Specifically, you wrote that the Board conducts executive sessions "when discussing and holding elections for Chairperson and officers, and when discussing construction matters." As you are aware, §100(1)(a) through (h) of the Open Meetings Law specifies and limits the areas of discussion that may appropriately be considered during an executive session. In my view, a discussion of the election of officers of the Board would not likely constitute a proper subject for executive session for no ground for executive session could appropriately be cited. Without a greater description of the subjects involved in "construction matters", it is difficult to provide specific direction concerning the propriety of holding an executive session. If you would provide greater specificity, perhaps I could provide greater direction.

Lastly, you inferred that the Board of Education votes during executive sessions. In this regard, public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

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 2d 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 view of the foregoing, a school board may deliberate in executive session in accordance with §100(1) of the Open Meetings Law, but it may not in my opinion vote during an executive session, except when the vote pertains to a tenure proceeding.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-665

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

August 17, 1981

Mr. Tom Merz
Rome Sentinel Company
333 W. Dominick Street
Rome, NY 13440

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Merz:

As you are aware, I have received your letter of July 30. Please accept my apologies for the delay in response.

You have requested an advisory opinion under the Open Meetings Law concerning a request made by the Oneida County Executive to the effect that the County Legislature "hear in private a report which he described as a 'personnel' matter". According to your letter, the report was prepared by a consulting firm and focuses upon government organization and job classification by the County. In addition, you wrote that the aim of the study is to determine whether the County's job grading system is fair and whether the actual functions of particular employees are consistent with their job descriptions.

Based upon the information contained within your letter, as well as the description of the government organization and classification and compensation study that you attached, I believe that the discussions of the report by the County Legislature must be conducted open to the public in great measure, if not in toto.

The Open Meetings Law, in brief, requires that all meetings of public bodies be conducted open to the public. Moreover, it is noted that the definition of "meeting", which determines the scope of the Law, has been interpreted expansively by the courts. Perhaps the landmark decision on the subject is Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], which held that

any convening of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized.

Further, §100(1) of the Open Meetings Law specifies and limits the areas of discussion that may appropriately be considered during an executive session. Although some areas of discussion relative to "personnel" might appropriately be discussed during an executive session, I would like to emphasize that the so-called "personnel" exception for executive session in the Open Meetings Law was clarified in a series of amendments to the Law that went into effect on October 1, 1979.

The original Open Meetings Law, §100(1)(f), permitted a public body to 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".

Under the language quoted above, public bodies often entered into executive sessions to discuss matters concerning personnel in general or matters that dealt with policy related to personnel. However, the Committee had consistently advised that the provision in question was intended to protect the privacy of individuals and not to shield matters of policy under the guise of privacy. As such, the Law was amended and now states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

In view of the insertion of the term "particular" in §100(1)(f) as amended, it is clear that an executive session convened to discuss "personnel" must deal with a particular person.

Under the circumstances, it would appear that the discussion of the study would likely deal with matters of policy that may affect "personnel" at some future time. Further, under the specific language of §100(1)(f) of the Law, not every matter that deals with a particular person would fall within the scope of that exception for executive session. For instance, even though a particular individual and his or her job description might be considered, such a discussion might not fall within any of the subjects enumerated in §100(1)(f). It also appears that such discussions would not involve the manner in which a particular employee is performing his or her duties, but rather the functions that the employee is carrying out. If that is so, it is in my view doubtful that §100(1)(f) would be applicable.

In sum, unless and until the County Legislature discusses one of the enumerated topics appearing in §100(1)(f) that are appropriate for discussion in executive session, the meetings of the County Legislature regarding the study must in my view be conducted open to 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:ss

cc: County Executive Boehlert
County Legislature

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2149
OML-AO-666

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

August 19, 1981

Elizabeth Davis
Board Member
Rome Hospital and Murphy
Memorial Hospital
1500 North James Street
Rome, New York 13440

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Davis:

As you are aware, I have received your letter of July 30. Please accept my apologies for the delay in response.

As a member of the Board of Managers of a municipal hospital, you expressed concern with respect to the capacity of members of the public who attend meetings of the Board to request and obtain the package of materials distributed to the Board and the press at the meetings. You indicated that you proposed that a "guest packet" be made available to members of the public who attend after excising from the materials those records that might justifiably be withheld. However, your proposal was defeated. Your question is whether the Board has a right at a public meeting to deny members of the public access to the agenda, a financial statement, minutes and similar materials contained in the packet distributed to the Board.

I would like to offer the following observations and suggestions.

First, there is no specific requirement contained in any provision of law of which I am aware that compels a public body to distribute materials at a meeting. Further, although agendas are often prepared prior to meetings, there is no legal requirement of which I am aware that agendas be compiled.

Second, however, as soon as records exist, they are subject to rights of access granted by the Freedom of Information Law. It is noted in this regard that 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..." [see attached, Freedom of Information Law, §86(4)].

Therefore, any materials found within the packet that you described would constitute "records" subject to rights of access granted by the Freedom of Information Law.

Third, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a municipal hospital, are available, except those records or portions thereof that fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law. I would also like to point out that, as you indicated, materials that you characterized as "questionable" might justifiably be withheld. From my perspective, the Freedom of Information Law represents a codification of common sense, for it states essentially that all records are available unless disclosure would in some manner damage a governmental process or an individual, for instance. Further, a review of the grounds for denial appearing in §87(2) of the Freedom of Information Law indicates that the majority contain operative verbs that specify potentially harmful effects of disclosure. In the same fashion, the grounds for executive session appearing in the Open Meetings Law [see attached, §100(1)(a) through (h)] are based upon potentially harmful effects of public disclosure.

Fourth, an agency subject to the Freedom of Information Law is not required to respond to a request for records immediately. However, in situations in which meetings are scheduled in advance, any member of the public could request the packet of materials prior to a meeting in order that the materials could be made available at the time of the meeting. Again, those portions of the materials found within the packet that may be denied pursuant to the provisions of the Freedom of Information Law could be removed or deleted from a visitor's packet.

Fifth, the Open Meetings Law contains provisions concerning the minimum contents of minutes and the periods of time in which they must be compiled and made available. In this regard, I direct your attention to §101(3) of the Open Meetings Law, which states that minutes of open meetings must be compiled and made available to the public within two weeks of such meetings. As such, assuming that the Board of Managers holds monthly meetings, minutes of the preceding meetings should be available to the public approximately two weeks prior to the monthly meetings. Therefore, it would appear that minutes, approved or otherwise, found within packets distributed to the Board, are available, to the public not only at the meetings, but prior to the meetings as well.

And lastly, you indicated that a "press packet" is made available to members of the news media at the meetings. In this regard, it is emphasized that members of the news media have no greater rights of access to records under the Freedom of Information Law than members of the public generally. Further, it has been held judicially that accessible records should be made equally available to any person, "without regard to status or interest" (see Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165). Therefore, if a packet is made available to the news media, I do not believe that the same materials could justifiably be withheld from 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

Robert J. Freeman
Executive Director

RJF:ss

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOML-AO-667

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

August 19, 1981

James E. Switzer
Support Services Manager
School District Clerk
District Administrative Offices
6076 Ontario Center Road, South
Ontario Center, New York 14520

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Switzer:

I have received your letter of August 10 and the materials attached to it. Your interest in compliance with the Open Meetings Law is much appreciated.

You have requested comments regarding the format, content and design of materials that you prepared concerning notice given to school board members less than twenty-four hours prior to special emergency meetings.

First, I am unfamiliar with any similar forms or notices that may have been devised by other public bodies. Consequently, I regret that I am unable to supply you with other examples of notices prepared to accomplish the same goals.

Second, I believe that there is a deficiency in the "NOTICE & CALL FOR A SPECIAL EMERGENCY MEETING" that you prepared. Specifically, in the second paragraph, it is indicated that:

> "[S]AID MEETING IS CALLED, at the direction of the President of the Board of Education, for the purpose of an executive session to consider a personnel matter".

In my view, although the Board may be called to discuss a matter appropriate for consideration in an executive session, I do not believe that it is proper to indicate in advance of a meeting that an executive session will indeed be held. The phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law prescribes a procedure that must be followed by a public body during an open meeting before it may enter into an executive session. Specifically, the cited provision states in relevant part 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..."

Based upon the language quoted above, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof. In addition, in a technical sense, it cannot be known in advance of a meeting that an executive session will indeed be held, for it cannot be known whether a motion to enter into an executive session will be carried by a majority of the total membership of a public body.

In view of the foregoing, it is suggested that reference to the holding of an executive session be deleted from the proposed form.

Lastly, although reference is made to the posting of a notice in the proposed form, no reference is made in the form to notice to the news media. Here I direct your attention to §99 of the Open Meetings Law. Subdivision (1) of §99 pertaining to meetings scheduled at least a week in advance requires that notice be given to the news media (at least two) and posted in one or more designated, conspicuous public locations not less than seventy-two hours

prior to such meetings. Subdivision (2) of §99 pertaining to meetings scheduled less than a week in advance, such as a special emergency meeting, requires that notice be given in the same fashion as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. As such, even though it is possible that the deliberations of a public body may be conducted during an executive session, notice must nonetheless be given in advance of such meetings to the public by means of posting and the news media in accordance with §99 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2152
OML-AO-668

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

August 19, 1981

Mr. Joseph Eisner
Library Director
Plainedge Public Library
1060 Hicksville Road
Massapequa, NY 11758

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Eisner:

As you are aware, I have received your letter of August 4. Please accept my apologies for the delay in response.

You have indicated that you are a member of the Nassau County Cultural Development Board, which was created by provisions of Nassau County Local Law 5-1978. In this regard, you have asked for an advisory opinion with respect to whether the Board in question is:

> "...subject to the provisions of the Freedom of Information Law and the Open Meetings Law? If so, are there any circumstances whereby the deliberations of the Board, when considering applications for funding by cultural groups which have applied at the Board's invitation, could be discussed and/or decided upon other than at a public, open session of the Board?"

I would like to offer the following observations with respect to your questions.

In my opinion, the Nassau County Cultural Development Board is both an "agency" subject to the Freedom of Information Law and a "public body" subject to the Open Meetings 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".

From my perspective, it is clear that any municipality or component of a municipality falls within the scope of the definition quoted above. Nassau County is itself a public corporation, and the entity in question is a municipal board created by the County. Further, based upon a review of the Local Law that created the Board, it is in my view clear that the Board is a governmental entity performing a governmental function for a municipality, Nassau County.

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

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body or such public body".

By viewing the definition in terms of its components, I believe that each condition necessary to a finding that the Board is a public body can be met. First, the Board consists of nine members. Second, it is in my view required to conduct its business by means of a quorum, even though there may be no specific reference to a quorum requirement in the Local Law that created the Board. It is noted that §41 of the General Construction Law has for decades provided that any group of three or more public officers or persons charged with any public duty to be performed or carried out

by them collectively, as a body, may do so only by means of a quorum, a majority of the total membership. Third, the Board, according to the description of its duties in the Local Law, clearly conducts public business. And fourth, the Board in my view performs a governmental function for Nassau County, which, as indicated previously, is a public corporation. In addition, under the definition of "public body" as amended on October 1, 1979, specific reference is made to committees, subcommittees and similar bodies of other public bodies, such as the County Board of Supervisors.

In view of the foregoing, I believe that the Board clearly falls within the provisions of both the Freedom of Information and Open Meetings Laws.

The second question is whether there are any circumstances in which the Board, when considering applications for funding by cultural groups that have applied at the Board's invitation, may deliberate or make decisions "other than at a public, open session of the Board".

As you are aware, the Open Meetings Law states that all meetings of public bodies shall be open to the public. However, the Law permits a public body to enter into closed or "executive" sessions to discuss subjects specified in the Law as appropriate for executive session, and §100(1)(a) through (h) identifies eight grounds for executive session. From my perspective, there is but one ground for executive session that might be applicable with respect to the deliberations that you have described.

Specifically, §100(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

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

In some instances, perhaps the Board in its deliberations may consider the financial or employment history of a particular person or corporation. To that extent, it would appear that an executive session may appropriately be convened.

Lastly, as a general rule, the Open Meetings Law permits a public body to take action during a properly convened executive session, unless the action is to appropriate public monies, in which case its action would have to be accomplished 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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2163
OML-AO-669

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

August 21, 1981

George H. Bull
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bull:

I have received your letter of August 12 and appreciate your interest in compliance with the Open Meetings Law. You have raised a series of questions regarding the implementation of the Open Meetings Law by the Sodus Village Board of Trustees. In conjunction with your questions, you attached a copy of the minutes of meetings held by the Board on July 14 and July 20.

I would like to offer the following observations with respect to your letter and the minutes.

First, you questioned the length of time in which the Board makes available the minutes of its meetings. Specifically, you wrote that minutes are generally available or prepared until prior to the ensuing meeting. In this regard, I direct your attention to §101 of the Open Meetings Law. Subdivision (1) of §101 prescribes the minimum requirements concerning the contents of minutes of open meetings. Subdivision (2) requires that minutes of executive sessions must include reference to any action taken during an executive session. Subdivision (3) specifies that minutes of open meetings must be compiled and made available within two weeks of such meetings and that minutes of executive sessions must be compiled and made available within one week of the meetings during which action was taken during an executive session. Consequently, if, for example, minutes are not approved or made available until a month after a meeting, I believe that the Board would have failed to comply with the Open Meetings Law.

It is noted that the requirement that minutes of open meetings be compiled and made available within two weeks represents an amendment to the Open Meetings Law that became effective on October 1, 1979. Prior to the effective date of that requirement, the Committee recognized that public bodies might not meet within two weeks to approve minutes. As such, the Committee by means of a memorandum distributed to all public bodies prior to the effective date of that amendment (see attached) recommended that unapproved minutes be made available within two weeks as required by the Law, but that they be marked as "unapproved", "draft", or "non-final", for example. By so doing, the public has the ability to learn generally what transpired at a meeting, and concurrently, notice is effectively given that the minutes are subject to change, thereby giving members of public bodies a measure of protection.

A second area of inquiry concerns complaints made against Village employees. You indicated that during one of the Board's meetings, "the Village Attorney stated that if the village board was going to discuss personnel, it would have to be a closed meeting". In this regard, I would like to make several comments.

First, it is noted that the Open Meetings Law is permissive. Stated differently, although a public body may in some instances enter into an executive session, there is no requirement that an executive session be held, even if the subject matter under consideration may appropriately be discussed behind closed doors. This point is confirmed by means of a review of the procedure prescribed by the Open Meetings Law that must be followed prior to entry into an executive session. Section 100(1) of the Law states in relevant part 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..."

The language quoted above indicates that three steps must be taken before a public body may enter into an executive session. First, a motion to go into an executive session must be made during an open meeting. Second, the motion must identify in general terms the subject matter to be considered. And third, the motion must be carried by a majority of the total membership of a public body. In view of these requirements, it is possible that a motion to enter into an executive session may be defeated, for it might not be carried by a majority of the total membership. Similarly, I do not believe that an executive session can be scheduled in advance of a meeting, for, in a technical sense, it can never be known in advance whether a motion to enter into an executive session will indeed be carried.

It is also emphasized that not every matter that deals with "personnel" may be discussed during an executive session. In the series of amendments to the Open Meetings Law to which reference was made earlier, the so-called "personnel" exception for executive session was clarified. Under the original Open Meetings Law that went into effect in 1977, a public body could under §100(1)(f) 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..."

Many public bodies under the language quoted above entered into executive sessions to discuss matters pertaining to policy related to personnel or matters concerning personnel in general. Nevertheless, the Committee consistently contended that the personnel exception was largely intended to protect privacy, and not to shield matters of privacy under the guise of privacy. Consequently, the Committee recommended a clarification of §100(1)(f) which was passed by the Legislature and signed into law. Currently §100(1)(f) of the Open Meetings Law permits a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

Due to the insertion of the term "particular", it is clear that a public body may enter into an executive session only to discuss matters pertaining to a particular person. Moreover, §100(1)(f) identifies specific subjects that may relate to particular individuals and, in my view, only those subjects as they pertain to a particular individual may appropriately be discussed behind closed doors.

At this juncture, I would also like to offer a comment regarding the Freedom of Information Law. That statute is based upon a presumption of access and states in brief that all records of an agency, such as a village, are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (h) of the Law.

With respect to complaints made against public employees, it has consistently been advised that a complaint is available, but that identifying details regarding the identity of the person who made the complaint may be deleted if disclosure of those identifying details would result in an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)].

Further, although a complaint may relate to a particular public employee, the courts have generally found that public employees enjoy a lesser degree of privacy than members of the public, for it has been determined that public employees have a greater duty to be accountable than any other group. In addition, in cases pertaining to records identifiable to public employees initiated under the Freedom of Information Law, it has been held on several occasions that records relevant to the performance of a public employee's official duties are available, for disclosure in such instances would constitute a permissible rather than an unwarranted invasion of privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905, (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977); aff'd 45 NY 2d 954 (1978); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980]. Conversely, if a record is irrelevant to the performance of a public employee's official duties, it may justifiably be withheld on the ground that disclosure would indeed constitute an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977). In the case of a complaint, at least one case held that complaints made against public employees are relevant to the performance of official duties and, therefore, are available (see Montes, supra).

Next, the minutes of the special meeting of the Board held on July 20 indicate that a discussion was held during an executive session regarding "possible litigation". In my opinion, "possible" litigation does not constitute an appropriate basis for entry into an executive session. Section 100(1)(d) of the Law states that a public body may enter into an executive session to discuss "proposed, pending or current litigation". From my perspective, virtually any discussion held by a public body could involve "possible" litigation. To be characterized as "proposed" litigation, there must in my view be a real threat or imminence of litigation to qualify for executive session under §100(1)(d).

Lastly, provisions concerning minutes appearing in §101 of the Open Meetings Law and the Freedom of Information Law require that a voting record be compiled in each instance in which a public body votes. Section 87(3)(a) of the Freedom of Information Law requires that a record of votes be compiled in every instance in which a vote is taken in which each member who voted and the manner in which that person voted is recorded.

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:ss

Attachment

cc: Vilage Board of Trustees

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2170
OML-AO-670

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

August 25, 1981

Ms. Jane Barton
Vice President
Montgomery County Land and
Home Owners Association
Windy Hill Farm
R.D. 1 - Box 713
Esperance, NY 12066

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Barton:

I have received your letter of August 14 in which you requested an opinion regarding the applicability of the Freedom of Information Law.

According to your letter, on June 24, your group, the Montgomery County Land and Home Owners Association, requested a copy of a tape recording of a meeting held on the preceding evening. You indicated that:

> "[I]t has been the policy of the Clerk of the Board to tape record the proceedings of the Board meeting, as well as the public segment of the meeting to use in assisting him in preparing the minutes of the meeting".

In response to your request for the tape recording and its preservation, you were denied access based upon a 1968 opinion of the Comptroller in which it was advised that a tape recorder owned by a clerk and used as an aid in the preparation of minutes does not constitute a public record.

In my opinion, the tape recording in which you are interested is available.

First, as you intimated, when the Comptroller's opinion was written, the Freedom of Information Law did not exist. Since the initial enactment and subsequent amendment of the Freedom of Information Law, rights of access to records have been broadened and clarified.

Second, §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 my opinion, since the Clerk of the Board uses a tape recorder in the performance of his official duties, I believe that the tape recording constitutes a "record" subject to rights granted by the Law, for it represents information produced for an agency.

To further bolster such a contention, two questions might be raised: Would the Clerk employ a tape recorder if he was not the Clerk? Would a tape recording be prepared by the Clerk of he was not acting in the performance of his official duties? In short, it appears that the Clerk used the tape recorder and prepared a tape recording in the performance of his official duties. Therefore, again, I believe that the tape recording was produced for the Board and is a "record" subject to the Freedom of Information Law.

Third, there are two judicial determinations which in my view strengthen the contentions offered above. In Zaleski v. Hicksville Union Free School District Board of Education (Sup. Ct., Nassau Cty., NYLJ December 27, 1978), it was held that tape recordings of a school board meeting constitute "records" that are available under the Freedom of Information Law. However, the decision did not make clear whether the tape recording was made through public funding or otherwise. Further, however, a similar argument was made in Warder v. Board of Regents of the State of New York [410 NYS 2d 742 (1978)]. In Warder, the Secretary to

the Board of Regents contended that personal notes taken at meetings, which were also used as an aid in compiling minutes, were the personal property of the Secretary. The Court found that the notes were not personal property, but rather were "records" prepared in the course of official duties that were available after having made an in camera inspection to determine rights of access.

It is important to point out, however, that the tape recording need not in my view be preserved for posterity. In this regard, §65-b of the Public Officers Law prohibits a municipality from destroying records without the consent of the Commissioner of Education. In conjunction with §65-b, the Department of Education has developed schedules for the retention and disposal of records. Based upon conversations with representatives of the Education Department, I believe that a tape recording may be destroyed or erased, for example, shortly after its creation and when it has no further utility. However, I do not believe that it would be appropriate to destroy or erase a tape recording while a request for a tape recording is pending under the Freedom of Information Law.

Third, I would also like to point out that any person may in my opinion use a tape recorder at an open meeting, so long as the presence of a tape recorder does not unreasonably detract from the deliberative process. In terms of background, until mid-1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt reasonable rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee on Public Access to Records had consistently advised that the use of tape recorders should not be prohibited in situations in which the devices used are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was essentially confirmed in a decision rendered in June of 1979. That decision arose when two individuals sought to bring their tape recorders to a meeting of a school board. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent the possibility of star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority".

Based upon the advances in technology and the enactment of the Open Meetings Law, the court in Ystueta found that a public body cannot adopt a general rule that prohibits the use of tape recorders.

In my opinion, the principle enunciated in Davidson remains valid, i.e., that a public body may prohibit the use of mechanical devices, such as tape recorders or cameras, when the use of such devices would in fact detract from the deliberative process. However, since a hand held, battery operated cassette tape recorder could not detract from the deliberative process, I do not believe that a rule prohibiting the use of such devices would be reasonable or valid.

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:ss

cc: Montgomery County Board of Supervisors

William Moore, County Attorney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-671

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

August 28, 1981

Charles P. Caputo
County of Fulton
Office of County Attorney
County Building
Johnstown, NY 12095

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Caputo:

As you are aware, I have received your letter of August 4.

Your correspondence concerns an earlier opinion prepared by this office at the request of Ms. Kathryn Thomas regarding the status of a so-called "Committee on Health Needs". In Ms. Thomas' letter to me, she indicated that the Committee was appointed by the Chairman of the Fulton County Board of Supervisors and later approved by the entire Board. On the basis of the information provided to me, it was advised that the Committee on Health Needs constituted a "public body" subject to the Open Meetings Law.

You have indicated, however, that the group in question is in no way connected with Fulton County, even though some of its members may be employed by the County. In short, you informed me that the Committee in question is essentially a citizens group interested in health care in the County, but that it has no connection whatsoever with government. Assuming that your description of the group in question is accurate, I do not believe that it would constitute a public body subject to the Open Meetings Law.

If I receive information to the contrary, I will contact you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Kathryn Thomas

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FML-AO-672

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

August 28, 1981

Thomas J. Dowd, Chairman
Nathan Littauer Hospital
99 East State Street
Gloversville, NY 12078

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dowd:

I have received your letter of July 30 and apologize for the delay in response.

Your correspondence concerns an advisory opinion written by this office at the request of Ms. Kathryn Thomas in which it was advised that an entity described by Ms. Thomas constituted a "public body" subject to the Open Meetings Law.

You have indicated, however, that at a meeting of the Fulton County Board of Supervisors held in March, the Chairman merely announced the names of eighteen people who had agreed to study the issue of long term health care. You wrote further that no appointments were made nor was any resolution, motion or similar formal act accomplished to officially create a task force or appoint individuals to serve as members of a task force.

In all honesty, I have received a letter on the same subject from Charles Caputo, the Fulton County Attorney, who also indicated that the group in question does not perform any duty on behalf of the County. Based upon the information provided by yourself and Mr. Caputo, which differs from that given by Ms. Thomas, it appears that the entity in question is not a public body subject to the Open Meetings Law.

Should I receive additional information contrary to that which you have provided, I will contact you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Kathryn Thomas

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-673

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

September 3, 1981

Joseph I Sellman
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sellman:

I have received your letter of August 24.

You indicated that you are a student at Baruch College, which is part of the City University of New York (CUNY). Having attended a meeting of the Board of Directors of the Baruch College Association, a non-for-profit corporation, you attempted to tape record a discussion of the annual itemized budget. Dr. Henry Wilson, the Dean of Students and Chairman of the Association, refused to allow you to use the tape recorder. According to your correspondence, Dr. Wilson also stated that the Association is neither subject to the Open Meetings Law nor required to permit a tape recording of its meetings.

You have requested a "decision" from the Committee regarding the issues raised. Please be advised that the Committee does not render "decisions" of a binding nature. Under the Open Meetings Law, the Committee does, however, have the authority to render advisory opinions. As such, I would like to offer the following observations regarding your inquiry.

In my view, a student association, such as the City University Baruch College Association, may be considered 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 conduct 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, or committee or subcommittee or other similar body of such public body".

By analyzing the elements contained in the definition quoted above, I believe that one may conclude that the Association is a "public body" subject to the Open Meetings Law.

First, the Association in question is an entity consisting of two or more members.

Second, I believe that it is required to conduct its business by means of a quorum, whether or not there is any specific requirement concerning a quorum in its by-laws or the act that created it. I direct your attention to §41 of the General Construction Law, which defines "quorum" as follows:

> "[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. 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".

Based upon the provision quoted above, whenever three or more public officers or "persons" are charged with any public duty to be exercised by them collectively as a body, they are permitted to do so only by means of a quorum, a majority of the total membership. Consequently, even if there is no specific direction to the effect that the Association must conduct its business by means of a quorum, §41 of the General Construction Law imposes such a requirement upon the Association. In addition, even if it is argued that §41 of the General Construction Law is inapplicable, §707 of the Not-for-Profit Corporation Law nonetheless requires that action may be taken only by a quorum of directors.

Third, it appears that the Board of Directors conducts public business and performs a governmental function for CUNY. Having spoken with a representative of CUNY, I was informed that the activity fee is mandatory and paid by all students. From my perspective, the function of the Directors regarding the means by which the fees are expended is reflective of a governmental function. In essence, it appears that the Association performs a function for CUNY that would, but for the existence of the Association, be performed by CUNY. Stated differently, the Association would not apparently exist but for its relationship with CUNY. Further, it also appears that Baruch College would perform the duties carried out by the Association if the Association did not exist. If these assumptions are accurate, I believe that the student Association is a public body which conducts public business and performs a governmental function for CUNY.

I would like to point out that the definition of "public body" discussed in the preceding paragraphs differs from the definition that appeared in the Open Meetings Law as originally enacted. Under the original statute, it was unclear whether committees, subcommittees and similar advisory bodies were subject to the Law. However, I believe that the definition as amended clearly includes such advisory bodies within the scope of the Law. Moreover, this point was confirmed in a recent decision, which found that a mayor's advisory task force is subject to the Open Meetings Law based upon the rationale I have offered above [see Matter of Syracuse United Neighbors v. City of Syracuse, 437 AD 2d 466 (Fourth Department, Appellate Division, March 27, 1981)].

Your second area of inquiry pertains to the use of a tape recorder at a meeting of a public body subject to the Open Meetings Law. In terms of background, until mid-1979, there had been but one judicial determination regarding the use of tape recorders at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee on Public Access to Records had consistently advised that the use of tape recorders should not be prohibited in situations in which the devices used are inconspicuous, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was essentially confirmed in a decision rendered in June of 1979. That decision arose when two individuals sought to bring their tape recorders to a meeting of a school board. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case

> "...was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct

> their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent the possibility of star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority".

Based upon the advances in technology and the enactment of the Open Meetings Law, the court in Ystueta found that a public body cannot adopt a general rule that prohibits the use of tape recorders.

In the Committee's view, the principle enunciated in Davidson remains valid, i.e., that a public body may prohibit the use of mechanical devices, such as tape recorders or cameras, when the use of such devices would in fact detract from the deliberative process. However, since a hand held, battery operated cassette tape recorder would not detract from the deliberative process, the Committee does not believe that a rule prohibiting the use of such devices would be reasonable or valid.

It is important to point out that a recent opinion of the Attorney General is consistent with the direction provided by the Committee. In response to the question of whether a town board may preclude the use of tape recorders at its meetings, the Attorney General reversed earlier opinions on the subject and advised that:

> "[B]ased upon the sound reasoning expressed in the Ystueta decision, which we believe would be equally applicable to town board meetings, we conclude that a town board may not preclude the use of tape recorders at public meetings of such board. Our adoption of the Ystueta decision requires that the instant opinion supersede the prior opinions of this office, which are cited above, and which were rendered before Ystueta was decided".

In view of the foregoing, I do not believe that a public body can prohibit the use of tape recorders at open meetings.

Lastly, as indicated earlier, I engaged in a conversation with a CUNY official, who disagrees with the opinion expressed herein.

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

BY: 

Pamela Petrie Baldasaro
Assistant to the Executive Director

PPB:RJF:ss

cc: Lester Freundlich
Henry Wilson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-674

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

September 3, 1981

Mrs. Elaine Hartnagel
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Hartnagel:

I have received your letter of August 25 in which you requested an advisory opinion.

According to your letter, on August 24, you contacted the office of the Palmyra Village Clerk and requested a copy of the minutes of a meeting of the Board of Trustees held on August 10. You were informed that the minutes were not ready and that James De Point, a member of the Board, requested that the minutes should not be disclosed until approved by the Board. Further, you wrote that at a meeting held on August 24, Mr. De Point moved to preclude disclosure of the minutes at any time until they have been approved by the Board.

I would like to offer the following observations regarding your inquiry.

First, I would like to direct your attention to §101 of the Open Meetings Law concerning minutes. Subdivision (1) of the cited provision prescribes the minimum requirements concerning the contents of minutes of open meetings. Subdivision (2) concerns minutes of executive sessions, which must be prepared only when action is taken during an executive session. Subdivision (3) states in brief that minutes of open meetings shall be compiled and made available within two weeks of such meetings and that minutes of executive sessions must be compiled and made available within one week of the executive sessions during which action was taken.

In view of the direction provided in §101 of the Open Meetings Law, minutes of an open meeting held on August 10 must in my view be compiled and made available within two weeks of that date. Therefore, by August 24, I believe that the minutes should have been available to you.

It is noted that the provisions concerning the time limits within which minutes must be compiled were enacted in a series of amendments to the Open Meetings Law that became effective on October 1, 1979. After that legislation passed, but before its effective date, the Committee transmitted a memorandum to all public bodies in the State offering advice and assistance with respect to the scope and interpretation of the amendments to the Law. At that time, the Committee recognized that in many instances public bodies might not convene within two weeks after a meeting and that, therefore, there might be no opportunity to approve minutes of meetings within the two week time period specified in the Law. Although it was suggested that minutes, whether approved or otherwise, be made available within the time limits specified in the Law (i.e. two weeks), it was also recommended that such minutes might be marked as "unapproved", "draft", or "non-final", for example. By so doing, the public has the ability to learn generally what transpired at a meeting, but concurrently, notice is given that minutes are subject to change, and the members of a public body are thereby given a measure of protection.

In sum, it is reiterated that minutes of open meetings must be compiled and made available within two weeks of such meetings. Further, if the motion to which you made reference was passed, I believe that it is void to the extent that it conflicts with the Open Meetings Law [see Open Meetings Law, §105(1)].

Enclosed for your consideration is a copy of the memorandum distributed to public bodies in 1979, a copy of the Open Meetings Law, which is attached to the memorandum, and an explanatory pamphlet that may be useful 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:ss

cc: Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-675

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

September 4, 1981

Clark A. Tooly
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tooly:

As you are aware, I have received your letter of August 28, in which you raised several questions regarding the Open Meetings Law.

Your first question involves the "course of action" that may be taken by a village trustee who was not notified of a special meeting of a board of trustees on which he serves during which "important Village business was conducted". You added during our telephone conversation that during the meeting for which you were given no notification, action was taken by the three members present.

In my opinion, if no reasonable attempt was made to provide you with notice of the meeting in question, the action taken by the Board may be of no effect, even though three members may have cast an affirmative vote.

In this regard, I direct your attention initially to §97(2) of the Open Meetings Law, which defines "public body" to mean:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

One of the conditions precedent to conduct public business involves the requirement of a quorum. From my perspective, under the circumstances that you described, even though three, a majority of the membership of the Village Board of Trustees, may have been present and voted, its gathering did not necessarily constitute a "quorum". The term "quorum" is defined in §41 of the General Construction Law, which has been in effect for decades. In relevant part, §41 states that:

> "[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".

As indicated by the language quoted above, the Village Board of Trustees may conduct its business and carry out its duties only by means of a "quorum". However, under the circumstances, one of the conditions precedent to the convening of a quorum involves "reasonable notice to all of" the members. Since reasonable notice was not given to you, I do not believe that a quorum was present, even though three members, a majority, convened. Further, since only a statutory quorum has the capacity to carry out the duties of a public body, it is my view that any action taken by the three members present at the special meeting is invalid.

In terms of legal action that may be taken, §102 of the Open Meetings Law prescribes the means by which the Law may be enforced. In relevant part, subdivision (1) of §102 states that:

> "[A]ny aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part".

Based upon the language quoted above, if, for example, action was taken in violation of the Open Meetings Law, after having initiated a proceeding under Article 78 of the Civil Practice Law and Rules, a court may in its discretion and upon good cause shown invalidate action taken in violation of the Open Meetings Law. It is also possible that injunctive relief could be sought in an effort to enjoin action taken in violation of the Law.

Second, you requested advice regarding the procedure by which notice should be given in situations in which a meeting is scheduled less than a week in advance. In this regard, §99(1) of the Open Meetings Law concerning meetings scheduled at least a week in advance requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous, public locations not less than seventy-two hours prior to such meetings. Subdivision (2) pertains to any meetings scheduled less than a week in advance and requires that notice be given in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, if, for example, a meeting is scheduled less than a week in advance, at the very least, the person designated to give notice must contact at least two representatives of the news media, perhaps by telephone, and post a notice in the locations designated by the Board for posting at a reasonable time prior to the meeting.

And third, you have asked whether a public body may enter into an executive session to discuss disagreement expressed by a member of the Board regarding the contents of unapproved minutes. As you are aware, the Open Meetings Law permits a public body to enter into an executive session only for the purposes of discussing one or more among

eight topics deemed appropriate for executive session [see §100(1)(a) through (h)]. As such, it is clear that a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, the subjects that may be discussed in executive session are limited to those listed in the provision cited above. In my view, it is doubtful that a discussion of the contents of unapproved minutes, particularly in the case of minutes of an open meeting, would constitute a proper subject for entry into an executive session. If my assumption is accurate, the subject matter in question would be required to 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:ss

cc: Board of Trustees, Village of Dolgeville

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-676

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

September 4, 1981

Mr. James G. Elliott
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Elliott:

I have received your letter of August 27 in which you requested an advisory opinion under the Open Meetings Law.

According to your letter, on August 25, you submitted a written request to the Clerk of the Village of Palmyra for minutes of a meeting held on August 10. However, at a meeting held on August 24, the Board apparently voted unanimously not to release minutes that had not been approved, notwithstanding the advice rendered by the Village Attorney.

I would like to offer the following observations regarding the situation that you described.

First, I would like to direct your attention to §101 of the Open Meetings Law concerning minutes. Subdivision (1) of the cited provision prescribes the minimum requirements concerning the contents of minutes of open meetings. Subdivision (2) concerns minutes of executive sessions, which must be prepared only when action is taken during an executive session. Subdivision (3) states in brief that minutes of open meetings shall be compiled and made available within two weeks of such meetings and that minutes of executive sessions must be compiled and made available within one week of the executive sessions during which action was taken.

In view of the direction provided in §101 of the Open Meetings Law, minutes of an open meeting held on August 10 must in my view be compiled and made available within two weeks of that date. Therefore, by August 24, I believe that the minutes should have been available to you.

Second, it is noted that the provisions concerning the time limits within which minutes must be compiled were enacted in a series of amendments to the Open Meetings Law that became effective on October 1, 1979. After that legislation passed, but before its effective date, the Committee transmitted a memorandum to all public bodies in the State offering advice and assistance with respect to the scope and interpretation of the amendments to the Law. At that time, the Committee recognized that in many instances public bodies might not convene within two weeks after a meeting and that, therefore, there might be no opportunity to approve minutes of meetings within the two week time period specified in the Law. Although it was suggested that minutes, whether approved or otherwise, be made available within the time limits specified in the Law (i.e. two weeks), it was also recommended that such minutes might be marked as "unapproved", "draft", or "non-final", for example. By so doing, the public has the ability to learn generally what transpired at a meeting, but concurrently, notice is given that minutes are subject to change, and the members of a public body are thereby given a measure of protection.

In sum, it is reiterated that minutes of open meetings must be compiled and made available within two weeks of such meetings. Further, the motion to which you made reference precluding the disclosure of unapproved minutes is in my view void to the extent that it conflicts with the Open Meetings Law.

Although the Committee on Public Access to Records has no authority to enforce the Open Meetings Law, often the opinions rendered by the Committee are persuasive and serve to avoid future problems regarding the interpretation of the Law. To inform the Board of Trustees of this opinion, a copy will be sent to its members.

Enclosed for your consideration is a copy of the memorandum distributed to public bodies in 1979, a copy of the Open Meetings Law, which is attached to the memorandum, and an explanatory pamphlet that may be useful 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

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Village Board of Trustees

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2187
OML-AO-677

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

September 8, 1981

Mr. George E. Phelps
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Phelps:

I have received your letter of August 27 which concerns a request directed to the Middle Island Public Library.

Specifically, you directed a request to the records access officer of the Middle Island Public Library on August 7 for transcripts of hearings held in May and June. As of August 19, you had not received a response, and at a meeting held on that date you again requested the transcripts. The request, however, was denied.

I would like to offer the following observations regarding the situation that you described.

First, it is emphasized that the Freedom of Information Law is an access to records law. Stated differently, as a general rule, an agency need not create a record in response to a request [see attached, Freedom of Information Law, §89(3)]. If, for example, public hearings were held, but no transcripts were prepared, the Middle Island Public Library would be under no obligation to create a a transcript on your behalf.

Second, assuming that the transcripts in question do exist, it would appear that they are available, for their contents would have become known to any person present at the hearings.

It is noted, however, that the status of public libraries under the Freedom of Information Law has not been finally determined. In this regard, I would like to point out that there are several types of libraries that may be characterized as "public". They include library sytems, cooperative libraries, free association libraries and public libraries. In some instances, a "public library" may be an independent not-for-profit corporation that has a relationship with several units of government, but which itself is not government. In other instances, a public library may be part and parcel of a governmental entity. In the case of the latter, public libraries is my view clearly fall within the scope of the Freedom of Information Law. In the case of the former, the coverage of the Freedom of Information Law is not entirely clear. Without greater knowledge of the nature of the Middle Island Public Library, I could not conclude with certainty that it is subject to the Freedom of Information Law.

Third, with respect to the time limits for response to requests, §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations provide that an agency must respond to a request within five business days of the receipt of a request. The response can take one of three forms. It can grant access, deny access, and if so, the denial should be in writing stating the reasons, or the receipt of a request may be acknowledged in writing if more than five days is necessary to review or locate the records and determine rights of access. When the receipt of the request is acknowledged within five business days, the agency has ten additional days to grant or deny access. Further, if no response is given within five business days of receipt of a request or within ten days of the acknowledgment of the receipt of a request, the request is considered "constructively" denied [see regulations, §1401.7 (b)].

In my view, a failure to respond within the designated time limits results in a denial of access that may be appealed to the head of the agency or whomever is designated to determine appeals. That person or body has seven business days from the receipt of an appeal to render a determination. In addition, copies of appeals and the determinations that follow must be sent to the Committee [see Freedom of Information Law, §89(4)(a)].

Fourth, another provision of law might be relevant. Specifically, §260-a of the Education Law states in relevant part that:

> "[E]very meeting, including a special district meeting, of a board of trustees of a library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a purpose of one million or more, which receives more than ten thousand dollars in state aid shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Under the provision quoted above, virtually all of the types of libraries characterized as "public libraries" are subject to the provisions of Article 7 of the Public Officers Law, which is commonly known as the Open Meetings Law, if they receive ten thousand dollars or more in state aid. Therefore, if the Middle Island Public Library receives ten thousand dollars or more in state aid, it would be subject to the provisions of §260-a of the Education Law.

Under the Open Meetings Law, each public body subject to its provisions is required to create minutes. Here I direct your attention to §101(1) of the Open Meetings Law, which states that:

> "[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 matter formally voted upon and the vote thereon."

Further, §101(3) requires that minutes of open meetings be compiled and made available to the public within two weeks of such meetings.

Lastly, it is noted that, based upon the direction given in §101(1), minutes need not consist of a verbatim transcript of all comments made at an open meeting. As indicated in the cited provision, minutes of open meetings must include references to all motions, proposals, resolutions, matters voted upon and the date and the vote.

If you could provide more specific information regarding the situations and the nature of the Middle Island Public Library, perhaps I could provide a more specific 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:jm

Encs.

cc: Middle Island Public Library

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-678

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

September 9, 1981

Ms. Kathryn Thomas
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Thomas:

I have received the news articles that you sent regarding the Fulton County Long Term Task Force. Based upon their contents, you requested that I review the make-up of that entity.

Having read the articles, the "makeup" of the Task Force remains unclear. Although both articles made reference to the attendance of representatives of several legislators, I do not believe that those representatives are members of the Task Force. Further, nothing in the articles indicates who the members of the Task Force are.

In order to gain additional information regarding the Task Force, I contacted James Mraz, Senior Planner in the Fulton County Planning Department, for reference was made to Mr. Mraz in one of the articles.

Mr. Mraz graciously provided me with a history of the Task Force. Based upon my conversation with him, some time ago there was a study conducted by the County Planning Department in which it was recommended that the County Board of Supervisors establish some sort of a body to study long term care. While that proposal did not receive significant support, the fact that the issue was raised led to various individuals volunteering their services in an effort to study the issue. As I understand it, the volunteers became known as the Fulton County Long Term Task Force.

Mr. Mraz informed me that the Task Force will seek to develop a plan, but that its recommendations will not be binding upon any governmental official or governmental entity. He also informed me that the Task Force has no specific membership and that individuals have been and might be added to it.

Based upon the information provided by Mr. Mraz, I could not conclude with certainty that the Task Force is a public body subject to the Open Meetings Law. Although it has some connection with the County, that connection appears to be tenuous and unofficial at best. Moreover, I know of no judicial determination that deals with an entity similar to the Task Force. Consequently, it is reiterated that I could not advise with certainty that the Task Force is subject to the Open Meetings Law.

Notwithstanding the absence of specific advice, Mr. Mraz told me that the Task Force has decided to permit any member of the public to attend its meetings. Consequently, it would appear that the issue of whether or not the Task Force is subject to the Open Meetings Law is unimportant, for you or any other person may attend 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
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-1629

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

September 10, 1981

Mr. Dale A. Nicholson
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nicholson:

I have received your letter of September 3 in which you requested an advisory opinion.

Specifically, the organization that you represent, the Concerned Citizens of Germantown, has requested that the Germantown Economic Development Committee (GEDC), provide access to the minutes of its meetings. Nevertheless, according to your letter, the Chairman of the GEDC, Mr. Edward Zajac, indicated that no minutes are taken at such meetings. You have also indicated that the GEDC is in your view a public body, for it was appointed by the Town Supervisor or the Town Board.

I would like to offer the following observations with respect to your inquiry.

First, although you cited the Freedom of Information Law as the basis for your contentions, the applicable statute is the Open Meetings Law, a copy of which is attached.

Second, I concur with your contention that the GEDC 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 conduct 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, or committee or subcommittee or other similar body of such public body."

From my perspective, each of the conditions required to be met to determine that the GEDC is a public body may indeed be met.

The GEDC is an entity which, according to our conversation, consists of more than two members. It is required to conduct its business by means of a quorum under §41 of the General Construction Law, even if its membership includes members of the public and not public officers, and even if the action that created it makes no reference to a quorum. Further, the committee in question conducts public business and performs a governmental function for a public corporation, in this instance, the Town of Germantown.

Moreover, although the status of committees, subcommittees and similar advisory bodies had been unclear under the Open Meetings Law as originally enacted, the amended definition of "public body" makes specific reference to committees, subcommittees and similar bodies. In addition, in a recent decision rendered by the Appellate Division, Fourth Department, it was determined that advisory bodies created by the head of an agency, in that case a mayor, constituted public bodies subject to the Open Meetings Law in all respects [Syracuse United Neighbors v. City of Syracuse, 437 NYS 2d 466, ___ AD 2d ___ (1981)].

In view of the foregoing, I believe that the GEDC is a "public body" required to comply with the Open Meetings Law.

Third, §101 of the Open Meetings Law provides the minimum requirements concerning the contents of minutes. In the case of minutes of open meetings, subdivision (1) of §101 states that:

> "[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 action taken in executive session, subdivision (2) of §101 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..."

It is also noted that §101(3) requires that minutes of open meetings be compiled and made available within two weeks of such meetings and that minutes of executive session be compiled within one week of an executive session.

As you requested, in order to inform the GEDC of this opinion, a copy will be sent to Mr. Zajac.

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: Edward Zajac

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2195
OML-AO-680

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

September 11, 1981

Edward J. Backowski
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Backowski:

As you are aware, your letter of September 8 addressed to Attorney General Abrams has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Open Meetings and Freedom of Information Laws.

You wrote that, at a special meeting of the Summitville Fire District Board of Commissioners, the Board adopted its present budget. However, you indicated that no notice was given and that no roll call vote was taken on the budget. Further, since the public was not present, there was no opportunity to offer comments. You have asked whether the budget is legal or whether an open meeting must be held to enable the public to comment and "see how their elected commissioners vote".

I would like to offer the following observations with respect to your inquiry.

First, I believe that a board of commissioners of a fire district is subject to the Open Meetings Law. The Board is in my view a "public body", which is defined to mean:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body" [see attached Open Meetings Law, §97(2)].

In my opinion, each of the conditions required to be found to determine that the Board is a public body can be met. The Board is an entity consisting of more than two members. It is required to conduct its business by means of a quorum pursuant to §41 of the General Construction Law. That provision states in essence that any entity consisting of three or more public officers or persons that performs its duties collectively, as a body, can do so only by means of a quorum, a majority of its total membership. The Board clearly conducts public business and performs a governmental function [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. Further, its functions are performed for a public corporation, a fire district [see Town Law, §174(6)]. Based upon the foregoing, I believe that the Board in question is a public body subject to the Open Meetings Law in all respects.

Second, since the Board is subject to the Open Meetings Law, its meetings must be convened open to the public. It is noted that the scope of the Open Meetings Law has been given an expansive interpretation by the courts. In this regard, it has been held that the definition of "meeting" [see §97(1)], encompasses any gathering of a quorum of a public body for the purpose of discussing public business, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Third, a public body cannot close a meeting to discuss the subject of its choice. Section 100(1)(a) through (h) of the Law specifies and limits the subjects that may appropriately be considered in a closed or "executive" session. From my perspective, a discussion of the budget would not fall within any of the grounds for executive session. Further, it has been held that budgetary matters are not among the subjects that may properly be considered during an executive session (see Orange County Publications, Division of Ottoway Newspapers, Inc. v. the City of Middletown, The Common Council of the City of Middletown, Sup. Ct., Orange Cty., December 6, 1978).

Fourth, §99 of the Open Meetings Law prescribes the requirements concerning notice of meetings. Section 99(1) concerning meetings scheduled at least a week in advance requires that notice be given to the news media (at least

two) and posted for the public in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 97(2) pertains to meetings scheduled less than a week in advance and requires that notice be given in the same manner as described in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. As such, notice is required to be given to the news media and to the public by means of posting prior to all meetings, whether regularly scheduled or otherwise.

Fifth, you intimated that the public should be able to comment at a meeting. In this regard, please be advised that the Open Meetings Law permits the public to attend and listen to the deliberations of a public body; it is silent with respect to public participation. Consequently, if a public body wants to permit public participation at a meeting, it may do so; however, it need not.

Sixth, you indicated there was no roll call vote taken with respect to the budget. Here I direct your attention to the Freedom of Information Law. That Law deals generally with public rights of access to government records. As a general rule, an agency, such as the Board, need not create a record in response to a request. Nevertheless, one of the exceptions to that rule is found in §87(3)(a), which requires that each agency shall maintain:

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

Therefore, in every instance in which a public body votes, a voting record must be compiled that identifies each member who voted and the manner in which he or she voted.

And seventh, you asked whether the budget would be legal if the Open Meetings Law was violated at the meeting during which it was adopted. In my opinion, the budget is legal unless and until a court determines to the contrary. Here I direct your attention to §102(1) of the Open Meetings Law, which states that:

> "[A]ny aggireved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part".

It is noted that the cited provision also states that:

> "[A]n 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".

Based upon the language quoted above, it would appear that unless a court invalidates the budget due to violations of the Open Meetings Law, the budget remains in effect.

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:ss

Attachment

cc: Summitville Fire District Board of Commissioners

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-681

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

September 11, 1981

Louis Caracciolo
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Caracciolo:

I have received your recent letter in which you requested assistance regarding the Open Meetings Law.

You have asked for advice regarding the appropriate steps that should be taken to provide notice prior to meetings. Specifically, the Mayor of the Village of Bainbridge informed you that the Board is not required to post notice of meetings or publish it in a newspaper. You indicated further that the Mayor stated that, once a year, the Village places a notice in the newspaper giving the time and place of all meetings and that such a step is all that is required.

The requirements concerning notice of meetings are found in §99 of the Open Meetings Law, a copy of which is attached for your review.

Subdivision (1) of §99 pertains to meetings scheduled at least two weeks in advance and states that notice of the time and place of such meetings shall be given to the news media (at least two) and posted for the public in one or more designated, conspicuous public locations at least seventy-two hours prior to such meetings.

Subdivision (2) of §99 concerns meetings scheduled less than a week in advance and states that notice must be given in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings.

In view of the foregoing, it is clear that notice of all meetings must be posted prior to the meetings.

It is noted, however, that in situations in which a public body has developed a schedule of regular meetings, it has been advised that a single notice to the news media is sufficient, so long as additional notice is given in accordance with the Open Meetings Law with respect to meetings that are not regularly scheduled. Consequently, one notice to the news media covering a period of scheduled meetings would in my view be sufficient. Nevertheless, as indicated previously, a notice should be posted in designated locations prior to all meetings.

Subdivision (3) of §99 states that a public body need not pay to place a legal notice in a newspaper, even though notice must nonetheless be given to the news media in accordance with subdivisions (1) and (2) described above.

In sum, based upon the provisions of the Open Meetings Law cited above, I disagree with the contention expressed by the Mayor, for notice must be posted prior to all 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
Executive Director

RJF:ss

Enclosure

cc: Mayor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2225
OML-AO-682

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

September 16, 1981

Mr. Robert L. Pardy
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Pardy:

I have received your letter of September 15 in which you requested assistance regarding a situation pertaining to the Board of Fire Commissioners of the Highland Fire District.

Specifically, according to your letter, on September 14, at a meeting of the Board, several subjects were considered regarding the proposed 1982 budget. You requested a copy of the proposed budget, but the Board refused to permit you to inspect it. In addition, the Chairman indicated that the Board would enter into an executive session and that anyone else present should leave. After you protested, and you asked what the purpose for the executive session was, and you were told that "they didn't have to tell anyone".

I would like to offer the following comments with respect to the situation that you described.

First, I believe that a board of commissioners of a fire district is subject to the Open Meetings Law. The Board is in my view a "public body" which is defined to mean:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body [see attached Open Meetings Law, §97(2)].

In my opinion, each of the conditions required to be found to determine that the Board is a public body can be met. The Board is an entity consisting of more than two members. It is required to conduct its business by means of a quorum pursuant to §41 of the General Construction Law. That provision states in essence that any entity consisting of three or more public officers or persons that performs it duties collectively, as a body, can do so only by means of a quorum, a majority of its total membership. The Board clearly conducts public business and performs a governmental function [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. Further, its functions are performed for a public corporation, a fire district [see Town Law, §174(6)]. Based upon the foregoing, I believe that the Board in question is a public body subject to the Open Meetings Law in all respects.

Second, since the Board is subject to the Open Meetings Law, its meetings must be convened open to the public. It is noted that the scope of the Open Meetings Law has been given an expansive interpretation by the courts. In this regard, it has been held that the definition of "meeting" [see §97(1)], encompasses any gathering of a quorum of a public body for the purpose of discussing public business, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Third, before entering into an executive session, a public body must follow the procedure specified in §100(1) of the Open Meetings Law. The cited provision states in relevant part 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..."

Based upon the language quoted above, a public body must take three steps before it may enter into an executive session: a motion must be made to go into an executive session during an open meeting; the motion must identify in general terms the topic to be considered; and the motion must be carried by a majority of the total membership of the public body.

Fourth, a public body cannot enter into an executive session to discuss the subject matter of its choice. On the contrary, paragraphs (a) through (h) of §100(1) specify and limit the areas of discussion that may appropriately be considered during an executive session.

If, for example, the proposed budget was the subject of discussion during the executive session, I do not believe that an executive session would have been proper. Further, it has been held that a discussion of a budget by a public body does not fall within any of the grounds for executive session [see Orange County Publications v. The Common Council of the City of Middletown, Sup. Ct., Orange Cty., December 6, 1978].

Sixth, in terms of your request for the proposed budet, I believe that such a record would be available. In this regard, I direct your attention to the Freedom of Information Law.

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

The only relevant ground for denial in my view would be §87(2)(g), which states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policy or determinations must be made available.

Under the circumstances, it would appear that a proposed budget would be available, for it would consist of statistical or factual information accessible under §87(2)(g)(i) [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd with no opinion, 43 NY 2d 754 (1977)].

It is noted, however, that an agency is not requited to respond immediately to a request. In the future, it is suggested that you submit a request for records in writing, reasonably describing the records in which you are interested. From its receipt of a request made under the Freedom of Information Law, an agency must respond within five business days.

Enclosed for your consideration are copies of the Open Meetings Law, the Freedom of Information Law and an explanatory pamphlet that may be useful 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

Encs.

cc: Board of Fire Commissioners

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2211
OML-AO-683

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

September 22, 1981

Ms. Rita L. Kwetcian
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Kwetcian:

I have received your letter of September 17 in which you raised a series of questions regarding the implementation of the Open Meetings Law by the Northern Adirondack Central School Board. You also asked for information relative to the Freedom of Information Law.

According to your letter, the School Board held a regular meeting on August 3 during which "the date, place and separate propositions of the budget vote were set." However, during the next week, you read in a local newspaper that the voting procedure had changed and learned that a "special, unpublished meeting was held on August 7, 1981, and the date, place and propositions to be voted on as one were changed." You have asked whether a special meeting, such as the one held on August 7, may be convened without notifying the public.

In this regard, I direct your attention to §99 of the Open Meetings Law. Subdivision (1) of §99 pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Subdivision (2) of §99 pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and posted for the public in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings.

In view of the requirements of §99, it is clear that notice must be given to the news media and the public by means of posting prior to all meetings, whether they are regularly scheduled or considered "special" or "emergency". In situations in which a special meeting is held on short notice, at the very least, I believe that a public body would be required to give notice to the news media, perhaps by means of a telephone communication, and in addition, notice of such meetings should be posted conspicuously as required by the Law.

I would also like to point out that §102 of the Law states that if a judicial proceeding is initiated under the Open Meetings Law and if a court finds that action was taken in violation of the Open Meetings Law, the court may in its discretion and upon good cause shown nullify action taken in violation of the Law. The same provision also states that:

> "[A]n 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. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes."

As such, action taken during a meeting for which no notice was given may by nullified only if good cause can be demonstrated, and only if a failure to give notice was "inadvertent".

You also wrote that during the Board's meeting of August 3, executive sessions were held on five occasions for the following reasons:

> "1. To create a teacher's position
>
> 2. To discuss cafeteria manager's salary
>
> 3. To read qualifications of prospective temporary teachers
>
> 4. Consideration of Committee on Handicapped minutes

5. To discuss clerk of works for new bus garage. (Previous to this regular meeting, he had apparently been on the job. This hiring appeared to be just a formality.)"

Relevant to several of the areas of discussion in executive session that you identified is §100(1)(f) of the Open Meetings Law. The cited provision states that a public body may enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, of matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

It is noted that the language quoted above is different from the language of the exception as it was originally enacted in 1977. Under the original Open Meetings Law, public bodies often entered into an executive session to discuss matters of policy that related to personnel in general or that affected personnel tangentially. The Committee had consistently advised that the so-called "personnel" exception was intended largely to protect privacy, and not to shield matters concerning policy from public view. Therefore, the Committee recommended that the term "particular" be inserted into the exception, and the recommendation was passed and became effective on October 1, 1979. Based upon the amendments to §100(1)(f), it has become clear that an executive session regarding "personnel" may be conducted only when the discussion concerns a particular person and only when one or more of the topics listed in §100(1)(f) is considered.

The first area of executive session that you described, the creation of a teacher's position, would not in my view pertain to any particular individual; on the contrary, the issue would in my view involve a policy consideration and the manner in which public monies will be expended.

The second and third areas that you identified were likely appropriate for discussion in executive session, for they apparently involved the employment history of particular individuals or matters leading to the employment of particular individuals.

The fourth area of executive session, consideration of minutes of the Committee on Handicapped, was in my view proper. In brief, federal law requires that education records identifiable to a particular student or students are confidential. Therefore, a discussion concerning particular students would be exempted from the Open Meetings Law under §103(3), which states that the Open Meetings Law does not apply to matters made confidential by federal or state law.

The fifth area of executive session that you described appears to deal with the hiring of a particular individual. If that is accurate, I believe that an executive session would be proper under §100(1)(f).

You also wrote that, at a meeting held on June 29, "before the regular meeting was called to order, an executive session was held to consider insurance coverage for the school district." Several comments are offered regarding that gathering.

First, the courts have rendered expansive determinations concerning the scope of the Open Meetings Law and particularly its definition of "meeting" [see Open Meetings Law, §97(1)]. In brief, it has been held that any convening of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. As such, assuming that a quorum of the School Board was present to discuss insurance coverage, that gathering constituted a meeting that should have been convened open to the public and preceded by notice given in accordance with §99.

Second, as a general rule, a public body cannot conduct an executive session prior to convening an open meeting. Section 97(3) of the Law defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) prescribes a procedure that must be followed by a public body during an open meeting before an executive session may be held. The cited provision states in relevant part 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..."

Based upon the language quoted above, it is clear that an executive session is not separate and distinct from an open meeting and that an executive session may be held only after having convened an open meeting.

Third, in terms of the validity of the executive session, the nature of the discussion concerning insurance coverage is not clear. If, for example, the District considered changing insurance companies, perhaps it discussed a matter leading to the employment of a particular insurance company in the future. Under such a circumstance, it would appear that §100(1)(f) may have been applicable. Otherwise, it is in my view questionable whether an executive session could properly have been held.

You also raised questions regarding minutes of the executive session relative to the discussion of insurance coverage. With regard to minutes of executive session, §101(2) of the Open Meetings Law 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..."

As I read §101(2), minutes of executive session must be compiled only when action is taken in executive session.

As such, public bodies may generally vote during a properly convened executive session, except in situations in which the vote concerns an appropriation of public monies. However, school boards must in my view vote in public in all instances, except when a vote is taken pursuant to §3020-a of the Education Law concerning tenure.

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 board 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 2d 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, §87(3)(a) of the Freedom of Information Law 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.

In view of the foregoing, a school board may deliberate in executive session in accordance with §100(1) of the Open Meetings Law, but it may not in my opinion vote during an executive session, except when the vote pertains to a tenure proceeding.

Lastly, you also indicated that you are interested in rights of access granted by the Freedom of Information Law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (h).

In terms of the usage of the Law, §89(3) states that an applicant should submit a request in writing "reasonably describing" the records in which he or she is interested. Further, the same provision states that an agency must respond to a request within five business days of the receipt of a request.

Enclosed for your consideration are copies of the Open Meetings Law, the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural implementation of the Freedom of Information Law, and an explanatory pamphlet dealing with both laws that may be useful 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

Encs.

cc: School Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOML-AO-684

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

September 25, 1981

Mary Beth Pratt
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Pratt:

As you are aware, I have received your letter of September 19, in which you requested an advisory opinion under the Open Meetings Law.

Specifically, according to your letter, the Perinton Town Board gathered at 7:00 p.m. on August 26 prior to its regular meeting, which apparently was scheduled to begin at 7:45 p.m. When the Board was asked whether a meeting had convened at 7:00 p.m., the Town Supervisor "replied to the effect that it was an administrative review, regarding personnel matters". You indicated that the Town Attorney stated that the Board met at an employee's request "for an administrative hearing" and that the gathering had not been an executive session. You also enclosed a copy of a news article published in the Rochester Times Union on September 8, which indicates that the closed session held by the Town Board was held to review "the circumstances surrounding the firings of public works employees..." The article also mentioned that the Town Supervisor stated that "we are simply going to talk about a personnel matter... it affects a limited situation..."

I would like to offer the following comments and observations with respect to your inquiry.

First and perhaps most importantly, the definition of "meeting" appearing in §97(1) of the Open Meetings Law is broad and has been interpreted expansively by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the State's highest court, held that the definition of "meeting" encompasses any situation in

which a quorum of a public body convenes for the purpose of discussing public business. The decision specified that the Open Meetings Law and its definition of "meeting" are applicable whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Therefore, based upon the facts described in your letter and the newspaper article, I believe that the gathering of the Town Board that convened at 7:00 p.m. on August 26 constituted a "meeting" subject to the Open Meetings Law in all respects.

In addition, in our recent telephone conversation, you stated that the Board held a closed session characterized as a "workshop" to discuss its budget. Based upon the language of the Open Meetings Law and its interpretation by the courts, that gathering was also in my opinion a "meeting" that should have been convened open to the public.

Second, as indicated by the case law, the mere characterization of a meeting as an "administrative review" or "hearing" would not remove such a gathering from the scope of the Open Meetings Law. From my perspective, deliberations regarding a public body's administrative functions are clearly intended to fall within the framework of the Law.

In many instances, I would agree that a hearing of a quasi-judicial matter would fall outside the scope of the Open Meetings Law, for §103(1) of the Law exempts from its provisions quasi-judicial proceedings. Nevertheless, the newspaper article indicated that the two individuals who sought to meet with the Board had already been terminated. They were not apparently involved in a hearing convened under §75 of the Civil Service Law, for example, which is conducted by a hearing officer and is indeed quasi-judicial in nature. In short, it is reiterated that the gathering convened at 7:00 p.m. was in my opinion a meeting subject to the Open Meetings Law.

I would also like to point out that, had the gathering in question been convened open to the public, the discussion by the Board could likely have been held during an executive session. In this regard, one of the grounds for executive session is §100(1)(f), which permits a public body to enter into an executive session to discuss:

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

Under the circumstances, it appears that the Board likely discussed the employment history of the two individuals named in the news article. If that was the case, an executive session would have been proper.

With respect to the capacity to hold an executive session generally, it is emphasized that the phrase "executive session" is defined in §97(3) of the Law to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law prescribes a procedure that must be followed by a public body before it may enter into an executive session. Specifically, the cited provision states in relevant part 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..."

Based upon the language quoted above, it is clear that a public body may enter into an executive session only after having convened an open meeting and following the steps envisioned by §100(1). It is also clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting.

Third, §99 of the Open Meetings Law requires that all meetings be preceded by notice. Subdivision (1) of §99 pertains to meetings scheduled at least a week in advance and requires that notice be given to the news media (at least two) and posted in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Subdivision (2) of §99 pertains to meetings scheduled less than a week in advance and

requires that notice be given in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. As such, it is clear that notice must be given to the news media, and to the public by means of posting, prior to all meetings, whether regularly scheduled or otherwise.

Fourth, you also raised questions regarding the minutes of the meeting of August 26. In response to your request for minutes, you were informed that:

> "...since it was an administrative meeting, not an executive session, no minutes were kept".

With regard to minutes of executive sessions, §101(2) of the Open Meetings 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; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter".

In addition, §101(3) of the Law states that minutes reflective of action taken in an executive session must be compiled and made available within one week of an executive session. In view of §101(2), it has been consistently advised that minutes of an executive session must be compiled only when action is taken during an executive session. Therefore, if, for example, a public body merely deliberates during an executive session but takes no action, minutes of the executive session need not be compiled.

It is also noted that §87(3)(a) of the Freedom of Information Law requires that a voting record be compiled in every instance in which a vote is taken. Further, that provision requires that the voting record identify each member who voted and the manner in which he or she cast a vote.

Lastly, you have asked whether, if the meeting was illegal, what recourse there might be.

In this regard, although it appears that the Open Meetings Law was violated, I believe that only a court can make a final determination concerning its legality. In terms of redress, §102(1) of the Open Meetings Law states that any aggrieved person has standing to initiate a proceeding against a public body by the commencement of a proceeding under Article 78 of the Civil Practice Law and Rules. In such a proceeding, a court has the discretionary authority, upon good cause shown, to make null and void any action taken in violation of the Open Meetings Law. The cited provision, however also states that:

> "[A]n 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".

I could not comment as to whether a failure to provide notice was unintentional.

Section 102(2) states that in a proceeding brought under the Open Meetings Law:

> "...costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party".

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:ss

cc: Franz Yeomans
Richard Hagen
George Schell, Esq.
Jack Fulreader
Lake Edwards

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-685

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

October 6, 1981

Mr. Richard P. Renzi
Sullivan, Peters, Burns
& Stander
Suite 600
One Exchange Street
Rochester, NY 14614

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Renzi:

I have received your letter of September 25 in which you requested an advisory opinion under the Open Meetings Law.

Your inquiry concerns a claim by a town planning board that it was not required to conduct a meeting subject to the Open Meetings Law due to its involvement in "judicial or quasi-judicial proceedings". Specifically, a town board held a zoning hearing regarding a parcel of land located in the town. Arguments for and against were heard, and the town board then referred the matter to the planning board for its recommendations. The planning board held a hearing attended by persons for and against the application and permitted interested persons to speak. You indicated that, although the public was present, notice was not given. Further, having attempted to attend the meeting held by the planning board following the hearing, the town attorney denied access to the meeting by members of the public.

You have contended that a planning board does not engage in quasi-judicial proceedings and that, therefore, the closed meeting in question should have been open.

I would like to offer the following observations regarding your inquiry.

First, as you are aware, the Open Meetings Law, §103(1), contains an exemption regarding "judicial or quasi-judicial proceedings". Stated differently, the Open Meetings Law simply does not apply to quasi-judicial proceedings.

As such, the issue in my view is whether the planning board under the circumstances engaged in what could appropriately be characterized as a quasi-judicial proceeding. Based upon the facts presented as well as my impressions of the functions of planning boards, I do not believe that the planning board engaged in a quasi-judicial proceeding that was exempt from the Open Meetings Law.

Second, the facts indicate that the planning board was designated by the town board to render a recommendation regarding a particular controversy. Further, as I understand the situation, the planning board will not be rendering a final determination regarding the controversy, but rather will make recommendations based upon its findings. In this regard , I believe that the determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon this notion is based in great measure upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as

> "[A] term applied to the action, discretion, etc., of public administrative officials, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

Since the planning board was not engaged in deliberations upon which it would rely in making a final and binding determination, I do not believe that the gathering in question could be characterized as "quasi-judicial". On the contrary, in view of the direction provided by the town board, it would appear that the function of the planning board in this instance was largely administrative in nature.

Third, if the assumptions and conclusion reached above are accurate, I believe that the gathering from which the public was excluded was a "meeting" subject to the Open Meetings Law. It is noted that the definition

of "meeting" in §97(1) of the Open Meetings Law has been interpreted expansively by the courts. In brief, it has been found by the Court of Appeals, the state's highest court, that the definition of "meeting" encompasses any situation in which a quorum of a public body convenes to discussion public business, whether or not there is an intent to take action and regardless of the manner in which a gathering is characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

And fourth, as you are likely aware, all meetings of public bodies must be preceded by notice given to the news media and to the public by means of posting. In the case of meetings scheduled at least a week in advance, §99 (1) of the Law requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. In the case of meetings scheduled less than a week in advance, §99(2) requires that notice be given in the same manner as prescribed by §99(1) "to the extent practicable" at a reasonable time prior to such 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
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-686

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

October 6, 1981

Mrs. Kathryn Thomas
[redacted]

Dear Ms. Thomas:

As promised, I have reconsidered your inquiry relative to the status of the Fulton County Task Force on Long Term Health Care.

In terms of background, some time ago, I responded to your request for an opinion and advised, based upon the facts that you presented, that the Task Force in question is a "public body" subject to the Open Meetings Law. In fairness and in order to advise government whenever possible, a copy of that opinion was sent to various officials of Fulton County. In response to that opinion, the County Attorney wrote to me and presented a different set of facts regarding the Task Force indicating that the Task Force was in no way connected with the County. Most recently, I have received from James Hinkle of the Schenectady Gazette two documents regarding the Task Force. One document is a press release concerning the Task Force and the other, entitled "Fulton County Task Force on Long Term Health Care", makes reference to the objectives, membership, meetings, etc., of the Task Force.

In order to ensure that I understand the facts regarding the Task Force, I have contacted several individuals on your behalf. Based upon those facts, it remains unclear whether the Task Force is a "public body" subject to the Open Meetings Law.

On its face, the document, entitled "Fulton County Task Force on Long Term Health Care", would apparently indicate that the Task Force is a public body. Of particular relevance is a portion of the document specifying that the Task Force would consist of a maximum of seventeen

members, "who will be selected by the Board of Supervisors". If indeed the members were selected by the County Board of Supervisors, the Task Force would in my opinion unquestionablyconstitute a "public body" subject to the Open Meetings Law.

Nevertheless, having discussed the matter with both James Mraz of the County Planning Department and Ellen Wood, a member of the Board of Supervisors and Chairperson of the Board's Public Health Committee, I learned that the document in question represented a proposal that was not acted upon by the Board. Ms. Wood, with whom I discussed the issue at length, stated that she recommended that a task force be created, but that the Board of Supervisors did not act with respect to her proposal. Further, notwithstanding the nature of issues raised during our conversation, it could not be determined with certainty that the Task Force is a public body subject to the Law.

Despite my inability to render an opinion advising that the Task Force is subject to the Open Meetings Law, as indicated in my most recent letter to you, and as stressed by Ms. Wood, the Task Force has determined that all of its meetings will be open. As such, the issue appears to be moot.

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:ss

cc: James Mraz
Ellen Wood
Charles Caputo
James Hinkle Jr.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-687

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

October 6, 1981

Mr. Alfred L. Streppa
Streppa, Osgood, Cleary,
Persons & Gaenzle
Suite 400
19 West Main Street
P.O. Box 3060
Rochester, NY 14614

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Streppa:

I have received your letter of September 30 and appreciate your interest in compliance with the Open Meetings Law.

As the attorney for the Fairport Central School District, you have been asked to obtain an advisory opinion regarding the "intent and interpretation of the legislative declaration contained in Section 95 of the Law as it pertains to the practice of Members of the Board of Education in discussing District business matters among all of the Members over the telephone." You wrote that the conversations involve "pending or proposed matters of School District business" and that they are conducted prior to open meetings. In addition, you expressed the view that, although the conversations could not be characterized as "caucuses", they are conducted to obtain a consensus of opinion among Board members prior to meetings.

I would like to offer the following observations with respect to your inquiry.

First, the initial sentence of §95, the legislative declaration of the Open Meetings Law, states that:

> "[I]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

In view of the language quoted above, it is clear that the State Legislature intended that public bodies perform their duties "in an open and public manner", and that the public should be able to "observe" their performance and attend and listen to their deliberations. Moreover, the courts have interpreted the legislative declaration in conjunction with the definition of "meeting" [see §97(1)] broadly and have held that the scope of the Open Meetings Law includes every step of the decision making process [see e.g., Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. As such, the Law includes any convening of a quorum of a public body for the purpose of discussing public business, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, supra, and Sciolino v. Ryan, 440 NYS 2d 795, ___ AD 3d ___ (1981)].

Second, whether or not the Open Meetings Law is applicable to the conversations that you described can in my view be determined by the facts. Stated differently, if, for example, a telephone conversation is conducted by two people, I do not believe that the Open Meetings Law would apply, for something less than a quorum of the Board would be involved.

If, however, three or more members of the Board discuss the business of the Board by means of a conference call or its equivalent, I believe that the Open Meetings Law would apply and that a conference call would likely violate the Law.

While a conference call conducted among a quorum of the members of a public body would not involve the physical convening of a public body, I believe that its effect would be the same as a physical convening in terms of the

capacity to deliberate as a body. Concurrently, however, I believe that a conference call among a quorum of a public body would constitute a violation of the Open Meetings Law, for the public in such a situation would not have the capacity "to observe the performance of public officials..." In this regard, it has also been advised that an open meeting cannot be convened by means of a conference call for the same reason expressed above, i.e., that although the public might be able to hear a public body's deliberations, it could not observe the performance of public officials.

In sum, if public business is discussed by telephone by two members of the School Board, I do not believe that the Open Meetings Law would be applicable. However, if a quorum of the Board discusses public business by means of a conference call or its equivalent, it would appear that such conversations would constitute "meetings" held in 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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 688

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

October 13, 1981

Craig H. Scott
Star-Gazette and
Sunday Telegram
201 Baldwin Street
Elmira, NY 14902

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scott:

I have received your letter of October 2 in which you requested an advisory opinion under the Open Meetings Law.

In terms of background, you attached to your letter a notice to the Elmira City School District Board of Education from the Superintendent of Schools regarding an "executive meeting" of the Board scheduled for September 23. The notice specified that the purpose of the meeting was to review the status of the "Long Range Plan". A second document dated September 25 consists of a brief description of the discussion held during the meeting held on September 23. That document also indicates that the Board agreed to reconvene and continue its review of the Long Range Plan on October 1. The last item enclosed is a copy of a news article that appeared in the Elmira Star-Gazette on October 2. According to that article, more than twenty parents and teachers were ordered to leave the meeting of the Board held on October 1. The Superintendent stated that the executive session in question was proper "because it has implications for staffing and implications for property disposal". The article stated further that, although the Superintendent indicated that discussions would involve "personnel matters", he stated that no specific teachers would be discussed.

I would like to offer the following observations with respect to your letter and the documentation attached to it.

First, in my view, the cornerstone of the Open Meetings Law is its definition of "meeting". When the Open Meetings Law went into effect in 1977, numerous questions arose with respect to the scope of the definition of "meeting". Many contended that so-called "work sessions", "planning sessions", "discussion sessions", and similar gatherings during which there was merely an intent to discuss public business but no intent to take action fell outside the scope of the Law. However, in a landmark decision rendered by the Court of Appeals, the state's highest court, it was held that any gathering of a public body for the purpose of discussing public business constitutes a meeting subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which the gathering is characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Moreover, in a series of amendments to the Open Meetings Law that went into effect on October 1, 1979, the definition of "meeting" was amended and clarified to reflect the decision of the Court of Appeals.

Based upon the definition of "meeting" as it currently appears in §97(1) of the Open Meetings Law, the so-called "executive sessions" held on September 23 and October 1 were in my view "meetings" subject to the Law that should have been convened open to the public.

Second, it is emphasized that the phrase "executive session" is defined by §97(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. In addition, §100(1) of the Law prescribes a procedure that must be followed before a public body may enter into an executive session. The cited provision states in relevant part 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..."

Based upon the language quoted above, a public body must complete three steps during an open meeting before it may enter into an executive session. Specifically, a motion to enter into an executive session must be made during an open meeting, the motion must identify in general terms the subject or subjects to be considered, and the motion must be carried by a majority vote of the total membership of the public body. Therefore, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of a meeting during which the public may be excluded. It is also clear that, as a general rule, a public body cannot convene a closed or executive session without first having convened an open meeting. In addition, if the procedure prescribed by §100(1) is appropriately followed, in a technical sense, it cannot be determined in advance of a meeting that an executive session will indeed be held, for it cannot be known in advance whether a motion to enter into an executive session will indeed be carried by a majority of the total membership of a public body.

Third, as you intimated in your letter, notice must be given prior to all meetings. Section 99(1) of the Open Meetings Law concerning meetings scheduled at least a week in advance requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 99(2) pertains to meetings scheduled less than a week in advance and requires that notice be given in the same manner as prescribed by §99(1) "to the extent practicable" at a reasonable time prior to such meetings. In view of the direction concerning notice provided in §99, it is clear that notice must be given to the news media and to the public by means of posting prior to all meetings, whether regularly scheduled or otherwise.

If the notice requirements prescribed by §99 of the Open Meetings Law were not followed with respect to the meetings that you have described, I believe that the Law was violated.

Fourth, the Open Meetings Law contains eight grounds for closed or executive sessions. In my view, a meeting of a public body is presumed to be open unless and until a basis for entry into executive session arises and the appropriate procedural steps for entry into an executive session are completed.

The situation at issue, the possibility of school closings, has arisen on numerous occasions. In my opinion, a school board would not have a basis for entry into executive session to discuss such an issue.

It is noted that, under the Open Meetings Law as originally enacted, the so-called "personnel" exception for executive session differed from the language of the analagous exception in the current Law. In its initial form, §100(1)(f) of the Open Meetings Law permitted a public body to 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..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" in a tangential manner or in relation to policy concerns. However, the Committee consistently advised that §100(1)(f) was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

In an attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §100(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §100(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §100(1)(f) are considered. Since, as the Superintendent indicated, no particular individual was the subject of the executive sessions, I do not believe that the executive sessions in question were appropriately held. On the contrary, I believe that the deliberations of the Board should have been conducted during open meetings.

In addition, the discussion in executive session apparently dealt with long range plans, which may at some future date involve personnal lay-offs. In this regard, even in a situation in which a public body discussed actual rather than potential lay-offs of a group of public employees, it was held judicially that lay-offs of personnel due to budget cuts would not constitute a proper subject for an executive session (Orange County Publications v. The Common Council of the City of Middletown, Sup. Ct., Orange Cty., December 6, 1978).

The only other potentially relevant ground for executive session with respect to the discussions in question appears to have been §100(1)(h). That provision permits a public body to enter into an executive session to discuss:

> "...the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof".

Based upon the materials attached to your letter, the focus of the discussions was school closings. At this juncture, it does not appear that there is any intent to purchase, sell or lease real property in the near future. Moreover, since there has apparently been no decision reached to sell or lease real property, it is difficult to envision how publicity would substantially affect the value of real property. If my assumptions are accurate, I do not believe that §100(1)(h) of the Open Meetings Law constituted a valid basis for entry into executive session.

In sum, the gatherings of the School Board to which you made reference were in my opinion "meetings" subject to the Open Meetings Law that should have been convened open to the public and preceded by notice given in accordance with §99 of the Law. In addition, as I understand the facts, the Board likely had no ground for entry into executive 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
Executive Director

RJF:ss

cc: James E. Carter, Superintendent
Carl T. Hayden, President
Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-68

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

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[redacted]
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 20, 1981

Steven Billmyer
Jonathan Rosenblum
The Cornell Daily Sun
109 East State Street
Ithaca, NY 14850

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Messrs. Billmyer and Rosenblum:

I have received your letter of October 8 in which you requested an advisory opinion under the Open Meetings Law.

Your question is whether the Cornell University Board of Trustees may "limit the number of spectators at an open meeting of the full Board of Trustees or at an open meeting of one of its committees."

In terms of background, on May 30, the University began to limit the number of persons who could attend meetings of the Board of Trustees to twenty. Further, according to your letter, the University established a rule requiring that individuals interested in attending meetings obtain admission tickets in advance of meetings. As a consequence, at the May meeting, students who did not have tickets were prohibited from attending. In addition, you indicated that at the March, 1980 meeting, 300 people attended the Board of Trustees' meeting, many of whom were apparently vocal with respect to their concerns about a proposed tuition increase. Due to the noisiness and disruptions of those in attendance, the Board of Trustees adjourned the meeting prior to the completion of its agenda. You indicated that University officials stated that the incident played a significant role in its determination to limit attendance.

I would like to offer the following observations and opinions with respect to your inquiry.

First, based upon a determination of the Appellate Division in Holden v. Board of Trustees of Cornell University [440 NYS 2d 58, ___ AD 2d ___ (1981)], the Cornell University Board of Trustees is subject to the Open Meetings Law when it deals with matters relating to Cornell's four statutory colleges.

Second, it has been held on numerous occasions that a public body may establish reasonable rules to govern its own proceedings. Therefore, the question is whether a rule establishing a limitation of twenty persons who may attend a meeting is reasonable.

From my perspective, the limitation in question would not be reasonable.

Further, although the news media may have a substantial interest in attending and reporting on meetings of public bodies, the Open Meetings Law does not distinguish among rights of members of the news media as opposed to rights of others. Stated differently, the Open Meetings Law does not grant rights to the news media in excess of those granted to others. Moreover, it is noted that §98(a) of the Open Meetings Law states in relevant part that "[E]very meeting of a public body shall be open to the general public..."

Third, it may be difficult if not impossible to draw a line of demarcation with respect to the number of those who may attend in terms of what may be a reasonable limitation as opposed to what may be unreasonable. In my view, the Open Meetings Law, like all laws, should be given a reasonable interpretation. To some extent, what is reasonable may depend upon circumstances. For instance, questions have in the past arisen regarding the size of a room in which a meeting is held in relation to the number of persons who might want to attend. If, for example, a public body has the option of meeting in a conference room that accommodates twenty persons and an auditorium that accommodates hundreds, and if there is substantial interest in attending, I believe that it would be unreasonable to hold a meeting in the smaller facility. However, in small communities, there may be no facility large enough to accommodate large numbers of persons. In such cases, a public body may have no choice but to hold its meetings in facilities that cannot accommodate every individual who seeks to attend.

In this instance, I would conjecture that Cornell University has at its disposal facilities that would accommodate a substantial number of persons. Therefore, I believe that it would be reasonable for the Board of Trustees to hold its meetings in such facilities.

With respect to disruptions at meetings by those in attendance, all that I can suggest is that a public body may establish reasonable rules of conduct in advance of its meetings. Perhaps a rule could be established whereby individuals who interrupt the proceedings would face ejection. It is also noted in this regard that the Open Meetings Law is silent with respect to public participation. Although the Law permits the public to attend and listen to the deliberations of public bodies, the Law confers no right upon the public to speak or otherwise participate at open meetings. Consequently, the Board of Trustees and its committees are not required to permit public participation at their meetings.

Lastly, in view of the disruption that occurred at the meeting of the Board of Trustees held in March, the concerns of the Board should in my view be recognized and appreciated. In short, if a public body cannot effectively carry out its duties due to disruptions, it may be appropriate to take steps to preclude such activities from occurring in the future.

Once again, it is suggested that the Board of Trustees adopt reasonable rules that deal with the capacity of members of the public to participate at meetings and the possibility of ejection from meetings in the event of disruption. Perhaps the establishment of such rules would serve to avoid the disruptions that have occurred in the past and concurrently permit access to more than twenty and perhaps all who are interested in attending.

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: Walter J. Relihan, Jr.
Jansen Noyes, Jr.
Leo E. Geier

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 690

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

October 26, 1981

Martin Eisenberg
United Community Centers, Inc.
833 Van Siclen Avenue
Brooklyn, New York 11207

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Eisenberg:

I have received your letter of October 19, in which you raised a series of questions under the Open Meetings Law.

Your first question is whether the Open Meetings Law applies to:

> "...joint discussions of the Community School Board and the N.Y.C. Board of Education if the Board of Education invites the Community School Board, or if the Community School Board invites the Board of Education?"

In this regard, it is emphasized at the outset that the cornerstone of the Open Meetings Law, the definition of "meeting" [see attached, Open Meetings Law, §97(1)], has been interpreted expansively by the courts. In a landmark decision construing the scope of the definition of "meeting", the Court of Appeals, the state's highest court, held that any convening of a quorum of a public body for the purpose of discussing public business constitutes a "meeting", whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Moreover, in a series of amendments to the Open Meetings Law that became effective on October 1, 1979, the definition of "meeting" was clarified to conform with the Court of Appeals' decision.

In view of the breadth of the definition of "meetings", when a quorum of either the New York City Board of Education or a community school board convenes to discuss public business, collectively, as a body, such a gathering would in my opinion constitute a "meeting" subject to the Open Meetings Law.

It is noted, too, that it has been held that joint meetings held by more than one public body are subject to the Open Meetings Law in all respects [see Oneonta Star Division of Ottoway Newspapers, Inc. v. Board of Trustees of Oneonta School District, 66 AD 2d 51].

Your second question is whether the Open Meetings Law applies "whenever there is a majority of any official body present". Based upon the previous discussion of the scope of the definition of "meeting", I believe that there are but few situations in which the presence of a majority of a public body would not constitute a meeting. Gatherings which would not in my view fall within the scope of the Law would include social events, for example. In addition, there may be situations in which a convention or similar gathering is attended by a majority of a public body but in which there is no intent on the part of the body to deliberate as a body.

Your third question involves the application of the Open Meetings Law to committees "of the main body". While questions were raised under the Open Meetings Law as originally enacted regarding the coverage of committees, subcommittees and similar advisory bodies, the definition of "public body" [see §97(2)] was amended to ensure that committees of a governing body, for example, fall within the framework of the Open Meetings Law. "Public body" is currently defined to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

Based upon the inclusion in the definition of committees, subcommittees and similar bodies, it is in my view clear that a committee of a "main body" is subject to the provisions of the Open Meetings Law.

Lastly, your remaining question is:

> "[I]n the absence of any specific court decision, whose interpretation of the open meetings law carries the most weight?"

In this regard, I would conjecture and hope that, in view of the Committee's statutory obligations under the Open Meetings Law, the advisory opinions of this office would be most persuasive. I would like to point out that §104 of the Open Meetings Law states in relevant part that the Committee shall:

> "1. issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the provisions of the open meetings law; and
>
> 2. review the implementation and operation of this article and report thereon not later than February first of each year to the legislature together with such recommendations as the committee deems advisable".

To the best of my knowledge, no agency of government other than the Committee renders advisory opinions under the Open Meetings Law. Further, while the Attorney General renders advisory opinions on various topics, when questions regarding either the Freedom of Information Law or the Open Meetings Law are raised before the Attorney General, his office routinely transmits those questions to 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

Robert J. Freeman
Executive Director

RJF:ss
Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2260
OML-AO-691

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

November 9, 1981

Edward F. Fagan, Jr.
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fagan:

I have received your letter of November 4 in which you described the procedure of a board of education during a so-called "work session".

According to your letter, at the "work sessions", the Board of Education and various administrators prohibit those in attendance from speaking or raising questions. Further, you wrote that as the sessions progress:

> "...the school superintendent distributes papers, charts and other written information on the agenda items as they come up for discussion. The Board members then silently read the subject matter and in due time the board President will usually ask, 'Is there any question on this'? If there is no question, they will usually vote. If there is a question it is sometimes, 'I would like to change a word in a paragraph on page four'. Sometimes there is a question which leads to a dialouge [sic] and on these occasions the public has some idea of what the discussion is about".

Consequently, you have indicated that there is often "not enough oral response by the board for the public to fully understand what is being discussed or voted upon". You also mentioned a specific problem that arises during

discussions of a proposed budget. According to your letter, references are made to page and account numbers and the Board has "ruled that the budget is not available to the public until after the year it pertains to is closed" (emphasis yours).

You have asked for advice regarding the situation described, for you believe that "the spirit of the Open Meetings Law is being skirted".

I would like to offer the following observations and comments regarding your inquiry.

First, as you are aware, the Open Meetings Law permits the public to attend and listen to the deliberations of a public body, except when an executive session may appropriately be convened. It is emphasized that the Open Meetings Law is silent with respect to public participation at meetings. Consequently, the Committee has consistently advised that a public body may, but need not, permit public participation at meetings. It has also been advised that if a public body chooses to permit public participation, it should do so based upon reasonable rules that treat all members of the public equally.

Second, there may be a method by which you may learn more about the records being discussed at a meeting. In this regard, I direct your attention to the Freedom of Information Law.

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

I would also like to point out that the term "record" is defined in §86(4) 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 breadth of the definition of "record", it is clear that virtually all materials used by the Board of Education at its work sessions are subject to rights of access granted by the Freedom of Information Law.

Third, to become more fully apprised of the substance of the discussions that transpire at the work sessions, it is suggested that you submit a request in advance of the work sessions to the district's records access officer. Perhaps a request would involve any materials distributed or intended to be reviewed by members of the Board of Education at its upcoming meeting or work session. While it is possible that not all of the materials would be available under the Law, the agency would in my view be required to review the records in question to determine the extent, if any, to which they could justifiably be withheld.

Fourth, based upon your description of the materials, it appears that many would likely be available.

Perhaps the most relevant ground for denial under the circumstances that you described would be §87(2)(g). Due to the structure of that ground for denial, it might also be cited as a basis for disclosure. Section 87(2)(g) states that an agency may withhold records that:

> "...are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations".

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, or final agency policies or determinations musb be made available.

Of particular import may be §87(2)(g)(i), which grant access to "statistical or factual tabulations or data" found within inter-agency or intra-agency materials. Records prepared by District officials for review by Board members would constitute "intra-agency materials". However, to the extent that they consist of statistical or factual information, they would in my view be available, unless a different ground for denial could justifiably be cited.

It may also be important to point out that a proposed budget to be considered by a school board is in my view required to be open to the public. Here, I direct your attention to §1716 of the Education Law, entitled "[E]stimated expenses for ensuing year". In relevant part, the cited provision states that:

> "[I]t shall be the duty of the board of education of each district to present at the annual meeting a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, specifying the several purposes and the amount for each. The amount for each purpose estimated necessary for payments to boards of cooperative educational services shall be shown in full, with no deduction of estimated state aid. This section shall not be construed to prevent the board from presenting such statement at a special meeting called for the purpose, nor from presenting a supplementary and amended statement or estimate at any time. Such statement shall be completed at least seven days before the annual or special meeting at which it is to be presented and copies thereof shall be prepared and made available, upon request, to taxpayers within the district during the period of seven days immediately preceding such meeting and at such meeting".

In view of the language quoted above, a proposed school district budget must be prepared and made available to taxpayers prior to the meeting during which it is adopted. As such, I cannot understand your statement that the Board will not make its budget available until it has been "closed". Again, the proposed budget is required to be prepared and made available prior to its adoption under the Education 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:ss

cc: Superintendent

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2266
OML-AO-692

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

November 13, 1981

John H. Cosgrove
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cosgrove:

I have received your letter of November 6, in which you requested an advisory opinion under the Freedom of Information Law.

According to your letter, at a meeting of the Town Board of the Town of Canaan, you requested to inspect a "controversial $18,000 bill that had been discussed during the monthly town board meeting after a public hearing on the budget". In response to your request, however, the Town Supervisor stated that you would have to "apply under FOI to see the bill..."

You have asked whether such a requirement is valid or legal in view of the past practices in which you have inspected bills and correspondence after the conclusion of Town Board meetings. You also wrote that members of the press and other members of the public have reviewed various documentation after meetings.

I would like to offer the following comments and observations regarding your inquiry.

First, as I may have explained in the past, the Open Meetings Law permits the public to attend and listen to the deliberations of a public body. The law is silent with respect to public participation. Consequently, it has been advised that although a public body may permit public participation at open meetings, there is no requirement that public participation be allowed. It has also been advised that if the public is permitted to speak or otherwise participate at meetings, that such activities should be permitted by means of rules that are reasonable and which treat all members of the public in like fashion.

Second, in a technical sense, an agency, such as the Town of Canaan, is not required to respond to requests made under the Freedom of Information Law, unless such requests are made in accordance with the Law and applicable regulations.

For instance, under the regulations promulgated by the Committee, which govern the procedural aspects of the Law, a request for records is generally directed to the agency's designated records access officer (see attached regulations, §1401.2). In addition, §1401.4(a) of the regulations states that:

> "[E]ach agency shall accept requests for public access to records and produce records during all hours they are regularly open for business".

Further, an agency is not required to respond to a request immediately. Under both §89(3) of the Law and 1401.5(d) of the regulations, an agency is required to respond to a request within five business days of its receipt.

In short, although the bill may have been the subject of discussion at an open meeting, a failure to permit inspection of the bill following the meeting would not in my view constitute a violation of the Freedom of Information Law.

Nevertheless, I believe that consideration should be given to the rules, policies and perhaps past practices of the Town. If it has been established by means of policy or practice that the public has the capacity to inspect accessible records during or following meetings, and if other members of the public were permitted to inspect records at the meeting, it is questionable whether a denial with respect to your request was appropriate. Stated differently, if there is a rule or policy that has been established by the Town Board that permits members of the public and the media to inspect accessible records during or after Town Board meetings, I believe that the rule should be carried out in a reasonable fashion and that all members of the public should be treated equally. If such a policy is in effect, a failure to permit you to inspect the bill in question might not have constituted a violation of the Freedom of Information Law, but rather the policy established by the Town.

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:ss

Enclosure

cc: Richard C. Klingler, Supervisor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-693

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

November 13, 1981

Alison Bermant
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Bermant:

I have received your letter of November 12 in which you requested an advisory opinion under the Open Meetings Law.

Specifically, you wrote that on November 10, the Oyster Bay-East Norwich Board of Education conducted an executive session. The purpose of the executive session "was to hear the faculty's reaction to a facilities advisory committee report". After entering the meeting, you and two others were barred from attending on the ground that "personnel matters would be discussed". However, an individual present during the entire discussion informed you later that personnel matters were not discussed. The facilities advisory committee, according to our telephone conversation, studied the possibility of school closings in the District.

Your question is whether the discussion was properly conducted during an executive session.

I would like to offer the following comments with respect to your inquiry.

First, it is noted that the cornerstone of the Open Meetings Law, the definition of "meeting" [see attached, Open Meetings Law, §97(1)], has been interpreted expansively by the courts. In brief, the state's highest court, the Court of Appeals, held that any gathering of a quorum of

a public body for the purpose of discussing public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. As such, if a quorum of any public body was present at the gathering to which you made reference, that gathering constituted a "meeting" subject to the Open Meetings Law in all respects.

Second, I believe that both the School Board as well as the facilities advisory committee, assuming that it was designated by the Board, are public bodies required to comply with the Open Meetings Law. The term "public body" is defined in §97(2) of the Law to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

Based upon the definition quoted above, the Open Meetings Law includes within its scope not only a governing body, such as a board of education, but also committees, subcommittees and similar advisory bodies.

Third, §100(1) of the Open Meetings Law specifies the areas of discussion that may appropriately be considered during an executive session. In this regard, it is emphasized that the so-called "personnel" ground for executive session was amended and clarified in a series of amendments to the Open Meetings Law that became effective on October 1, 1979.

Under the Open Meetings Law as originally enacted, a public body had the capacity to 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..." (emphasis added).

Problems of interpretation arose often with respect to the language quoted above. In many instances, for example, public bodies entered into executive sessions to discuss matters that dealt with personnel in a tangential manner or with policies that may have concerned personnel in general. The Committee had consistently advised, however, that the provision in question was largely intended to protect privacy, and not to shield matters of policy under the guise of privacy. As a consequence, the Committee recommended an amendment to the applicable provision, §100(1)(f), which was approved and is now a part of the Law. Specifically, the current provision states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, disciplient, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

In view of the insertion of the word "particular", it is clear that discussions relevant to "personnel" may appropriately be conducted during an executive session only when the issue deals with a "particular person", and only when one or more of the areas described in §100(1)(f) are under consideration.

Therefore, if, for example, the issue of a school closing is considered, and in conjunction with that issue, possible lay-offs are discussed, I do not believe that an executive session could appropriately be convened. Although the discussion might relate generally to personnel, no particular individual would likely be the subject of the discussion.

Lastly, you have asked whether the community is now "entitled to hear the faculty's reaction in a public meeting at the earliest opportunity". There is nothing in the Open Meetings Law that would require a public body to meet and discuss a particular issue. Further, as I explained during our telephone conversation, I doubt that the situation occurring in the past can be remedied. Often, however, the issuance of an advisory opinion and a review of the Open Meetings Law may serve to avoid problems from occurring in the future.

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

Enc.

cc: Jeffrey Forchelli, President
Daniel F. Stevens, Ed.D.
Edward Robinson, Esq.
Susan Bryant, President

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-2269
OML-AO-694

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

November 16, 1981

Mr. Thomas R. Cogar
[redacted]

The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cogar:

I have received your letter of November 9 as well as the correspondence attached to it. You have raised questions regarding both the Freedom of Information and Open Meetings Laws.

It is noted at the outset that the facts as stated in your letter and the correspondence are not entirely clear. Nevertheless, I will attempt to be responsive to each of the areas of your inquiry.

Your first point concerns the procedure for entry into an executive session. In this regard, I would like to offer the following comments.

First, the cornerstone of the Open Meetings Law, the definition of "meeting" [see §97(1)] has been interpreted broadly by the courts. In brief, it has been held that any convening of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Second, the term "executive session" is defined in §97(3) of the Law to mean a portion of an open meeting during which the public may be excluded. Further, §100 (1) of the Law prescribes the procedure that must be followed by a public body before it may enter into an executive session. Specifically, the cited provision states in relevant part 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..."

In view of the foregoing, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting. Moreover, three steps must be accomplished before a public body may enter into an executive session. They include a motion to go into an executive session made during an open meeting, a statement in the motion that identifies in general terms the subject or subjects to be considered during an executive session, and passage of the motion to go into an executive session by a majority of the total membership of a public body.

It is also noted that a public body may not enter into an executive session to discuss the subject of its choice. Section 100(1)(a) through (h) specifies and limits the areas of discussion that may appropriately be considred during an executive session. Your correspondence does not indicate whether or not the procedure described in the preceding paragraphs was followed. However, the description of the procedure may be useful to you as a member of the public, as well as persons who serve on public bodies.

The second area of inquiry pertains to a request that you made under the Freedom of Information Law regarding records of a "so-called executive session".

In response to your request, William Kellerhals, the Clerk-Treasurer and records access officer of the Village of Port Leyden, indicated that no minutes were taken during the executive session and that no action was taken by the Board "either during or after the session."

Here I direct your attention to §101(2) of the Open Meetings Law concerning minutes of executive sessions. The cited provision 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; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter."

In my view, the language quoted above indicates that minutes of an executive session must be compiled only when action is taken during an executive session. Therefore, if no action was taken during the executive session to which you and Mr. Kellerhals made reference, I do not believe that there was any obligation to keep minutes.

Further, in terms of the Freedom of Information Law, that statute grants access to existing records. Section 89(3) of the Law states that, in general, an agency, such as a village, is not required to create records in response to requests. Consequently, if no records exist, the Freedom of Information Law would not be applicable.

In view of the provisions of both the Freedom of Information Law and the Open Meetings Law, it appears that minutes of the executive session in question were not required to be kept. As such, I do not believe that there was any violation of law with regard to that issue.

Your third enclosure pertains to an executive session during which the "fate of the Village was discussed" and in which the discussion pertained to the Village Police. You wrote that notice of the time and place of the meeting had not been given prior to that executive session.

Here I would like to offer two comments.

First, §99 of the Open Meetings Law requires that notice be given prior to all meetings. Specifically, §99 (1) concerning meetings scheduled at least a week in advance requires that notice of the time and place of such meetings be given to the public by means of posting in one or more designated, conspicuous public locations and the news media (at least two) not less than seventy-two hours prior to such meetings. Section 99(2) concerning meetings scheduled less than a week in advance requires that notice be given in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, it is in my view clear that notice must be given to the public by means of posting and to the news media prior to all meetings, whether regularly scheduled or otherwise.

With respect to the subject matter under consideration, it is unclear whether an executive session was appropriate. If, for example, the Village was involved in collective bargaining negotiations under the Taylor Law with members of the Police Department, an executive session would have been appropriate under §100(1)(e) of the Open Meetings Law.

Another ground for executive session might have been relevant. For instance, if the budget of the Police Department was under consideration, or if the possibility of layoffs was the subject of the discussion, §100(1)(f) of the Open Meetings Law may have been the basis for entry into an executive session. The cited provision states that a public body may go into executive session to discuss:

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

It is emphasized that the language quoted above permits a public body to enter into an executive session to discuss those matters listed only when they deal with a "particular" person. As such, a discussion of personnel in general terms would not in my view qualify as a basis for entry into an executive session. If, however, a particular individual was the subject of the discussion, it is possible that an executive session may have been proper.

Enclosed for your consideration are copies of both the Freedom of Information Law and Open Meetings Law, as well as an explanatory pamphlet 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
Executive Director

RJF:jm

Encs.

cc: William Kellerhals
William Hamblin

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-695

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

November 19, 1981

Ms. Penelope K. Frontuto
[redacted]

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Frontuto:

I have received your letter of November 11 in which you requested an advisory opinion.

According to your letter:

> "[O]n October 19, 1981, at a regular meeting of the Palmyra Village Board, the mayor, Mary Lou Wilson, refused to recognize a non-village resident. She emphatically stated that she refused to recognize him and that was her policy. A few minutes later, the Mayor did recognize another man who she knew not to be a village resident.
>
> At the Village Board meeting of November 2, 1981, Mayor Wilson stated that the Board was going to implement their previous policy of recognizing those citizens who had previously requested to be on the agenda. The Mayor did in fact recognize two individuals during the meeting who were not on the agenda and failed to recognize several others".

You have expressed the belief that the Open Meetings Law does not address the subject of public participation at meetings and that as a consequence, a public body may permit

public participation but is not required to do so. You have asked, however, whether public participation that is permitted by the Palmyra Village Board of Trustees should be based upon rules that treat the public equally.

I agree with your contention that the Open Meetings Law is silent with respect to public participation. In brief, the Open Meetings Law states that the public has the right to attend and listen to the deliberations of public bodies. Nowhere does it confer a right upon the public to speak or otherwise participate at meetings. Consequently, the issue raised relates to the Open Meetings Law but does not fall squarely within its provisions. Nevertheless, as a service to those having questions, advice has often been given regarding such matters. In this instance, I would concur with your contention that if the Village Board of Trustees permits public participation, it should do so based upon reasonable rules.

Although §98(a) of the Open Meetings Law permits any member of the general public to attend an open meeting, it is possible that rules may be adopted concerning public participation whereby such participation might be restricted to residents or voters, for example, of a particular municipality. As such, it would in my view be reasonable to limit public participation to those individuals who fall within a particular class, such as residents or qualified voters. If those individuals are permitted to speak, I believe that an equal opportunity to speak should be accorded to all. If, however, any existing rules do not distinguish among residents or voters of the Village and others, presumably those others would have the same opportunity to participate as those within a particular class. Further, assuming that one non-resident is given the opportunity to speak, other non-residents should in my view be accorded the same privilege.

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:ss
cc: Village Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-2274
OML-AO-696

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

November 24, 1981

Ernest A. Arico, Jr.
The Times Record
501 Broadway
Troy, NY 12181

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Arico:

I have received your letter of November 16 in which you requested an advisory opinion regarding which meetings of public bodies can be attended by members of the public and the news media. Your specific question pertains to meetings of the Hoosick Falls Volunteer Fire Company, which recently held a meeting and, according to your letter, barred members of the news media from attending.

I would like to offer the following observations regarding your inquiry.

First, the Open Meetings Law applies to meetings of all public bodies. In this regard, §97(2) of the Law defines "public body" to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

It is important to note that the language quoted above differs from the definition of "public body" as it appeared in the Open Meetings Law as originally enacted. Under the original definition, questions often arose regarding its scope and whether the definition was applicable to entities other than governing bodies. The original definition made reference, for example, to the capacity to "transact" public business. Many contended that the term "transact" involved the capacity to take final action. In order to ensure that advisory bodies, including committees and subcommittees, for instance, would be subject to the Law, the term "transact" was replaced with "conduct". Further, the end of the definition makes specific reference to committees, subcommittees and similar bodies. As such, under the amended definition of "public body", which became effective on October 1, 1979 , I believe that it is clear that the Open Meetings Law is applicable not only to governing bodies, but also to other bodies, even if such bodies have only the authority to advise and no authority to take final action.

With respect to volunteer fire companies, I believe that each of the conditions necessary to a finding that such companies are public bodies can be met.

A volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the conditions precedent can be met, I believe that a volunteer fire company is a "public body" subject to the Open Meetings Law.

I would also like to point out that the status of volunteer fire companies had long been unclear. Such companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not such bodies conducted public business and performed a governmental function. Nevertheless, in a case brought under the

Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland Newspapers v. Kimball, it is in my view clear that a volunteer fire company also falls within the definition of "public body" and is required to comply with the Open Meetings Law.

You have also asked what possible steps may be taken to prevent the public from being barred at future meetings. In this regard, it is suggested that educating the members of various public bodies may be the best method of informing them of their duties under the Open Meetings Law. If that fails, an aggrieved person barred from a meeting may initiate a proceeding under Article 78 of the Civil Practice Law and Rules.

In order to assist the volunteer fire company in question by explaining the appropriate provisions of the Open Meetings Law, a copy of this advisory opinion will be sent to the company.

With respect to case law rendered under the Open Meetings Law, I have enclosed a summary of judicial determinations rendered under the Law. In addition, as you requested, enclosed is a supply of pamphlets that explain both the Freedom of Information and Open Meetings Laws.

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:ss

Enclosures

cc: Hoosick Falls Volunteer Fire Company

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-697

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

November 30, 1981

John Holden Adams, Esq.
Corbally, Gartland and Rappleyea, Esqs.
Bardavon Building
35 Market Street
Poughkeepsie, NY 12601

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Adams:

As you are aware, your correspondence of November 17 addressed to the Department of Law has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information and Open Meetings Laws.

According to your letter, the issue concerns the coverage of the Open Meetings Law with respect to deliberations of the zoning board of appeals of the Town of Wappinger. The correspondence indicates that it is your view that deliberations of the Board may be conducted during closed sessions. Your contention appears to be based largely upon the exception regarding quasi-judicial proceedings appearing in the Open Meetings Law, §103(1), and the decision rendered in Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

In my view, the deliberations of a town zoning board of appeals must be conducted open to the public, not under the Open Meetings Law, but rather under a provision of the Town Law.

The Orange County Publications decision dealt with two issues that arose with respect to the City of Newburgh. One of the issues pertained to the status of work sessions

held by the Common Council. The other concerned closed deliberations of the Zoning Board of Appeals of the City of Newburgh. With regard to the latter, the Appellate Division held that the City of Newburgh's Zoning Board of Appeals is exempt from the Open Meetings Law to the extent that it engages in quasi-judicial proceedings (see 60 AD 2d 409).

It is emphasized that the decision insofar as it applies to zoning boards of appeals dealt only with a city zoning board of appeals. I believe that the Law that governs the conduct of town and village zoning boards of appeals is different from that which governs city zoningboards of appeals.

As you are aware, §103(1) of the Open Meetings Law states that the Law does not apply to quasi-judicial proceedings. However, §105(2) of the Open Meetings Law provides that any less restrictive provisions of law than the Open Meetings Law remain in effect. In this regard, §267(1) of the Town Law and §7-712(1) of the Village Law, which concern the conduct of meetings of town and village zoning boards of appeals respectively, state in relevant part that:

> "[A]ll meetings of such board shall be open to the public".

Consequently, this Committee has consistently advised that the exemption in the Open Meetings Law regarding quasi-judicial proceedings is not applicable to town or village zoning boards of appeals. On the contrary, the deliberations of such boards are governed respectively by the Town Law, §267(1), and the Village Law, §7-712.

It is noted that a city zoning board of appeals is not governed by any provisions of law analogous to those cited in the Town Law and the Village Law.

Further, the only decision of which I am aware that focused upon the issue as it concerns town zoning boards of appeal confirmed the advice of the Committee and held that a town zoning baord of appeals is governed not by the Open Meetings Law, but rather by §267(1) of the Town Law. As such, the exemption appearing in §103(1) of the Open Meetings Law is not in my view applicable to town zoning boards of appeals. I have enclosed copies of the decision

rendered in Matter of Katz (Sup. Ct., Westchester Cty., NYLJ, June 25, 1979). It is important to point out that the Katz case was argued twice due to the confusion caused by Orange County Publications regarding quasi-judicial proceedings. The court in Katz, however, spefically distinguished the status of a city zoning board of appeals such as that dealt with in Orange County Publications and town zoning boards 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:ss

Enclosures

cc: George Braden

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-698

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

November 30, 1981

Leighton B. Wilklow
Superintendent
Barker Central School
1628 Quaker Road
Barker, NY 14012

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wilklow:

I have received your thoughtful letter of November 19 and appreciate your interest in compliance with the Open Meetings Law.

According to your letter, the President of the Board of Education of the Barker Central School District contacted the District's appointed attorney and informed him that she had, by means of a series of telephone conversations, obtained the necessary votes from members of the Board to remove him as the District's attorney. The President of the Board apparently requested that the attorney resign, but he refused. Two days later, the Board considered the issue during an executive session and, at that time, it became apparent that the statement made by the President of the Board to the attorney was a misinterpretation of the discussions that she held by telephone with members of the Board.

You have expressed concern that, as you analyze the intent of the Open Meetings Law, its purpose is to require members of public bodies to deliberate together, as bodies, and not to reach determinations by means of telephone calls or contacts made on an individual basis prior to meetings.

In this regard, you have asked for my opinion on the subject.

I agree with your view of the Open Meetings Law. While there is nothing in the Law that would preclude two members of a public body from conferring by telephone, a series of telephone calls by one member with all of the others upon which a decision might be based would in my view violate the spirit if not the letter of the Law.

The ensuing comments are based upon both technical and philosophical perspectives of the Open Meetings Law.

From a technical point of view, it is noted that the definition of "public body" appearing in §97(2) of the Open Meetings Law refers to entities that are required to conduct public business by means of a quorum. In this regard, the term "quorum" is defined in §41 of the General Construction Law, which has existed for decades. The cited provision states that:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public budy 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".

Based upon the language quoted above, a public body cannot carry out any of its powers or duties unless it conducts a meeting duly held upon reasonable notice to all the members. As such, it is my view that a public body should deliberate and has the capacity to act only during duly convened meetings.

Moreover, §97(1) of the Open Meetings Law defines "meeting" to mean "the official convening of a public body for the purpose of conducting public business". In my opinion, the term "convening" means a physical coming together. Further, based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assembly syn see "SUMMON" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of the ordinary definition of "convene", I believe that a "convening" requires the assembly of a group in order to constitute a quorum of a public body.

I would also like to direct your attention to the legislative declaration of the Open Meetings Law, §95, which states in part that:

> "[I]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy".

While the subject matter at issue could in my opinion be properly discussed during an executive session [see Open Meetings Law, §100(1)(f)], as you are aware, a public body must convene an open meeting before it may enter into an executive session. Discussions of an issue with all the members prior to a meeting would in my opinion negate any capacity of the public to "be fully aware of" and be "able to observe the performance of public officials..."

Lastly, from a philosophical perspective, I would conjecture that public bodies were created by the Legislature in an attempt to enable a group of individuals having different points of view to deliberate collectively in an effort to reach a better decision that could be reached by a single individual. As such, I believe that conducting public business by means of a series of ex parte telephone communications would not only violate the intent of the Open Meetings Law, but also the purpose for which public bodies were created.

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:ss

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-699

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

December 1, 1981

Penelope K. Frontuto
[redacted]

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Frontuto:

I have received your letter of November 11. Please accept my apologies for the delay in response.

According to your letter, the Palmyra Village Board of Trustees scheduled a special meeting to begin at 6:30 p.m. on October 13. Several residents who planned to attend the meeting arrived earlier than the scheduled time and found the door to the Village office closed. In the Village office were the Mayor, four other members of the Board and the Board's attorney. At 6:35, a member of the public knocked on the door, which was opened by James DePoint, a member of the Board of Trustees, and asked whether a meeting would indeed be held as scheduled. Mr. DePoint replied in the negative. When asked whether an executive session was being held, Mr. DePoint again answered in the negative but added that "we are having a discussion with the door closed". Shortly thereafter, a member of the Board left the office, and several residents entered. Mayor Wilson called a meeting to order. Apparently, the discussion behind closed doors involved matters leading to the hiring of a Village employee.

You wrote that it is your understanding that an executive session may be conducted only after an open meeting has been convened and that a motion to enter into an executive session should be made in public. You also indicated that it is your belief that the term "meeting" is defined to include any situation in which "a quorum of a public body gathers for the purpose of discussing public business".

You have asked for an advisory opinion with respect to the situation that you described.

It is noted at the outset that I agree with your contentions.

In terms of background, more than three years ago, the state's highest court, the Court of Appeals, rendered an expansive interpretation of the definition of "meeting". In brief, in Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh [60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], the Court of Appeals held that the definition of "meeting" encompasses any situation in which a quorum of a public body convenes for the purpose of discussing public business, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized. Therefore, based upon the facts as you presented them, it appears that the unscheduled gathering from which members of the public were excluded constituted a "meeting" subject to the Open Meetings Law that should have been preceded by notice given in accordance with §99 of the Law.

In addition, as you intimated, the phrase "executive session" is defined by §97(3) of the Law to mean a portion of an open meeting during which the public may be excluded. Moreover, §100(1) states in relevant part 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..."

In view of the language quoted above, I believe that a public body must accomplish three conditions before it may enter into an executive session. Specifically, a motion to enter into an executive session must be made during an open meeting, the motion must identify in general terms the subject sought to be considered during the executive session, and a vote carrying the motion to enter into an executive session must be accomplished during an open meeting.

Lastly, it is noted that in spite of the fact that there may have been violations of the Open Meetings Law, the subject matter under discussion could likely have been considered appropriately during an executive session. In this regard, I direct your attention to §100(1)(f) of the Law, which states that a public body may enter into an executive session to discuss:

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

Since the issue apparently dealt with matters leading to the appointment of a particular person, an executive session could likely have been held in compliance with 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:ss

cc: Village Board of Trustees

STA E OF NEW YORK
CO MITTEE O PUBLIC ACCESS TO RECORDS

OML-AO-700

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

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ECUTIVE DIRECTOR
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December 8, 1981

Mr. James H. Faux, Ed.D
Clerk of the Board
Spencerport Central Schools
71 Lyell Avenue
Spencerport, NY 14559

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Faux:

I have received your letter of December 4 'n which you req ested an advisory opinion under the Open Meetings Law. Your interest in compliance with the aw is much appreciated.

According to your letter, at the most recent meeting of the School Board of the Spencerport Central School District, the Board discussed "[W]ho should represent the School District at the Table during our 1982 teacher collective bargaining negotiations." n relation to that topic, the Superintendent presented an analysis of negotiations of other districts in Monroe County and the Board then discussed whether the District should retain the services of an outside firm or designate the Superintendent as the District's chief negotiator.

Your question is whether the topic in question is appropriate for discussion during executive session.

As you are aware, all deliber tions during meetings of public bodies are open to the public, except to the extent that a subject appropriate for consideration in executive session arises. In those instances, pursuant to the procedure described in §100(1) of the Open Meetin

Law, a public body may enter into an executive session [see Open Meetings Law, §100(1)(a) through (h)].

Perhaps most relevant to your inquiry is §100(1)(e) of the Open Meetings Law, which states that a public body may enter into an executive session to discuss:

> "collective negotiations pursuant to article fourteen of the civil service law..."

It is noted that the reference to Article 14 of the Civil Service Law pertains to what is commonly known as the "Taylor Law". In my opinion, the topic that you identified would not fall within the scope of the exception for executive session quoted above.

Although the issue of selection of a bargaining representative for the District relates to collective bargaining, I do not believe that it would constitute collective bargaining negotiations under the Taylor Law. Further, from my perspective, the Open Meetings Law is based largely upon the principle that a public body is required to deliberate in public, unless the deliberations would in some manner "damage" some governmental process or individual. In cases in which damage would arise, there is invariably a ground for executive session that may appropriately be asserted. Conversely, when discussions would not adversely affect a public body in the performance of its duties or an individual, as a general rule, deliberations must be open.

In the case of collective bargaining negotiations, I believe that §100(1)(e) exists in order to enable public bodies to discuss collective bargaining negotiations and their strategies, for example, without the presence of the general public, which might include its adverseries at the bargaining table. In short, if a collective bargaining unit could be aware of all that is known to the District and its negotiators, the District could be placed at a disadvantage at the bargaining table.

Unless I am mistaken, a discussion of the selection of the District's bargaining representatives would not result in the harm envisioned by §100(1)(e) of the Open Meetings Law.

There may, however, be another ground for executive session that could be applicable. Specifically, I direct your attention to §100(1)(f), which permits a public body to convene an executive session to discuss:

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

In my opinion, if the discussion involves a policy consideration (i.e., should the District employ its own resources, or seek resources outside the District), the discussion would not pertain to a "particular person" and should, therefore, be open to the public. If, on the other hand, the Board seeks to review the qualifications or experience of a particular individual, it would appear that §100(1)(f) could be cited as a basis for entry into 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
Executive Director

RJF:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 701

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

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[redacted]

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 8, 1981

Penelope K. Frontuto
[redacted]

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Frontuto:

I have received your letter of November 29 in which you requested an advisory opinion under the Open Meetings Law.

Your first area of inquiry concerns the process by which procedures were developed regarding public participation at meetings by the Board of Trustees of the Village of Palmyra, as well as the procedures themselves. As I indicated to you in previous correspondence, the Open Meetings Law is silent with respect to public participation. Consequently, although general advice was given in a recent letter to you regarding the means by which public participation might be permitted, I believe that it is beyond the scope of both the Open Meetings Law and my authority to provide advice regarding the specific issues that you raised on the subject of public participation. Therefore, I regret that I cannot provide specific advice in that area of inquiry.

Your second question involves what a citizen can do when he or she believes that minutes of a meeting are incorrect, but nonetheless approved by a public body. In a related vein, you you asked what may be done to ensure the completeness of the minutes of a public body.

Here I direct your attention to §101 of the Open Meetings Law. It is emphasized that the cited provision provides what may be characterized to be minimum requirements concerning the contents of minutes. Clearly minutes

need not consist of a verbatim transcript; on the contrary, minutes are required to consist of a record or summary of what might be characterized as the "highlights" of a meeting. Specifically, §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".

It is also important to point out, as a general rule, a public body may take action during a properly convened executive session, so long as the action does not involve the appropriation of public monies, in which case action must be taken during an open meeting. In this regard, §101(2) concerning minutes of executive sessions states 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; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter".

In my view, minutes of executive sessions are required to be taken only when action is taken during an executive session. Further, if, for example, a public body merely deliberates during an executive session but takes no action, minutes need not in my opinion be compiled.

In terms of ensuring that minutes are accurate, again, §101 of the Open Meetings Law provides minimum requirements concerning the contents of minutes. In addition, I believe that a member of the public may tape record open meetings and, as such, maintain for himself or herself a record of what may have transpired at a meeting [see People v. Ystueta, 418 NYS 2d 508 (1979)]. That record might be used as a basis for comparing minutes with the deliberations conducted at a meeting.

Lastly, I would like to point out that the Open Meetings Law as amended contains specific time limits for the preparation and public availability of minutes. Section 101(3) of the Law requires that minutes of open meetings be compiled and made available within two weeks of such meetings, and that minutes of action taken during executive sessions must be compiled and made available within one week of the executive sessions. Prior to the effective date of §101(3), which was October 1, 1979, the Committee transmitted a memorandum to all public bodies in anticipation of problems regarding unapproved minutes. For example, in many instances, a public body might not meet within two weeks and, therefore, might not be able to approve or make minutes official. Consequently, it has been suggested that in such instances, the clerk or whoever is responsible for preparing minutes do so within the appropriate time limits and mark the minutes as "unapproved", "non-final", "draft", for example. By so doing, a member of the public can learn generally what transpired at a meeting, and concurrently, notice is given to the effect that minutes are subject to change.

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:ss

cc: Mayor Wilson

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-702

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

December 18, 1981

Ms. Therese Madonia
The Press Club of
Long Island
P.O. Box 103
Smithtown, NY 11787

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Madonia:

I have received your letter of December 12 in which you requested an advisory opinion under the Open Meetings Law.

Specifically, according to your letter, the Town Board of the Town of Smithtown consists of five members, three of whom represent a particular political party. Those three members apparently met on several occasions to discuss the Town's bugdet, without notifying the public or the remaining two members. During their gatherings, you indicated that it was agreed that a department of the Town and twenty-four positions would be eliminated, thereby laying the groundwork for official action to be taken at an ensuing regular meeting of the Board. Upon questioning the status of the gatherings, you were advised by the Town Attorney that they constituted "informal meetings" that fell outside the scope of the Open Meetings Law. You have asked whether the gatherings in question constituted a meeting subject to the Open Meetings Law.

I would like to offer the following observations and comments regarding your inquiry.

As you may be aware, §103(3) of the Open Meetings Law exempts political caucuses from the coverage of the Law. However, recent judicial determinations indicate that the exemption for political caucuses applies only to discussions of purely political party business. Conversely, thoses determinations indicate that discussions by a majority of a public body representing a single political party regarding matters that would later arise at regular meetings fell outside the scope of the exemption for political caucuses and constitute meetings subject to the Open Meetings Law. Specifically, in Sciolino v. Ryan, which was decided by the Appellate Division, Fourth Department, it was held that the Open Meetings Law:

> "...encompasses private meetings, attended by only a quorum of the members of a public entity, at which the matters for discussion and eventual decision are such as would otherwise arise at a public meeting (Matter of Britt v. County of Niagara, App.Div., 440 N.Y.S.2d 790 [1981]; Matter of Oneonta Star Div. of Ottaway Newspapers v. Board of Trustees of Oneonta School Dist., 66 A.D.2d 51, 412 N.Y.S.2d 927). It is not necessary that an entity have binding authority for it to be considered a public body; it is within the meaning of the Open Meetings Law if its determinations affect the public and eventually obtain substance in official form (Matter of Syracuse United Neighbors v. City of Syracuse, App.Div., 437 N.Y.S.2d 466 [1981]).
>
> "[4] The closed sessions of the Council's Democratic majority constitute meetings within the scope of the Open Meetings Law. A majority of the nine-member Council constitutes a quorum (Rochester City Charter, §5-7), and it is undisputed that a quorum was present at the three closed sessions to which petitioners sought admission. The decisions of these sessions, the legislative future of items before the Council, although not binding, affect the public and directly relate to the

> possibility of a municipal matter becoming an official enactment. To keep the decision making process of all but one of the members of the Council secret, simply because they term themselves a 'majority' instead of a 'quorum', allows the public to be aware of only legislative results, not deliberations, violating the spirit of the Open Meetings Law and exalting form over substance (Matter of Syracuse United Neighbors v. City of Syracuse, supra)." [see Sciolino v. Ryan, 440 NYS 2d 795, at 797-798, ___ AD 2d ___ (1981)].

The court further stated that:

> "To assure that the purpose of the statute is realized, the exemption for political caucuses should be narrowly, not expansively, construed. The entire exemption is for the 'deliberations of political committees, conferences and caucuses' (Public Officers Law, §103 subd. 2), indicating that it was meant to prevent the statute from extending to the private matters of a political party, as opposed to matters which are public business yet discussed by political party members. To allow the majority party members of a public body to exclude minority members, and thereafter conduct public business in closed sessions under the guise of a political caucus, would be violative of the statute..." (id. at 798).

Another case dealt with a situation in which a majority of members of a common council representing a single political party met to discuss a proposed budget without notifying the remaining members. In that case, it was also held that the private meetings were held "to discuss matters of public business rather than matters which were purely, or even primarily, political in nature" and were, therefore, subject to the Open Meetings Law [see In re Cooper, Sup. Ct., Westchester Cty., NYLJ, June 8, 1981].

Due to the similarity of the facts that you described and those presented in both Sciolino and Cooper, supra, it would appear that the gatherings in question were "meetings" subject to the Open Meetings Law.

Moreover, assuming that the exemption for political caucuses would not have been applicable, I do not believe that a characterization of the gatherings in question as "informal meetings" would remove them from the scope of the Open Meetings Law. As stated by the Appellate Division in Orange County Publications v. Council of the City of Newburgh:

> "[W]e 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'..." [60 AD 2d 409, at 416, aff'd 45 NY 2d 947 (1978)].

In sum, in view of the judicial interpretations of the Open Meetings Law cited above, it appears that the gatherings to which you made reference constituted "meetings" 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
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 703

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

December 28, 1981

Merrill E. Trefzer
[redacted]

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Trefzer:

I have received your letter of December 14. Please accept my apologies for the delay in response, which, I am pleased to report, was due to the birth of a son.

You have raised questions regarding a gathering held by the Orchard Park Board of Education and the District's Committee on the Handicapped. You wrote that the members of the Board of Education attended a meeting of the Committee on the Handicapped at the invitation of the Committee to discuss the functions of the Committee. You wrote further that public notice of the meeting was not given by the District.

Your questions involve whether the gathering in question should have been a "public meeting", and if there is any distinction in terms of the coverage of the Open Meetings Law with respect to whether the Board or the Committee called the meeting.

I would like to offer the following observations with respect to your questions.

First, perhaps most importantly is the scope of "public body", which is defined in §97(2) of the Open Meetings Law to include:

> "...any entity, for which a quorum is required in order to conduct 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, or committee or subcommittee or other similar body of such public body".

While questions often arose under the original Open Meetings Law enacted in 1977 concerning the application of the Law to committees, subcommittees and advisory bodies, amendments to the Law that became effective on October 1, 1979, in my view removed those problems of interpretation. Under the original statute, the definition of "public body" made reference to entities that could "transact" public business. As such, it was contended by many that only governing bodies, such as boards of education, and not committees, which may have no authority to take final action, were covered by the Law. The amended definition, however, replaced the word "transact" with "conduct" and, in addition, makes specific reference to committees, subcommittees and similar bodies. In view of the alterations in the definition of "public body", I believe that it is clear that both the Board of Education and the Committee on the Handicapped are public bodies subject to the Open Meetings Law in all respects.

Assuming that a quorum of either or both the Board of Education or the Committee on the Handicapped convened for the purpose of discussing public business, such a gathering would in my view have constituted a "meeting" subject to the Open Meetings Law [see attached Open Meetings Law, §97(1), definition of "meeting"].

Second, if there was a quorum of both public bodies present, I believe that the joint gathering of two public bodies would be subject to the Open Meetings Law. In this regard, an Appellate Division decision indicated that joint meetings of public bodies are subject to the Open Meetings Law in all respects [see Oneonta Star Division of Ottoway Newspapers, Inc. v. Board of Trustees of Oneonta School District, 66 Ad 2d 51].

Third, assuming that the gathering in question was a meeting of one or more public bodies, it should have been preceded by notice given in accordance with §99 of the Open Meetings Law. Section 99(1) concerning meetings scheduled at least a week in advance requires that notice be given to the news media (at least two) and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 99(2) concerning meetings scheduled less than a week in advance requires that notice be given in the same manner as prescribed in §99(1) "to the extent practicable" at a reasonable time prior to such meetings. Therefore, I believe that notice must be given prior to all meetings, whether regularly scheduled or otherwise.

And lastly, in terms of the substance of the discussion, if indeed the Committee and the Board met to discuss the functions of the Committee, it does not appear that any ground for closing the meeting could appropriately have been cited. As you are aware, the Open Meetings Law contains eight grounds for executive session, none of which would in my opinion have been appropriate for closing the meeting based upon the facts that you presented.

It is also noted that a committee on the handicapped may often close its meetings by means of another provision of the Open Meetings Law. Specifically, §103(3) of the Open Meetings Law indicates that the Law does not apply to matters that are made confidential by federal or by state law. If, for example, the records of a particular handicapped student were being reviewed, such a discussion would in my opinion be exempt from the Open Meetings Law, because the records are required to be kept confidential under federal law. However, the exemption could not in my view have appropriately been cited if the discussion dealt with the functions of the Committee and not any particular student.

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:ss

cc: Committee on the Handicapped
Board of Education

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 704

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

December 30, 1981

Richard K. Bernard
General Counsel
NYC Transit Authority
370 Jay Street
Brooklyn, NY 11201

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bernard:

I have received a copy of your letter sent to Gene Russianoff of the New York Public Interest Research Group written in response to his letter addressed to you of December 14. As you are aware, Mr. Russianoff requested an advisory opinion from this office regarding the conduct of the meeting held by the Board of the New York City Transit Authority on December 11.

Having reviewed the materials and discussed the matter with Mr. Russianoff, it appears that the Board acted in great measure in compliance with the Open Meetings Law. As you indicated to Mr. Russianoff, the chairman of the Board advised the members of his wish to enter into an executive session following a discussion of the last item on the agenda for the open portion of the meeting. You wrote further that "[W]hile a show of hands was not requested, the members had the opportunity to voice their objection to the conduct of the executive session if they chose to do so".

While I cannot disagree with the legality of its action, and perhaps I am being overly technical, perhaps it would be preferable for the Board in the future to follow more closely the procedure prescribed in §100(1) of the Law prior to entry into executive session. The cited provision states in relevant part that:

> "[U]pon a majority vote of its total membership, taken in an open meeting pursaunt 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..."

Again, while it could be inferred that a vote to enter into an executive session was effectively accomplished, controversies might be avoided if the Board were to engage in a more formal vote prior to entry into executive sessions.

I hope that I have been of some assistance. Best wishes for a happy new year.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ss

cc: Gene Russianoff

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 705

162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518).474-2518, 2791

December 30, 1981

Daniel MacDonald
Niagara Bureau Chief
Buffalo Evening News
9701 Niagara Falls Blvd.
Niagara Falls, NY 14304

The staff of the Committee on Public Access to Records is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. MacDonald:

I have received your letter of December 17. Please accept my apologies for the delay in response, which, I am pleased to report, was due to the birth of a son.

You have raised a number of questions regarding the implementation of the Open Meetings Law, and I will attempt to respond to each.

First, you asked whether a school board's obligation to provide notice to the news media prior to special meetings extends only to a designated "official newspaper", or whether such an obligation would be applicable to other news organizations that usually cover board proceedings. In a related vein, you asked whether if, for example, five news organizations generally cover board meetings, it is reasonable to ask the board that all five be notified prior to special meetings, "even those called on short notice".

In this regard, I would like to direct your attention to §99 of the Open Meetings Law pertaining to notice. Section 99(1) concerns meetings scheduled at least a week in advance and requires that notice be given to the news media and to the public by means of posting in one or more designated, conspicuous public locations not less than seventy-two hours prior to such meetings. Section 99(2) pertains to meetings scheduled less than a week in advance and requires that notice be given to the news media and the public in the same manner as prescribed in subdivision (1) "to the extent practicable" at a reasonable time prior to such meetings.

In view of the foregoing, if a school board has designated an "official newspaper" for the purpose of publishing notice, I do not believe that notice given to that newspaper alone would comply with the Open Meetings Law. As stated above, §99 requires that notice be given to the news media, which is plural, and, therefore, would involve notice given to at least two news media organizations. There is nothing, however, in the Law that would require a public body to provide notice to more than two news organizations. Nevertheless, if a number of news media organizations routinely cover meetings of a particular public body, I can envision no reason why the public body would not be willing to provide notice to each organization that has requested notification prior to meetings.

I would also like to point out that §99(3) of the Open Meetings Law specifically states that a public body need not pay to place a notice of a meeting in a newspaper, as in the case of a legal notice. As such, the notification to a number of news media organizations would not in my view impose any financial constraints upon a public body.

Your second question pertains to the right to obtain notice prior to so-called "work sessions", "study sessions" and similar gatherings during which "no formal votes are planned".

When the Open Meetings Law went into effect in 1977, you might recall that the key question that constantly arose dealt with the scope of the definition of "meeting". Specifically, due to the lack of clarity of the definition, many public bodies convened "work sessions" and other gatherings similarly described and contended that those gatherings were not meetings on the ground that there was no intent to take action. Nevertheless, in response to a challenge to a closed so-called "work session", the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of discussing public business constitutes a "meeting" subject to the Open Meetings Law in all respects, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Moreover, the definition of "meeting" appearing in §97(1) of the Law was amended in 1979 in a manner consistent with the Court of Appeals' decision.

In view of the foregoing, I believe that the responsibility of a public body to provide notice prior to a "work session" is the same as in the case of a meeting during which there is an intent to take action.

Your third question involves the right to obtain notice prior to "special meetings that are expected to consist primarily of executive sessions for legitimate reasons". As indicated previously, notice is required to be given in accordance with §99 of the Law prior to all meetings, even if the discussions to be conducted during meetings could likely be held in substantial part during executive sessions.

I would also like to point out that, in a technical sense, a public body cannot in my opinion schedule an executive session in advance of a meeting. Here I direct your attention to §97(3) of the Open Meetings Law, which defines "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, §100(1) of the Law states in relevant part that:

> "[U]pon a 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..."

In view of the language quoted above, it is clear that a public body cannot enter into an executive session until an open meeting has been convened. Moreover, in order to enter into an executive session, the procedural steps prescribed by §100(1) must be accomplished during an open meeting. Therefore, it is clear that an executive session is not separate and distinct from an open meeting but rather is a portion thereof.

The fourth question is whether you are "on solid ground in asking that notification of a special meeting be made by telephone to our office to avoid the possibility that a notice sent by mail might not arrive on time". As stated earlier, §99(2) concerning meetings scheduled less than a week in advance requires that a public body give notice "to the extent practicable" at a reasonable time prior to such meetings. In my view, the quoted language

comply with the Law. Concurrently, I believe that the interpretation of §99(2) is based upon an intent to enable the news media and the public to receive notice prior to special or "emergency" meetings. Therefore, if a meeting is scheduled on short notice and it could not be assumed that notice provided by mail would reach the recipient at a reasonable time prior to the meeting, I believe that the method of reasonably carrying out §99(2) would of necessity involve a quicker communication, such as a telephone call, for example.

Your last question deals with the potential penalties that may be invoked when violations of the Open Meetings Law occur. Section 102 of the Open Meetings Law states in part that action taken in violation of the Open Meetings Law may be nullified by a court. Your question is whether such action may also be taken "if an action was planned or only discussed at a meeting held without proper notice and then voted upon at a meeting called with proper notice". In all honesty, I could only conjecture as to the answer. Section 102 of the Open Meetings Law provides a court with discretionary authority to make null and void action taken in violation of the Open Meetings Law in whole or in part, "upon good cause shown". There are no judicial determinations of which I am aware that specify what a showing of "good cause" must involve. If, however, it could be demonstrated that action taken at an open meeting preceded by meetings tainted with violations of the Open Meetings Law which may have resulted in different conclusions had the meetings been held in compliance with the Law, I do not believe that it would be inconceivable for a court to take the drastic action envisioned by §102.

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

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